

# HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

## COMMISSION II

### Jurisdiction and Foreign Judgments in Civil and Commercial Matters

#### DIX-NEUVIÈME SESSION NINETEENTH SESSION

#### Distribution:

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Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001

Interim Text

Prepared by the Permanent Bureau and the Co-reporters

For the sake of clarity this summary follows the order of the articles as set out in the preliminary draft Convention of October 1999. It is understood that the structure and form of the Convention awaits final discussion.\*

#### CHAPTER \* – SUBSTANTIVE SCOPE

##### ***Article 1 Substantive scope***

1. The Convention applies to civil and commercial matters.<sup>1</sup> It shall not extend in particular to revenue, customs or other<sup>2</sup> administrative matters.<sup>3</sup>

2. The Convention does not apply to –

- 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;

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\* Note: proposals have only been included if endorsed by Member State delegations.

<sup>1</sup> It has been proposed to add the words 'before courts of Contracting States' at the end of the first sentence. This proposal has not been discussed. Note the statement in Preliminary Document No 11 (the Nygh/Pocar Report) at p. 31 that there was a consensus in the Special Commission that the application of the Convention should be confined to proceedings before courts. There was no suggestion in the Diplomatic Conference that this consensus should be departed from with the possible exception of authentic instruments (see Art. 35 below). It should be noted, however, that there were proposals to include decisions of certain administrative organs in the scope of Article 12. See footnote 88 below.

<sup>2</sup> It was agreed to add the word 'other' in order to indicate that revenue and customs matters are also of an administrative nature.

<sup>3</sup> A desire was expressed for further clarification of the meaning and scope of 'administrative matters'. An attempt to provide further clarification was made, but this did not achieve consensus. That clarification would also have merged paragraph 3 with paragraph 1.

- d) wills and succession;
- e) insolvency, composition or analogous proceedings;
- f) social security;
- g) <sup>4</sup>arbitration and proceedings related thereto;<sup>5</sup>
- h) admiralty or maritime matters;
- i) [anti-trust or competition claims;]<sup>6</sup>
- j) [nuclear liability;]<sup>7</sup>
- k) <sup>8</sup>Alternative A

[provisional and protective measures other than interim payment orders;]<sup>9</sup>

#### Alternative B

[provisional or protective measures [other than those mentioned in Articles 13 and 23A];]<sup>10</sup>

- l) [rights in rem in immovable property;]<sup>11</sup>
- m) [validity, nullity, or dissolution of a legal person and decisions related thereto].<sup>12</sup>

3. [This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.]<sup>13</sup>

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<sup>4</sup> There was general agreement that alternative dispute resolution was also outside the scope of the Convention, except to the extent that it has resulted in a consent judgment or settlement to which the court has given its authority under Article 36, below.

<sup>5</sup> If paragraph 3 (see below) was accepted, this sub-paragraph should be deleted.

<sup>6</sup> There was general agreement towards the proposal's approach, subject to further study, that certain aspects of what is covered in the United States (including the Sherman Act, the Clayton Act and the antitrust portions of the Federal Trade Commission Act) by the term 'anti-trust claims' such as actions against cartels, monopolisation, abuse of market dominance, horizontal or vertical restraints, mergers and acquisitions, price fixing or price discrimination be excluded from the Convention. On the other hand, it was acknowledged that words such as 'unfair competition' (*concurrency déloyale*) went too far since in certain systems it might include matters such as misleading or deceptive practices, passing off and infringement of marks, copyrights and patents. The problem remains of finding the appropriate terminology to define the area to be excluded and which can be understood at the international level.

<sup>7</sup> There is no consensus on this proposed exclusion.

<sup>8</sup> This paragraph would be deleted if Article 13 (Alternative A) was adopted.

<sup>9</sup> The intention of this Alternative (see the discussion of Article 13 below) is to exclude provisional and protective measures from the scope of the Convention but to ensure that jurisdiction to make interim payment orders remains subject to the list of prohibited jurisdictions. The proponents of this version favour the inclusion of a provision in the chapter on recognition and enforcement to clarify that interim payment orders will not be recognised or enforced under the Convention. No consensus exists on this proposal.

<sup>10</sup> This second Alternative is primarily inspired by a wish to exclude provisional and protective measures from the scope of the Convention. It differs from the first Alternative in specifically excluding each of the categories of provisional measures and protective measures by using the word 'or' and by omitting any reference to interim payments. However, the words within the final brackets 'other than those mentioned in Articles 13 and 23A' are put forward as a further option for those who favour a restricted provision for jurisdiction and recognition and enforcement in respect of provisional and protective measures. There is no consensus in respect of any of these options.

<sup>11</sup> The exclusion of this matter from the scope of the Convention has been proposed. See Article 12(1) below.

<sup>12</sup> The exclusion of this matter from the scope of the Convention has been proposed. See Article 12(2) below.

<sup>13</sup> This proposal is designed to meet the desire expressed that a judgment given in breach of an arbitration agreement or contrary to an arbitration award not be recognised or enforced. No consensus exists on this proposal.

4. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for the State is a party thereto.
5. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

### **Article 2 Territorial scope**<sup>14</sup>

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State –
  - a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute [provided that dispute is of an international character];<sup>15</sup>
  - b) Article 12, regarding exclusive jurisdiction shall apply;
  - c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.
2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

## CHAPTER \*\* – JURISDICTION

### **Article 3 Defendant's forum**<sup>16</sup>

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of [a] [the] State [in which] [where] that defendant is [habitually] resident.
2. [For the purposes of the Convention, a natural person shall be considered to be resident–

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<sup>14</sup> Another proposal for the amendment of paragraph 1 of this Article has been reproduced as part of Proposal 4 in Annex I

<sup>15</sup> Concern has been expressed that sub-paragraph a) as it stands, will have the effect of making the Convention applicable to purely domestic situations involving not only parties who were habitually resident within the same State but also involving a legal relationship and a subject matter entirely confined to that State: see the Report of the co-reporters Prel Doc 11 at p. 41, note 40. The words in brackets were proposed to require an international connection. This proposal was opposed, and it was pointed out that it was difficult to define when a dispute was of an international nature and that this might lead to divergent interpretations. The view was also expressed that this issue should be determined only by the selected court. Other suggestions made were: that paragraph a) be deleted with the result that the Convention, including Article 4, would not apply if all the parties to the choice of forum agreement were habitually resident in the same State, or extending Article 22 in order to allow the selected court in such a situation to decline jurisdiction.

<sup>16</sup> There is agreement on the defendant's forum as a forum of general jurisdiction.

- a) if that person is resident in only one State, in that State;
- b) if that person is resident in more than one State,
  - i. in the State in which that person has his or her principal residence; or
  - ii. if that person does not have a principal residence in any one State, in each State in which that person is resident.]<sup>17</sup>

3. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be [habitually] 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.<sup>18</sup>

#### **Article 4 Choice of court**

1. If the parties have agreed that [a court or] [the]<sup>19</sup> courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that court or those] [the]<sup>20</sup> courts [of that Contracting State]<sup>21</sup> shall have jurisdiction [, provided the court has subject matter jurisdiction]<sup>22</sup> and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates [a court or][the] courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the [court or]<sup>23</sup> courts chosen have themselves declined jurisdiction. [Whether such an agreement is invalid for lack of consent (for example, due to fraud or duress) or incapacity shall depend on national law including its rules of private international law.]<sup>24</sup>

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<sup>17</sup> The view has been expressed that 'habitual residence' has acquired a too technical meaning in the interpretation of earlier Hague Conventions, particularly the *Convention of 1980 on the Civil Aspects of International Child Abduction*. Another view favoured continuity of the established concept of 'habitual residence' and feared that 'residence' provided too slight a connection. Reference was made to the appearance of 'the temporary residence [...] of the defendant' in Article 18(2)(i), as it now stands, as one of the prohibited grounds of jurisdiction. If the proposed paragraph 2 were accepted, consequential amendments to other articles would be necessary. It was also suggested that a separate definitions article be drafted. There is no consensus on these points.

<sup>18</sup> There appears to be agreement on this paragraph, except for the inclusion of the word 'habitual', see note 17 above. A re-numbering would be required if paragraph 2 were inserted.

<sup>19</sup> It has been proposed to delete the reference in paragraph 1 to 'a court' and refer to 'the courts' of the chosen country, to meet the concern that paragraph 1 could allow a court to interpret a choice of forum clause in a contract as conferring jurisdiction on a specific court that it would not otherwise be authorised to exercise under national law. There was a general agreement that a choice of forum clause could only confer jurisdiction over the person of the defendant and not in respect of subject matter outside the competence of the chosen court; see the comments of the Co-reporters in Preliminary Document No 11, at p. 44. However, doubts were expressed whether this proposal was either necessary or appropriate.

<sup>20</sup> See note 19, above.

<sup>21</sup> See note 19, above.

<sup>22</sup> This is an alternative proposal to address the problem referred to in note 19, above.

<sup>23</sup> See note 19, above.

<sup>24</sup> This proposal seeks to confirm that the substantive validity of the choice of forum agreement is governed by the national law of the forum seised, including its choice of law rules. It also seeks to confine substantive validity to questions affecting the consent or capacity of the parties as opposed to questions of reasonableness and public policy. Objections were raised, however, that reasonableness could be an element of consent or capacity. It was also pointed out that general rules of contract validity should apply without limitation to consent or capacity. See also paragraphs 4 and 5 and footnotes 27 and 28. There was no consensus in respect of this proposal.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into –
- a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
  - b) orally and confirmed in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
  - c) in accordance with a usage which is regularly observed by the parties;
  - d) 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.<sup>25</sup>
3. Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is [in writing or evidenced in writing], that court shall have jurisdiction.<sup>26</sup>
4. [The substantive validity of an agreement conferring jurisdiction shall be determined in accordance with the applicable law as designated by the choice of law rules of the forum.]<sup>27</sup>
5. [The parties cannot be deprived of the right to enter into agreements conferring jurisdiction.]<sup>28</sup> [However,] [such agreements and similar clauses in trust instruments shall be without effect, if they conflict with the provisions of Article 7, 8 or 12.]<sup>29</sup>

***Article 5 Defendant's right to contest jurisdiction***<sup>30</sup>

[The defendant shall have the right to contest jurisdiction under Articles [white list] [at least until] [no later than at]<sup>31</sup> the time of the first defence on the merits.]<sup>32</sup>

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<sup>25</sup> This paragraph as redrafted was accepted by agreement. The redraft removes the words 'or confirmed' from the chapeau to sub-paragraph b) where it is more appropriate.

<sup>26</sup> This paragraph is intended to deal with the situation where a defendant consents to appear and defend in a jurisdiction other than the chosen one. There was agreement as regards the purpose of this provision, but the view was expressed that the reference to 'writing' should be aligned with paragraph 2.

<sup>27</sup> This is an alternative proposal to that discussed in note 24, above. There was no consensus on this proposal.

<sup>28</sup> This proposal seeks to make it clear that national law may not prohibit the entry into choice of forum clauses by express prohibition or the use of public policy, except in the cases which may be provided for in the Convention, such as consumer transactions or employment contracts; see the views expressed by the co-reporters in Preliminary Document No 11, at p. 42. This proposal did not receive consensus.

<sup>29</sup> This is the text as it appeared in the preliminary draft Convention of October 1999. The relationship between the choice of forum provisions and consumer transactions and employment contracts still has to be resolved.

<sup>30</sup> See also Article 27A below.

<sup>31</sup> It has been proposed to delete the words 'no later than at' and substitute the words 'at least until' the time of. The purpose of this proposal is to make clear it was a minimum condition. It did not receive consensus.

<sup>32</sup> It has been proposed that this provision be deleted in its entirety as an intrusion into the proper role of national law. No consensus was reached on this issue.

## **Article 6 Contracts** <sup>33</sup>

[Alternative A

1. [Subject to the provisions of Articles 7 and 8,]<sup>34</sup> a plaintiff may bring an action in contract in the courts of the State –

- a) in which the defendant has conducted frequent [and] [or]<sup>35</sup> significant activity; [or
- b) into which the defendant has directed frequent [and] [or] significant activity;]<sup>36</sup>

provided that the claim is based on a contract directly related to that activity [and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State].<sup>37</sup>

[Variant 1<sup>38</sup>

2. For the purposes of the preceding paragraph, 'activity' means one or more of the following –

- a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;
- b) the defendant's regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in case of loans or of contracts for the purchase and sale of currency];<sup>39</sup>
- c) the performance of a contract by supplying goods or services, as a whole or to a significant part.]

[Variant 2<sup>40</sup>

3. For the purpose of the preceding paragraph, 'activity' includes, inter alia, the promotion, negotiation, and performance of a contract.

4. [The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.]<sup>41</sup>]

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<sup>33</sup> There was no consensus on the basis for jurisdiction in contractual matters. In the material that follows, two basic options are put forward: one alternative refers to activity (with several sub-options) and the other alternative focuses on the place of performance.

<sup>34</sup> This refers to the provisions on consumer transactions and employment contracts on which no decisions have been taken as yet.

<sup>35</sup> This leaves open the question of whether the requirements of frequency and significance should be cumulative or alternative.

<sup>36</sup> This leaves open the question of whether the activity of the defendant should take place within the State of the forum or could be directed from outside that State into the State of the forum.

<sup>37</sup> If the words within brackets are accepted, this would be a condition to be satisfied in addition to that of frequent and/or significant activity.

<sup>38</sup> In this variant the scope of 'activity' would be confined to the activities of promotion, negotiation and performance which are further defined in the following sub-paragraphs.

<sup>39</sup> The words in brackets, if accepted, would exclude the payment of the purchase price or fee for services rendered from the scope of 'performance'.

<sup>40</sup> Under this variant the activities of promotion, negotiation and performance would be within the scope of 'activity' but would not define its parameters.

<sup>41</sup> This proposal that would have to be considered whether Variant 1 or 2 was adopted, seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State.

[Alternative B<sup>42</sup>

A plaintiff may bring an action in contract in the courts of a State in which –

- a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
- b) in matters relating to the provision of services, the services were provided in whole or in part;
- c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.]

**[Article 7 Contracts concluded by consumers** <sup>43</sup>

1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, [unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise].<sup>44</sup>

2. Subject to paragraphs [5-7], a consumer may bring [proceedings][an action in contract]<sup>45</sup> in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, [unless<sup>46</sup> [that party establishes that]<sup>47</sup> –

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<sup>42</sup> This alternative option consists of the text as it appeared in the preliminary draft Convention of October 1999.

<sup>43</sup> This Article consists of the first four common paragraphs with three different alternative solutions (including two variants of the second alternative) to meet the desire of some delegations to allow a choice of forum clause in consumer contracts in cases where the relevant law permits this, the agreement complies with the requirements of Article 4, paragraphs (1) and (2), and provided the agreement is valid as to substance under the applicable law. A fourth alternative solution has also been suggested: to exclude business to consumer contracts from the scope of the Convention. For that reason the whole of the Article is placed in square brackets. There is no consensus in respect of any of them either that one or more should be omitted or that any one of them should be preferred.

<sup>44</sup> The purpose of this provision within brackets is to give some protection to the business party, especially in a long distance transaction such as in electronic commerce, where the business party cannot easily ascertain with whom it is dealing or the truthfulness of that person's representations. There was opposition to the insertion of this provision on the ground that it would be very difficult for a consumer to rebut an allegation that the business was unaware that the buyer was a consumer.

<sup>45</sup> Not all proceedings brought by consumers are actions in contract. They may be actions for a common law tort or delict, or a civil claim on a ground provided for by a statute enacted for the protection of consumers. Some delegations wanted to confine paragraph 2 to actions in contract. There was no consensus on this point.

<sup>46</sup> This is the so-called 'small shop' exception that seeks to protect a business party who has dealt with a foreign consumer, such as a tourist, entirely in its State of habitual residence. The question was raised whether there was a need to make such a provision that could only be of relevance to small transactions that are unlikely to become the subject of proceedings under the Convention.

<sup>47</sup> This provision would place the burden of establishing that the two conditions in sub-paragraphs (a) and (b) were fulfilled on the business party. The fear was expressed that the burden would be too high for many small businesses. If this issue was not resolved one way or the other, the question of on whom the burden lies, will remain uncertain and would lead to divergent interpretations. There was no consensus on this point.

a) the consumer took the steps necessary for the conclusion of the contract in another State; [and

b) the goods or services were supplied to the consumer while the consumer was present in the other State.]<sup>48]</sup>

3. [For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.]<sup>49</sup>

4. Subject to paragraphs [5-7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.<sup>50</sup>

[Alternative A<sup>51</sup>

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.<sup>52</sup>

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.<sup>53</sup>

7. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, Article 4 applies to the agreement to the extent that it is binding on both parties under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.<sup>54</sup>

Add at the beginning of Article 25 the words:

'Subject to Article 25 *bis*'

Insert [Article 25 *bis*<sup>55</sup>

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<sup>48</sup> There was no consensus on whether this condition should be added to that set out in sub-paragraph (a).

<sup>49</sup> This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this provision.

<sup>50</sup> This is proposed as the general rule to which Alternatives A to C are exceptions.

<sup>51</sup> This Alternative is a revised version of the solution that was presented to the informal discussions held in Edinburgh in April 2001: see Prel Doc 15, Annex III-A. It provides that a choice of forum clause in a consumer contract will be effective if valid under the law of the habitual residence of the consumer and the Contracting State in which recognition and enforcement is sought has made the declaration provided for in the proposed Article 25 bis. For the sake of convenience that proposed Article is reproduced here as part of Alternative A. Several delegations objected to this proposal on the ground of its complexity, but there was no agreement that it should be omitted from the list of alternatives.

<sup>52</sup> This is the provision that appeared as Article 7(3)(a) in the preliminary draft Convention of October 1999. It is not controversial.

<sup>53</sup> This repeats the provision that appeared as Article 7(3)(b) in the preliminary draft Convention of October 1999. It is not controversial in so far as it allows the consumer to bring proceedings in the chosen forum in addition to other fora, including the forum under Article 7(2). The controversial issue is whether the proceedings brought by the consumer could be confined to the chosen forum.

<sup>54</sup> This provision contains a choice of law provision referring to the law of the consumer's habitual residence the issues of whether the choice of forum clause is lawful as regards each party and whether it is substantially valid (including issues of public policy and reasonableness): see Report of the co-reporters, Prel. Doc. No 11 at p. 42.

<sup>55</sup> If accepted, this Article should be placed among the articles dealing with recognition and enforcement.

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where -

a) the judgment was rendered by the court of origin under Article 7(2) [or Article 8(2)]<sup>56</sup>; and

b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.<sup>57</sup>

2. [A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) [or Article 8(2)] if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]<sup>58</sup>

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]]

[Alternative B<sup>59</sup>

[Variant 1<sup>60</sup>

5. This provision may be departed from by a jurisdiction agreement provided that it conforms with the requirements of Article 4.

6. A Contracting State may declare that –

a) it will only respect a jurisdiction agreement if it is entered into after the dispute has arisen or to the extent that it allows the consumer to bring proceedings in a court other than a court indicated in this Article or in Article 3; and

b) it will not recognise and enforce a judgment where jurisdiction has been taken in accordance with a jurisdiction agreement that does not fulfil the requirements in subparagraph a).]

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<sup>56</sup> The reference to Article 8(2) will be relevant if this solution is extended to individual contracts of employment.

<sup>57</sup> Under this provision a State may declare that it will only recognise or enforce judgments under the Convention that are consistent with a choice of court clause. A State making the declaration would not be bound to recognise or enforce a judgment given in accordance with Article 7(2) if this jurisdiction was incompatible with the choice of court clause. On the other hand, a State not making the declaration would be bound to recognise or enforce a judgment rendered in accordance with Article 7(2) in other Contracting States, including a State that had made the declaration. But a non-declaring State would not be bound to recognise or enforce a judgment rendered by the chosen court, including one of a State that had made the declaration. A concern was expressed at this lack of reciprocity and fear of possible complexities that might be introduced if the declaration also specified conditions.

<sup>58</sup> This provision is intended to prevent States that make a declaration under Article 25 bis (1) from denying recognition or enforcement of a judgment when that State does not treat such choice of court provisions as binding on its own consumers.

<sup>59</sup> There are two variants in this Alternative. The basic rule is that stated in paragraph 4 above which limits the business party to the forum of the consumer's habitual residence. Both Variants allow a departure from this rule, but differ in whether departure is allowed unless a declaration is made to the contrary (Variant 1) or whether a departure is not allowed unless a State makes a declaration to the opposite effect (Variant 2).

<sup>60</sup> Variant 1 allows the parties to depart from the basic rule by an agreement that complies with the requirements of Article 4, but this choice of forum will not be regarded as excluding the forum provided for in paragraph 2 nor will a judgment rendered by the chosen forum (unless the consumer commenced the proceedings there or it coincided with the habitual residence of the consumer) be recognised or enforced in a State that makes a declaration to that effect. That State thereby 'opts-in' into the system of restricted jurisdiction over proceedings brought by the business party against the consumer.

[Variant 2<sup>61</sup>

5. Article 4 applies to an agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen; or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer's habitual residence.
6. A Contracting State may declare that in the circumstances specified in that declaration –
  - a) it will respect a jurisdiction agreement entered into before the dispute has arisen;
  - b) it will recognise and enforce a judgment in proceedings brought by the other party given by a court under a jurisdiction agreement entered into before the dispute has arisen;
  - c) it will not recognise and enforce a judgment given by a court in which proceedings could not be brought consistently with a jurisdiction agreement entered into before the dispute has arisen.]]

[Alternative C<sup>62</sup>

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.
6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen –
  - a) the consumer may bring proceedings against the other party under the Convention in the courts of the State designated in that agreement;
  - b) the consumer may not bring proceedings against the other party under this Convention in any other court, unless the agreement permits the proceedings to be brought in that court;
  - c) the other party may bring proceedings against the consumer under this Convention only if the agreement permits the proceedings to be brought in the courts of the State in which the consumer is habitually resident.]]

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<sup>61</sup> Under Variant 2 pre-dispute choice of forum clauses are not binding on consumers except in States that have made a declaration that they will respect such an agreement and that they will recognise and enforce judgments given in pursuance of such agreements. Such States will not recognise and enforce judgments given in breach of choice of forum clauses. Whatever system of declaration is adopted, problems of reciprocity remain.

<sup>62</sup> This Alternative limits the 'white list' jurisdiction that may be invoked by each of the parties in cases where a choice of forum agreement has been concluded between the parties. In essence there will only be 'white list' jurisdiction if the consumer brings proceedings in the chosen forum. Conversely, there will only be 'white list' jurisdiction in the chosen forum in relation to an action brought by the business party if the chosen forum coincides with the habitual residence of the consumer. If the consumer brings proceedings in the forum provided for under paragraph 2 or in any other 'white list' forum contrary to a choice of forum clause, that forum will be deprived of its 'white list' status. It will then depend on the national law of the forum to determine whether the consumer will be permitted to rely on that jurisdiction and it will also depend on the national law of the State addressed to determine whether a judgment rendered in a State other than that of the chosen forum will be recognised or enforced, even if, in the absence of a choice of forum clause, the court in the State of origin would have exercised a 'white list' jurisdiction, such as a jurisdiction under paragraph 2.

## **Article 8 Individual contracts of employment**

This matter was not discussed by Commission II. The Commission agreed that the Working Documents put forward in relation to this subject as well as the draft prepared at the informal discussions in Edinburgh in April 2001 should be reproduced in Annex II to facilitate further discussion. The proposals in Annex II should be viewed in the light of the Alternatives proposed in relation to Article 7 above.

## **Article 9 Branches [and regular commercial activity]<sup>63</sup>**

1. A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [, or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or other establishment [or to that regular commercial activity].
2. [For purposes of applying paragraph 1, a legal entity shall not be considered a 'branch, agency or other establishment' by the mere fact that the legal entity is a subsidiary of the defendant.]<sup>64</sup>

## **Article 10 Torts [or delicts]<sup>65</sup>**

1. A plaintiff may bring an action in tort [or delict] in the courts of the State –
  - a) in which the act or omission that caused injury occurred, or
  - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.<sup>66</sup>
2. [A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.]<sup>67</sup>

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<sup>63</sup> The matter placed between the brackets has not been discussed pending general discussion of the 'activity jurisdiction' elsewhere. There appears to be general agreement, subject to further clarification (see note 64 below), on the remainder of the paragraph.

<sup>64</sup> It was proposed to delete the term 'nécessairement' in the French text. It was also proposed to replace the term 'simple' by the term 'seul' in the French text. There does not appear to be any objection with the interpretation given by the Co-Reporters in Preliminary Document No 11 at p. 56 that a subsidiary, even one that is wholly owned by a parent, will not by that fact alone be regarded as falling within the definition of 'a branch, agency or other establishment'. However, some delegations expressed a fear that the formal incorporation of those comments into the body of the text might be misinterpreted. There is no consensus on this provision.

<sup>65</sup> The deletion of the words 'or delicts' in the title and in the first paragraph has been proposed. The concern was raised that the term includes both civil and criminal offences in some legal systems and may extend the reach of Article 10 or result in other unintended consequences in those systems. There is no consensus on this proposal.

<sup>66</sup> This is the text of the preliminary draft Convention of October 1999. No specific proposals were made to modify this text. However, it was noted that the paragraph would have to remain under consideration in light of e-commerce and intellectual property issues, its relation to activity jurisdiction proposals, and constitutional issues in one State. There was agreement that the material appearing as paragraph 2 in the preliminary draft Convention of October 1999 should be deleted.

<sup>67</sup> This proposal seeks to insert an activity based jurisdiction similar to that proposed in relation to Article 6 Contracts, Alternative A, paragraph 1. There is no consensus on this proposal.

3. [The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.]<sup>68</sup>
4. [A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.]<sup>69</sup>
5. [If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.]<sup>70</sup>

### **Article 11 Trusts**

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have jurisdiction, and that jurisdiction shall be exclusive unless the instrument provides otherwise.<sup>71</sup> Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction. [The validity of such a designation shall be governed by the law<sup>72</sup> applicable to the validity of the trust.]<sup>73</sup>
2. In the absence of such [valid]<sup>74</sup> designation, proceedings may be brought before the courts of a State –
  - a) in which is situated the principal place of administration of the trust; or
  - b) whose law is applicable to the trust; or
  - c) with which the trust has the closest connection for the purpose of the proceedings, taking into account in particular the principal place where the trust is administered, the place of residence or business of the trustee, the situation of the assets of the trust, and the objects of the trust and the places where they are to be fulfilled; or
  - d) in which the settlor (if living) and all living beneficiaries are habitually resident, if all such persons are habitually resident in the same State.<sup>75</sup>
3. [This Article shall only apply to disputes among the trustee, settlor and beneficiaries of the trust.]<sup>76</sup>

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<sup>68</sup> This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this proposal.

<sup>69</sup> The deletion of this paragraph that appeared as Article 10, paragraph 3 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

<sup>70</sup> The deletion of this paragraph that appeared as Article 10, paragraph 4 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

<sup>71</sup> There was agreement on the insertion of the last sub-sentence in order to bring the provision in conformity with the similar provision found in Article 4, paragraph 1.

<sup>72</sup> It was noted that the phrase 'national law' should replace the word 'law' if the Convention consistently uses 'national law' in such cases.

<sup>73</sup> The words within brackets were proposed to ensure that the question of the existence and validity of the choice of forum clause would be determined by the law applicable under the choice of law rules of the court seised and not necessarily by any law nominated as the applicable law by the settlor. No consensus was reached on this provision.

<sup>74</sup> See note 73 above.

<sup>75</sup> Subject to the use of the word 'valid' in the chapeau, this paragraph was approved by consensus.

<sup>76</sup> This paragraph did not achieve consensus. It has been proposed that this matter should be left to national law: see the comment of the co-reporters in Preliminary Document No 11, at p. 62 that the disputes covered by this Article are disputes that are internal to the trust.

## **Article 12 Exclusive jurisdiction**

1. [In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property [concluded for a maximum period of six months]<sup>77</sup>, the tenant is habitually resident in a different State.]<sup>78</sup>

2. [In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.]<sup>79</sup>

3. In proceedings concerning the validity of entries in public registers other than those dealing with intellectual property rights, the courts of the Contracting State in which the register is kept shall have exclusive jurisdiction.

Intellectual property<sup>80</sup>

[Alternative A<sup>81</sup>

4. In proceedings in which the relief sought is a judgment on the grant, registration, validity, abandonment, revocation or infringement<sup>82</sup> of a patent or a mark, the courts of the Contracting State of grant or registration shall have exclusive jurisdiction.<sup>83</sup>

5. In proceedings in which the relief sought is a judgment on the validity, abandonment, or infringement of an unregistered mark [or design], the courts of the Contracting State in which rights in the mark [or design] arose shall have exclusive jurisdiction.]

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<sup>77</sup> It has been proposed to limit the exclusion of tenancies of immovable property from the exclusive jurisdiction of the State of situation to a lease for a single period not exceeding 6 months. There was no consensus on this proposal.

<sup>78</sup> It has been proposed to exclude rights *in rem* in immovable property and tenancies of movable property from the scope of the Convention. There was no consensus on this proposal.

<sup>79</sup> It has been proposed to exclude the validity, nullity, or dissolution of a legal person and decisions related thereto from the scope of the Convention. There was no consensus on this proposal.

<sup>80</sup> Three proposals have been made with respect to the treatment of intellectual property in the Convention. The first two appear within general brackets and are each bracketed also (Alternatives A and B). That indicates that there is no consensus on the inclusion of intellectual property within the scope of the Convention or in respect of each of the proposals themselves. For the third proposal, see note 88 below.

<sup>81</sup> The main difference between Alternatives A and B is whether proceedings for the infringement of patents and marks and such other rights as may be covered by this provision should fall within the exclusive jurisdiction or not. In addition, for a number of the delegations that favour an exclusive jurisdiction also for infringement under this provision, a satisfactory final or disconnection clause with respect to existing and future instruments regulating jurisdiction, recognition and enforcement for specific areas such as intellectual property is a precondition for including infringement in this Article on exclusive jurisdiction.

<sup>82</sup> It was pointed out that, when deciding which proceedings (e.g. infringement proceedings based on provisions of an Unfair Competition Act or of a Patent or Trademark Act, or proceedings concerning certain common law torts such as passing off) were to be covered by 'infringement', the solution should be consistent with the possible exclusion of 'antitrust or competition claims' from the scope of the Convention.

<sup>83</sup> This paragraph also covers situations where an application for the grant or registration of a patent or mark has been filed.

[Alternative B<sup>84</sup>

5. In relation to proceedings which have as their object the infringement of patents, trademarks, designs or other similar rights, the courts of the Contracting State referred to in the <sup>85</sup> preceding paragraph [or in the provisions of Articles [3 to 16]] have jurisdiction.

#### Alternatives A and B

6. [Paragraphs 4 and 5 shall not apply where one of the above matters arises as an incidental question in proceedings before a court not having exclusive jurisdiction under those paragraphs. However, the ruling in that matter shall have no binding effect in subsequent proceedings, even if they are between the same parties. A matter arises as an incidental question if the court is not requested to give a judgment on that matter, even if a ruling on it is necessary in arriving at a decision.]<sup>86</sup>

7. [In this Article, other registered industrial property rights [(but not copyright or neighbouring rights, even when registration or deposit is possible)]<sup>87</sup> shall be treated in the same way as patents and marks]

8. [For the purpose of this Article, 'court' shall include a Patent Office or similar agency.]<sup>88</sup>

#### **Article 13 Provisional and protective measures<sup>89</sup>**

[Alternative A<sup>90</sup>

1. A court seised<sup>91</sup> and having jurisdiction under Articles [in the white list] to determine the merits of the case has jurisdiction to order provisional and protective<sup>92</sup> measures.

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<sup>84</sup> This Alternative does not dispute the proposition in Alternative A that there should be exclusive jurisdiction in respect of proceedings that have as their object the registration, validity, nullity or revocation of patents, trade marks, designs or other similar rights. To that extent paragraphs 4 and 5 would remain if paragraph 5A was accepted. Alternative B refers only to proposed paragraph 5A. Paragraphs 6, 7 and 8 are common to both Alternatives.

<sup>85</sup> This provision will have to be excluded from the exceptions stated in Article 17.

<sup>86</sup> The purpose of this paragraph is to maintain non-exclusive jurisdiction where a matter otherwise falling within the scope of paragraphs 4 and 5 arises as an incidental question in proceedings which do not have as their object one or more of the matters described in that paragraph. The intention is that any decision made between the parties on such an incidental question will not have a preclusory effect in another State, in other cases when produced by one of the parties. There is no consensus on this paragraph.

<sup>87</sup> There is no consensus on the words included within the brackets. Other suggestions are to exclude copyright from the scope of the Convention either in whole or only copyright infringement on-line. Furthermore, the following text was proposed as an alternative: ["In proceedings concerning the infringement of a copyright or any neighbouring right, the courts of the Contracting State under whose laws the copyright or the neighbouring right is claimed to be infringed shall have exclusive jurisdiction"]. This proposal seeks to include copyright within the exclusive jurisdiction of the courts of the Contracting State under whose law a copyright is claimed to have been infringed. This is an alternative to the exclusion of proceedings for the infringement of copyright proposed in paragraph 7 above.

<sup>88</sup> This paragraph might be necessary to ensure that decisions of these organs are covered by the chapter on recognition: see the definition of 'judgment' in Article 23.

<sup>89</sup> This Article would be deleted if Alternative A of Article 1(2)(k) was adopted. It would also be deleted if the Alternative B of Article 1(2)(k) was adopted without the reference to Articles 13 and 23A. Some delegations have also suggested that provisional and protective measures should be dealt with in a separate Chapter in the Convention. This would certainly be necessary if no provision were made for the recognition and enforcement of provisional and protective measures.

<sup>90</sup> For another proposal in relation to Article 13, see Article 1(2)(k) which proposes that provisional and protective measures be excluded from the scope of the Convention with certain qualifications.

<sup>91</sup> It has been suggested that it would be sufficient if a court is seised after a provisional and protective measure is made. This would require the addition of the words 'or about to be seised' or similar.

<sup>92</sup> The description 'provisional and protective' is intended to be cumulative, that is to say, the measures must meet with both criteria.

2. A court of a Contracting State [may] [has jurisdiction to]<sup>93</sup>, even where it does not have jurisdiction to determine the merits of a claim, order a provisional and protective measure in respect of property in that State or the enforcement of which is limited to the territory of that State, to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party in a Contracting State which has jurisdiction to determine that claim under Articles [in the white list].<sup>94</sup>

3. Nothing in this Convention shall prevent a court in a Contracting State from ordering a provisional and protective measure for the purpose of protecting on an interim basis a claim on the merits which is pending or to be brought by the requesting party in another State.<sup>95</sup>

4. In paragraph 3<sup>96</sup> a reference to a provisional and protective measure means

a) a measure to maintain the status quo pending determination of the issues at trial; or

b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or

c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

[Alternative B<sup>97</sup>

A court which is or is about to be seised of a claim and which has jurisdiction under Articles [3 to 15] to determine the merits thereof may order provisional and protective measures, intended to preserve the subject-matter of the claim.]

#### **Article 14 Multiple defendants**

It was agreed to delete this Article.

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<sup>93</sup> A form of words has also been suggested that would make it clear that Contracting States are obliged to provide this jurisdiction, although it was also stressed that this would not interfere with the discretion of the courts of such States either to make or to refuse to make such orders.

<sup>94</sup> It was noted that some States, especially those in the Commonwealth other than the United Kingdom, did not provide for jurisdiction to make provisional and protective orders unless the court was seised of jurisdiction to determine the merits of the case. This could operate to the detriment of foreign plaintiffs who sought to 'freeze' assets within the jurisdiction in aid of litigation pending elsewhere. The provision is intended to provide such States with jurisdiction to make such orders based on the existence of property in the forum and limited to the territory of the forum. There was no consensus on this provision.

<sup>95</sup> This provision is intended to overcome any restrictions imposed on the exercise of jurisdiction by the courts of Contracting States by the list of prohibited jurisdictions (at present found in Article 18). The provision would also allow the exercise of jurisdiction to make provisional and protective orders under national law without the restrictions imposed by the list of prohibited jurisdictions. It is proposed to remove the reference to Article 13 in Article 17 in order to allow the exercise of such jurisdiction under national law. Some delegations took the view that this paragraph was the only provision on provisional and protective measures that should be included in the Convention.

<sup>96</sup> It has been proposed that this definition apply also to paragraphs 1 and 2.

<sup>97</sup> This proposal is linked with the second alternative in Article 1(2)(k) which in itself contains the options either to exclude provisional or protective measures entirely from the scope of the Convention or to permit a limited jurisdiction to make such orders. Alternative B provides for such a limited jurisdiction, if so desired.

### **Article 15 Counter-claims<sup>98</sup>**

[Subject to Article 12,]<sup>99</sup> a court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based [unless the court would be unable to adjudicate such a counter-claim against a local plaintiff under national law].<sup>100</sup>

### **Article 16 Third party claims**

It was agreed to delete this Article.

### **Article 17 Jurisdiction based on national law<sup>101</sup>**

[Subject to Articles 4, 7, 8, 11(1), 12 and 13<sup>102</sup>,]<sup>103</sup> 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.

### **[Article 18 Prohibited grounds of jurisdiction<sup>104</sup>**

1. [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 that State and [either] the dispute [or the defendant]<sup>105</sup>.]<sup>106</sup>

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<sup>98</sup> There was agreement that there should be provision for a jurisdiction based on a counter-claim and that this jurisdiction should be one that is entitled to recognition and enforcement under Article 25(1). There was some debate on whether this was already obvious or should be further clarified: see the remarks of the co-reporters in Preliminary Document No 11, at p. 95. The language not within brackets was also approved by consensus.

<sup>99</sup> It was agreed that the proposal to add this qualification should remain within brackets pending resolution of the status of Article 12.

<sup>100</sup> It was proposed to add the language within brackets to provide for the situation where the counterclaim is outside the subject matter jurisdiction of the court. There was general agreement that a counter-claim could only confer jurisdiction over the person of the defendant and not subject matter jurisdiction (including excess of any monetary limits) which it did not possess under national law. There was some discussion as to whether this was already obvious, or whether the issue which also arises in relation to forum selection clauses, should be dealt with in a general provision, and whether the language proposed within the brackets was adequate for the intended purpose. In relation to the last issue, the following alternative words have been proposed: " [...], unless the court seised does not have subject matter jurisdiction to adjudicate the counter-claim".

<sup>101</sup> Subject to the determination of the material in brackets, this Article was approved by agreement.

<sup>102</sup> It has been proposed that the reference to Article 13 be deleted. This will allow the making of provisional and/or protective orders under national law.

<sup>103</sup> The question of the existence or exclusivity of Articles 7, 8, 12 and 13 still remain to be resolved.

<sup>104</sup> There was no consensus on this provision.

<sup>105</sup> It has been proposed to add the words 'either' and 'or the defendant' in order to meet the difficulties in national legal systems where the main emphasis for jurisdictional competence lies on the link between the forum and the defendant, rather than the subject matter of the dispute. There is no consensus on this point.

<sup>106</sup> The deletion of the whole of paragraph 1 has been proposed in order to emphasise the basic concept of the Convention that there be a limited number of required bases of jurisdictions that are generally accepted, a limited number of jurisdictional bases so universally disapproved as exorbitant that they should be listed as prohibited jurisdictions, and that any other jurisdiction not listed in either category should remain open for the exercise of jurisdiction under national law (the 'grey zone'). There was no consensus on the deletion of paragraph 1.

2. [In particular,]<sup>107</sup> [Where the defendant is habitually resident in a Contracting State,]<sup>108</sup> jurisdiction shall not be exercised by the courts of a Contracting State on the basis [solely of one or more]<sup>109</sup> of the following –

- a) [the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;]<sup>110</sup>
- b) the nationality of the plaintiff;
- c) the nationality of the defendant;
- d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
- e) [the carrying on of commercial or other activities by the defendant in that State, [whether or not through a branch, agency or any other establishment of the defendant,]<sup>111</sup> except where the dispute is directly related to those activities;]<sup>112</sup>
- f) the service of a writ upon the defendant in that State;
- g) [the unilateral designation of the forum by the plaintiff;]<sup>113</sup>
- h) [proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings]<sup>114</sup>[initiation of proceedings in that State by the party against whom jurisdiction is claimed, for the purpose of recognising or enforcing a judgment from another State]<sup>115</sup>;
- i) [the temporary residence or presence of the defendant in that State;]<sup>116</sup>
- j) [the signing in that State of the contract from which the dispute arises;]<sup>117</sup>
- k) [the location of a subsidiary or other related entity of the defendant in that State;]<sup>118</sup>
- l) [the existence of a related criminal action in that State].<sup>119</sup>

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<sup>107</sup> If paragraph 1 is to be deleted, the words in brackets should also be deleted.

<sup>108</sup> If paragraph 1 is to be deleted, the words in brackets should be placed in what is now paragraph 2.

<sup>109</sup> It has been proposed to delete the words within the brackets. No consensus exists on this point.

<sup>110</sup> It has been proposed to delete sub-paragraph a) entirely. There is no consensus on this issue.

<sup>111</sup> The addition of the words within the brackets is proposed to make it clear that the presence of a branch, agency or other establishment within the forum should not be a basis for the exercise of general jurisdiction under national law: see the view expressed by the co-reporters in Preliminary Document No 11 at p. 57 that 'such a general jurisdiction is inconsistent with the Convention' (the preliminary draft Convention of October 1999). No consensus was reached on this proposal.

<sup>112</sup> It has been proposed to delete sub-paragraph e) entirely. There is no consensus on this issue.

<sup>113</sup> It has been proposed to delete sub-paragraph g) entirely. There is no consensus on this point.

<sup>114</sup> This was the text as it appeared in the preliminary draft Convention of October 1999.

<sup>115</sup> The language within the brackets was proposed as an alternative to the October 1999 text by way of clarification only. However, it was objected that the omission of the words 'except where the dispute is directly limited to such proceedings' had a substantive effect and would deprive the judgment debtor of the opportunity to raise objections directly related to the enforcement, such as part payment of the debt.

<sup>116</sup> It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.

<sup>117</sup> It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.

<sup>118</sup> The addition of this item to the list of prohibited jurisdiction has been proposed. There is no consensus on this point.

<sup>119</sup> The addition of this item to the list of prohibited jurisdictions has been proposed. There is no consensus on this point: see the comments of the co-reporters in Preliminary Document No 11, at p. 31, footnote 14 and accompanying text.

3. [Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming damages in respect of conduct which constitutes –

a) [genocide, a crime against humanity or a war crime];<sup>120</sup> or]<sup>121</sup>

b) a serious crime under international law, provided that this State has exercised its criminal jurisdiction over that crime in accordance with an international treaty to which it is a Party and that claim is for civil compensatory damages for death or serious bodily injuries arising from that crime<sup>122</sup>.

Sub-paragraph b) only applies if the party seeking relief is exposed to a risk of a denial of justice<sup>123</sup> because proceedings in another State are not possible or cannot reasonably be required.]<sup>124</sup>]

### **Article 19 Authority of the court seised**

1. Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if –

a) national law so requires; or

b) the plaintiff so requests; or

c) [the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]

d) [the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State]

or

[it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State].<sup>125</sup>

2. [When the jurisdiction of the court seised in a Contracting State is based on or is consistent with a ground of jurisdiction provided for in Articles 3 to 16, a party may request the court to declare so in the judgment.]<sup>126</sup>

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<sup>120</sup> It was proposed to include a reference to the definitions contained in the Statute of the International Criminal Court. However, it was pointed out that this Statute had not as yet entered into force.

<sup>121</sup> There was agreement that the material in sub-paragraph a) be placed in separate brackets, because subparagraphs a) and b) raised different issues.

<sup>122</sup> The original proposal had translated the French 'exerce' as 'established'. Some favourable comments on the proposal were withdrawn when it was pointed out that the intention was not to say 'established' in English but to restrict the article to situations where criminal jurisdiction is 'exercised'.

<sup>123</sup> It was pointed out that the concept of 'denial of justice' was unknown under certain legal systems.

<sup>124</sup> There was no consensus on the proposed paragraph 3. It is included in the text within square brackets to facilitate future discussion.

<sup>125</sup> It was agreed to place the text of Article 19, paragraph 1, as it appeared in the preliminary draft Convention of October 1999 (including any bracketed material) in the present document.

<sup>126</sup> There was no consensus on this proposal.

## **Article 20<sup>127</sup>**

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.
2. [Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]
3. [Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

## **Article 21 *Lis pendens***

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list]<sup>128</sup> [or under a rule of national law which is consistent with these articles]<sup>129</sup> and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, 11]<sup>130</sup> or 12.
2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.
4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
5. For the purpose of this Article, a court shall be deemed to be seised –

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<sup>127</sup> It was agreed to place the text of Article 20, as it appeared in the preliminary draft Convention of October 1999 (including any bracketed material) in the present document.

<sup>128</sup> It was agreed to add the words within brackets in order to make it clear that the *lis pendens* rule only applies when the court first seised exercises jurisdiction under the Convention: see the Report of the co-reporters, Preliminary Document 11, at p. 86.

<sup>129</sup> This proposal sought to make it clear that the *lis pendens* rule will not only apply where the court first seised is exercising 'white list' jurisdiction as such, but also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State: see Report of co-reporters, Preliminary Document 11, at p. 86. There was no consensus on this point.

<sup>130</sup> There was no consensus on the insertion of a reference to Article 11 (trusts).

- a) when the document instituting the proceedings or an equivalent document is lodged with the court; or
- b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

- a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and
- b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

### ***Article 22 Exceptional circumstances for declining jurisdiction***

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, 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. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

- 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.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State,<sup>131</sup> unless the defendant establishes that [the plaintiff's ability to enforce the

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<sup>131</sup> It was agreed to insert the words "or if it is in a non-Contracting State" in order to fill a gap in the provision, see the Report of the co-reporters, Preliminary Document 11, at pp. 92-93.

judgment will not be materially prejudiced if such an order is not made]<sup>132</sup> [sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced]<sup>133</sup>.

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

6. This Article shall not apply where the court has jurisdiction only under Article 17 [which is not consistent with Articles [white list]].<sup>134</sup> In such a case, national law shall govern the question of declining jurisdiction.<sup>135</sup>

7. [The court seised and having jurisdiction under Articles 3 to 15 shall not apply the doctrine of forum non conveniens or any similar rule for declining jurisdiction.]<sup>136</sup>

## CHAPTER \*\*\* – RECOGNITION AND ENFORCEMENT

### ***Article 23 Definition of 'judgment'***

For the purposes of this Chapter, 'judgment' means any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention.<sup>137</sup>

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<sup>132</sup> The words in the preceding brackets were proposed in substitution of the existing text which were thought to set too high a standard for the defendant to be able to meet on the one hand and still not give the plaintiff the security needed on the other: see the Report of the co-reporters, Preliminary Document 11 at p. 93. There was no consensus on this point.

<sup>133</sup> This is the text of the preliminary draft Convention of October 1999.

<sup>134</sup> This proposal sought to ensure that the preservation of national rules of forum non conveniens will not apply both where the court seised is exercising 'white list' jurisdiction as such, and also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State. There was no consensus on this point.

<sup>135</sup> This paragraph makes it clear that Article 22 does not apply where the court is only exercising jurisdiction under national law. In that case, the court can apply its own rules of forum non conveniens or similar (if any). This resolves the question raised by the co-reporters in Preliminary Document 11, at p. 89. It was agreed to insert this paragraph.

<sup>136</sup> This paragraph was proposed to ensure that national rules of forum non conveniens or similar rules would not be used in relation to 'white list' jurisdiction as a means of declining jurisdiction. There was no consensus on this point.

<sup>137</sup> For those delegations that support the complete exclusion of provisional and protective measures from the Convention, no reference to such measures will be necessary in this Article. It has been proposed to include in the Convention provisions both for jurisdiction to take provisional and protective measures and for their recognition and enforcement. As for jurisdiction, it was pointed out that the definition of 'judgment' in Article 23 could be read to include provisional and protective measures. As for recognition and enforcement, proposals are made in Article 23A below.

***[Article 23A Recognition and enforcement of provisional and protective measures<sup>138</sup>***

[Alternative A

1. A decision ordering a provisional and protective<sup>139</sup> measure, which has been taken by a court seised<sup>140</sup> with the claim on the merits, shall be recognised and enforced in Contracting States in accordance with Articles [25, 27-34].
2. In this article a reference to a provisional or protective measure means –
  - a) a measure to maintain the status quo pending determination of the issues at trial; or
  - b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or
  - c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

[Alternative B

Orders for provisional and protective measures issued in accordance with Article 13<sup>141</sup> shall be recognised and enforced in the other Contracting States in accordance with Articles [25, 27-34].]

***Article 24 Judgments excluded from Chapter III***

This Chapter shall not apply to judgments based solely on a ground of jurisdiction provided for by national law in accordance with Article 17, and which is not consistent with any basis of jurisdiction provided for in Articles [white list].<sup>142</sup>

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<sup>138</sup> The two alternatives which do not appear to differ much in substance, provide for the recognition and enforcement of provisional and protective orders made by a court that is seised (or about to be seised) of the substantive dispute. Such a provision is opposed naturally by those delegations that favour exclusion of such measures from the scope of the Convention. But several delegations that favoured the inclusion of a provision relating to such measures in the jurisdictional or procedural part of the Convention, opposed making provision for the recognition and enforcement of provisional and protective orders. Note also that there may be a need to address: the extent to which similar relief is known in the State of the court addressed; and, procedures to safeguard the interests of third parties or of the defendant (e.g. an undertaking to pay damages).

<sup>139</sup> The two descriptions 'provisional' and 'protective' are intended to be cumulative.

<sup>140</sup> It was suggested that it would be sufficient if a court is seised after a provisional and protective measure is made as long as it is already seised by the time of recognition and enforcement of the provisional and protective measure is sought abroad.

<sup>141</sup> This refers back to the proposal made as Alternative B in Article 13, above. The order must have been made by a court which is seised or about to be seised of a claim and which has white list jurisdiction to determine the merits thereof.

<sup>142</sup> The addition of the second part of the sentence was accepted by consensus. The additional words make it clear that Chapter III will apply to any judgment based on one or more grounds of jurisdiction, so long as any one of those grounds is consistent with a required basis for jurisdiction under the Convention. For recognition purposes, the application of Article 24 is confined to judgments that can only be based on jurisdiction provided for by national law.

### **Article 25 Judgments to be recognised or enforced**

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.
2. [In order to be recognised, a judgment referred to in paragraph 1 must have the effect of *res judicata* in the State of origin.]<sup>143</sup>

or

[A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin.]<sup>144</sup>

3. [In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.]<sup>145</sup>

or

[A judgment referred to in the preceding paragraphs shall be enforceable from the time, and for as long as, it is enforceable in the State of origin.]<sup>146</sup>

4. However, recognition or enforcement may be postponed [or refused]<sup>147</sup> if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

### **Article 26 Judgments not to be recognised or enforced**<sup>148</sup>

A judgment based on a ground of jurisdiction which conflicts with Article 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.<sup>149</sup>

### **Article 27 Verification of jurisdiction**<sup>150</sup>

1. The court addressed shall verify the jurisdiction of the court of origin.
2. In verifying the jurisdiction of 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.

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<sup>143</sup> This is the text of paragraph 2 as it appeared in the preliminary draft Convention of October 1999. It was suggested to avoid the use of technical terms such as '*res judicata*' or '*autorité de la chose jugée*' which may not have a uniform meaning in all legal systems.

<sup>144</sup> This text was proposed as an alternative text to paragraph 2 by the Informal Working Group on Article 25. It has been agreed to insert it in the text to facilitate future discussion.

<sup>145</sup> This is the text of paragraph 3 as it appeared in the preliminary draft Convention of October 1999.

<sup>146</sup> This text was proposed as an alternative text to paragraph 3 by the Informal Working Group on Article 25. It has been agreed to insert it in the text for future discussion.

<sup>147</sup> The addition of the words in brackets is proposed in order to ensure that Contracting States are not obliged to recognise or enforce judgments under the circumstances described in this paragraph. The decision whether to postpone or refuse recognition should be left to national law. The proposal has not as yet been discussed.

<sup>148</sup> Agreement was reached on this Article subject to further identification of the Articles to which it will apply.

<sup>149</sup> Agreement was reached on this paragraph subject to further identification of the Articles to which it will apply.

<sup>150</sup> This Article was agreed to.

3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

**Article 27A Appearance without protest**

1. If, in the proceedings before the court of origin,
  - a) the plaintiff claimed that the court had jurisdiction on one of the grounds specified in Articles [white list]; and
  - b) the plaintiff did not claim that the court had jurisdiction on any other ground under national law; and
  - c) the court did not determine that it had jurisdiction under any other ground under national law; and
  - d) the defendant proceeded on the merits without contesting jurisdiction,<sup>151</sup>

the defendant shall, in the court addressed, be precluded from contesting the jurisdiction of the court of origin.

2. This Article shall not apply if the courts of a Contracting State other than the State of the court of origin had exclusive jurisdiction under Article 12.<sup>152</sup>

**Article 28 Grounds for refusal of recognition or enforcement**

1. Recognition or enforcement of a judgment may be refused [only]<sup>153</sup> if –
  - a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21<sup>154</sup>
  - 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;<sup>155</sup>
  - c) [the [judgment results from] proceedings [in the State of origin were]<sup>156</sup> incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court];]<sup>157</sup>

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<sup>151</sup> The view was expressed that the time limits presently specified in Article 5, above, should be incorporated in subparagraph d). There was no consensus on this point.

<sup>152</sup> Apart from the matter noted in note 151, above, there was consensus on this proposed new article. Its purpose is to overcome the difficulty referred to by the co-reporters in relation to the text of Article 5 as it appeared in the preliminary draft Convention of October 1999 (see Preliminary Document No 11, at p. 46) that under the text as it then stood appearance without protest to a jurisdiction exercised pursuant to national law (the 'grey zone') would convert that jurisdiction into required jurisdiction. There was a consensus that this would be an undesirable effect of the previous provision. The effect of the new provision would remove appearance by the defendant from the list of required jurisdictions (the 'white list'), but appearance of the defendant without protest will, if the conditions set out in paragraph 1 are fulfilled, preclude the defendant from contesting the jurisdiction of the court of origin upon the verification of the jurisdiction of that court by the court addressed.

<sup>153</sup> The insertion of the word 'only' has been proposed to make clear that the following list is an exclusive list of grounds for refusal or enforcement, see Preliminary Document No 11, at p. 102. No consensus was reached on the inclusion of this word in the text.

<sup>154</sup> This sub-paragraph was agreed to.

<sup>155</sup> This sub-paragraph was agreed to.

d) 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 [, or was not notified in accordance with [an applicable international convention] [the domestic rules of law of the State where such notification took place]],<sup>158</sup> unless the defendant entered an appearance and presented his case without contesting the matter of notification in the court of origin, provided that the law of that court permits objection to the matter of notification and the defendant did not object.<sup>159</sup>

e) the judgment was obtained by fraud in connection with a matter of procedure;<sup>160</sup>

f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.<sup>161</sup>

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.<sup>162</sup>

### ***Article 29 Documents to be produced***<sup>163</sup>

1. The party seeking recognition or applying for enforcement shall produce –

a) a complete and certified copy of the judgment;

b) 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;

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<sup>156</sup> The deletion of the words 'judgment results from' and the insertion of the words 'in the State of origin' has been proposed. This is intended to clarify the provision. Further discussion depends on the decision of the issue raised in footnote 157.

<sup>157</sup> The deletion of this sub-paragraph has been proposed because it would encourage attacks on the impartiality and independence of the court by the losing party in an attempt to delay enforcement. It would also be contrary to the need for mutual trust and confidence among the courts of Contracting States. It may be that, subject to revision, the first part of the sub-paragraph could be acceptable. No consensus was reached on the continued inclusion of the sub-paragraph in its present form.

<sup>158</sup> No difficulties were raised about the portion of the sub-paragraph not in brackets. The material within the brackets was put forward as containing two options. The option contained within the first set of brackets would permit the requested court to deny recognition in cases where the applicable international convention was violated, such as the Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The second option would permit the requested court to deny recognition where service was not effected in accordance with the requirements of the law of the State where notification took place. In most cases, but not all, this would coincide with the State addressed. There was no consensus on the acceptance of either option.

<sup>159</sup> The addition of the words after the last comma was agreed to, subject to drafting.

<sup>160</sup> Agreement was reached on this sub-paragraph.

<sup>161</sup> Agreement was reached on this sub-paragraph.

<sup>162</sup> Agreement was reached on this paragraph.

<sup>163</sup> This Article was approved by consensus as it appeared in the preliminary draft Convention of October 1999. It was noted that drafting changes would have to be made if the proposed amendments to Article 25 were accepted.

c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;

d) if the court addressed so requires, a translation of the documents referred to above, made by a person [legally]<sup>164</sup> qualified to do so.

2. [An application for recognition or enforcement may be accompanied by the form annexed to this Convention<sup>165</sup> and, if the court addressed so requires, a translation of the form made by a person [legally]<sup>166</sup> qualified to do so.]<sup>167</sup>

3. No legalisation or other formality may be required.

4. 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 the production of any other necessary documents.

### ***Article 30 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 State addressed so far as the Convention does not provide otherwise. [The law of the State addressed must provide for the possibility to appeal against the declaration of enforceability or registration for enforcement.]<sup>168</sup> The court addressed shall act [in accordance with the most rapid procedure available under local law]<sup>169</sup> [expeditiously].

### ***Article 31 Costs of proceedings***

1. No security, bond or deposit, however described, to guarantee the payment of costs or expenses [for the procedure of Article 30]<sup>170</sup> shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

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<sup>164</sup> It was proposed to add the words 'legally'. There was no consensus.

<sup>165</sup> A draft of such a form is attached in Annex III as a basis for further discussion.

<sup>166</sup> It was proposed to add the words 'legally'. There was no consensus.

<sup>167</sup> It was agreed that the nature of the form and whether it should be mandatory, available upon request, or discretionary on the part of the rendering court, required further discussion.

<sup>168</sup> This proposal was put forward in order to ensure that there be at least one possibility of an appeal against a decision either to grant or to refuse *exequatur* or registration. This proposal was opposed on the ground that the provision of a method of challenging or reviewing such a decision should be left to national law. The matter remains unresolved.

<sup>169</sup> The language within the brackets was proposed to replace the word 'expeditiously' in the existing text. Its intention was to give expression in the text of the Convention to the comment of the Reporters in Preliminary Document No 11 at p. 110 that Article 30 'oblige Contracting States to use ... the most rapid procedure they possess in their national law'. Concerns were expressed that the proposal would constitute too great an intrusion into national law and that certain rapid procedures that are provided for, for example, in the context of regional arrangements, are not necessarily appropriate in a world wide convention. In a further clarification the Reporters pointed out that such a provision would not oblige a State to use a procedure made available specifically for the purposes of a treaty or arrangement to which that State was a party, but referred to its non-treaty law (*droit commun*). No consensus was reached on this provision.

<sup>170</sup> This addition was proposed with the intention of clarifying the scope of the Article without changing the substance. The necessity for this provision was questioned and fears were expressed about unintended consequences. Reference was also made to Article 16 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. Consensus was reached on the substance of this paragraph.

2. [An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.]<sup>171</sup>

### **Article 32 Legal aid**<sup>172</sup>

[Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition and enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.]

### **Article 33 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 State addressed 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.<sup>173</sup>

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<sup>174</sup> have been awarded, recognition and enforcement may be limited to a lesser amount.

b) In no event shall the court addressed recognise or enforce<sup>175</sup> the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.<sup>176</sup>

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<sup>171</sup> The proposal for this paragraph is based on Article 15 of the Hague Convention of 1980 on International Access to Justice and Article 18 of the Hague Convention of 1954 on Civil Procedure. Its purpose is to secure enforcement of an order made by the requested court for the payment of the costs and expenses borne by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin. There was no consensus on this point.

<sup>172</sup> It was proposed that this provision be deleted from the Convention because it raised constitutional concerns. Some delegations did not consider the provision essential and it could therefore be deleted. But for yet other delegations it was of great importance. It was suggested that the issue could be resolved through an 'opt-in' provision. There was no consensus on these proposals.

<sup>173</sup> The text of paragraph 1 has been approved by consensus and replaces the text of the preliminary draft Convention of October 1999. The working group that produced this text also recommended consideration of reversing the order of paragraphs 1 and 2.

<sup>174</sup> The Reporters explained that the statement at p. 114 of Preliminary Document No 11 to the effect that as a general principle 'grossly excessive' was likely to mean 'grossly excessive by the standards of the court of origin', did not mean that the question of whether the damages were grossly excessive should be judged only by the standards of the court of origin. This would depend on the circumstances of each case, especially on whether the judgment creditor was a resident of the State of origin or of the requested State. In the latter case, obviously the standards of the requested State would assume greater importance.

<sup>175</sup> The addition of the reference to enforcement here and in other parts of the Article was proposed in order to make clear that the Article applies to both recognition and enforcement, see the comments of the Reporters in Preliminary Document No 11, at p. 113. The proposal was accepted by consensus.

<sup>176</sup> It was inquired whether statutory damages (where a statute has determined the amount to be awarded in case of breach), liquidated damages (where a contract has determined the amount to be paid in case of breach) and fixed interest on damages awards would fall within the scope of Article 33 and, if so, whether their character would be compensatory or non-compensatory. The co-reporters indicated that Article 33 would be applicable in such cases and that the classification of such damages as compensatory or punitive would be determined by the requested court. That court would take into account whether the statutory provision in question of the originating forum, or the contractual provision as interpreted according to its governing law, merely sought to estimate what was required to compensate the plaintiff or sought to impose a penalty.

3. In applying paragraph 1 or 2, 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 34 Severability**

[Alternative A

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.]<sup>177</sup>

[Alternative B

*Partial recognition or enforcement*

Partial recognition or enforcement of a judgment shall be granted where:

- a) partial recognition or enforcement is applied for; or
- b) only part of the judgment is capable of being recognised or enforced under this Convention; or
- c) the judgment has been satisfied in part.]<sup>178</sup>

### **Article 35 Authentic instruments**

[Alternative A

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.]<sup>179</sup>

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<sup>177</sup> This is the text as it appeared in the preliminary draft Convention of October 1999. It was noted by the co-reporters in Preliminary Document No 11, at p. 115 that this text made no express provision for partial enforcement. Such a provision would allow the court addressed to sever the portion of the judgment which had already been paid or otherwise satisfied.

<sup>178</sup> This is an alternative text which has been included in this document to facilitate future discussion.

<sup>179</sup> This is the text as it appeared in the preliminary draft Convention of October 1999. According to that text States wishing to take advantage of Article 35 should specifically elect to adopt it on the basis of reciprocity with other States making a similar declaration.

[Alternative B

1. Authentic instruments formally drawn up or registered and enforceable in a Contracting State shall, upon request,<sup>180</sup> be declared enforceable in another Contracting State.]<sup>181</sup>
2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.<sup>182</sup>
3. [The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]<sup>183</sup>

**[Article X<sup>184</sup>**

Any Contracting State may, at the time of ratification, acceptance, approval of, or accession to, this Convention, or at any time thereafter, make a declaration that it will not apply Article 35, or that it will apply that Article subject to reciprocity<sup>185</sup>.]<sup>186</sup>

**Article 36 Settlements<sup>187</sup>**

Settlements to which a court has given its authority shall be recognised, declared enforceable, registered for enforcement, or enforced in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

**CHAPTER \*\*\*\* -GENERAL PROVISIONS**

**Article 37 Relationship with other Conventions**

It was agreed that the proposals made in the **Annex** to the preliminary draft Convention as well as the Working Documents produced for the purposes of the present Session be reproduced in Annex 1 of this Summary.

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<sup>180</sup> Further discussion will be necessary to clarify what is meant by the words 'upon request' or whether the method and form of making the request (in writing, to a court or other instance) should be left to national law.

<sup>181</sup> According to this alternative text, Article 35 will apply to all Contracting States in the absence of a declaration as envisaged in the proposed Article X below. No consensus was reached on the version of paragraph 1 to be preferred.

<sup>182</sup> This was the text as it appeared in the preliminary draft Convention of October 1999.

<sup>183</sup> It was decided that this paragraph should remain within square brackets.

<sup>184</sup> This provision is part of Alternative 2 to paragraph 1, above. If accepted, it will probably be placed among the General Provisions of the Convention. If accepted, it will give Contracting States the following options:

- not to apply Article 35 under any circumstances;
- to apply Article 35 on condition of reciprocity; or
- to apply Article 35 without requiring reciprocity, that is, where a Contracting State is prepared to give effect to authentic instruments, although it does not provide for that institution under its domestic law.

<sup>185</sup> It remains to be decided whether reciprocity should be required in this proposal.

<sup>186</sup> There is no consensus as regards this provision.

<sup>187</sup> This Article was approved by consensus.

### **Articles 38 to 40 inclusive Uniform interpretation**

This matter has not yet been discussed.

### **Article 41 Federal clause**

This matter has not yet been discussed.

### **[Article 42 Ratification of and accession to the Convention]<sup>188</sup>**

[Alternative A

1. This Convention shall become effective between any two Contracting States on the date of entry into force provided that the two States have each deposited a declaration confirming the entry into force between the two States of treaty relations under this Convention.
2. At the time of deposit of its instrument of ratification or accession, or at any time thereafter, each State shall deposit with the depository a copy of its declarations concerning all Contracting States with which the State will enter into treaty relations under the Convention. A Contracting State may withdraw or modify a declaration at any time.
3. The depository shall circulate all declarations received to all Contracting States and to Member States of the Hague Conference.
4. The Hague Conference on Private International Law shall regularly publish information reporting on the declarations that have been deposited pursuant to this Article.]

[Alternative B

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Nineteenth Session.<sup>189</sup>
2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
3. Any other State may accede to the Convention.
4. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
5. The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

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<sup>188</sup> It was agreed that the two following proposals be included in this document in order to facilitate future discussion of this subject. There was no decision on whether there should be a provision dealing with bilateralisation and, if so, what form such a provision should take and how far bilateralisation should extend.

<sup>189</sup> It was requested that consideration be given to a method whereby the European Community could become a party to the Convention.

6. The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

7. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.]<sup>190</sup>

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<sup>190</sup> This proposal follows the language of Articles 37 and 38 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

## ANNEX I<sup>191</sup>

### **Article 37 Relationship with other Conventions**

#### Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorised under the provisions of Article 18 of the Convention.
3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

#### Proposal 2

1.
  - a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as “the European instruments”.
  - b) A State Party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as “European instrument States”.
2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.
3. Except where the provisions of the European instruments on –
  - a) exclusive jurisdiction;
  - b) prorogation of jurisdiction;
  - c) *lis pendens* and related actions;
  - d) protective jurisdiction for consumers or employees;are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.
4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply –
  - a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
  - b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and

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<sup>191</sup> Proposals 1-3 were annexed to the preliminary draft Convention of October 1999. Proposal 4 was introduced and discussed at the June 2001 Session.

- c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

### Proposal 3

Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article ..., a Contracting State chooses –

- a) not to be governed by this provision, or
- b) not to be governed by this provision as to certain designated other conventions.

### Proposal 4<sup>192</sup>

#### ***Article 2 Territorial scope***

Insert the words shown in brackets in the chapeau of paragraph 1, as follows:

The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State [or in the territory of a regional economic integration organisation that is a Contracting Party under Article [ ]]. However, even if all the parties are habitually resident in that [Contracting] State [or Party] –

[...]

#### ***Article 37A Relationship with Conventions in particular matters***

This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

#### ***Article 37A Relationship with Conventions in particular matters***

This Convention shall not affect the application of any other convention to which the Contracting States are or will be parties and which, in relation to particular matters, governs jurisdiction or the recognition or enforcement of judgments, provided that the application of such other convention shall not affect the rights and obligations under this Convention of any State Party that is not a Party to such other convention.

#### ***Article X Allocation of jurisdiction under this Convention***

Nothing in this Convention shall affect any rule of a Contracting State regarding the internal allocation of jurisdiction among the courts of that State.

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<sup>192</sup> It was pointed out to facilitate future discussions that Article 37A and Article X could in principle also be extended to cover regional economic integration organisations.

## *ANNEX II (Art. 8)*

### Proposal 1

#### ***Article 8 Individual contracts of employment***

1. An employee may bring a claim in matters relating to individual contracts of employment against the employer
  - a) in the courts of the State where the employer has its habitual residence;
  - b) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or
  - c) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated or in the courts of the State in which the employee carried out the work which has given rise to the dispute.
2. An employer may bring a claim in matters relating to individual contracts of employment against the employee only in the courts of the State in which the employee is habitually resident or in which the employee habitually carries out his work.
3. However, proceedings may be brought before the courts referred to in an agreement which conforms with the requirements of Article 4, paragraphs 1 and 2
  - a) if the agreement is entered into after the dispute has arisen;
  - b) to the extent that the agreement allows the employee to choose whether to bring proceedings in the courts referred to in the agreement or in the courts of the State referred to in paragraph 1; or
  - c) to the extent that the agreement is binding on both parties under the law of the State in which the employee carried out the work which has given rise to the dispute and provided that it meets the requirements specified in the declaration made by such State as contemplated in Article X.

### Proposal 2

#### ***Article 8 Individual contracts of employment***

1. In matters relating to individual contracts of employment, an employee may bring a claim against the employer,
  - a) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or
  - b) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.
2. An employer may bring a claim against the employee under this Convention only –
  - a) in the courts of the State:

- i. in which the employee is habitually resident; or
  - ii. in which the employee habitually carries out his work; or
- b) if the employee and the employer have entered into an agreement to which paragraph 4 b) or c) applies, in the court designated in that agreement.
3. Article 4 applies to an agreement between an employee and an employer only:
- a) to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or
  - b) if the agreement is entered into after the dispute has arisen; or
  - c) to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

### Proposal 3

#### ***Article X Reservation in respect of consumer contracts and employment contracts***

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 7 or 8 of this Convention.
2. A Contracting State which makes a declaration in accordance with the preceding paragraph may also declare that it will not be bound by Chapter III of this Convention in respect of judgments rendered under Article 7 or 8.
3. A Contracting State which makes a declaration in accordance with the preceding paragraphs is not to be considered a Contracting State of this Convention in respect of matters to which the declaration applies.

Note: This proposal is an alternative to Article 25 bis in the Edinburgh Draft Annex III A and Article 8, paragraph 4 c). It could also work well with the present wording of Articles 7 and 8 in the 1999 draft Convention. However, some modifications of the rules of jurisdiction will have to be modified in the Edinburgh Draft.

The purpose of this reservation is to make it possible for States that do not accept special rules about consumers or employees, to opt out from the Convention in this respect.

Under the first paragraph a State can opt out from the jurisdictional rules but not the rules on recognition and enforcement under Chapter III. Consequently, such a State is bound to recognise and enforce judgments rendered under Article 7 or 8. However, the State is not obliged to apply Articles 7 and 8 in relation to jurisdiction.

Under the second paragraph, a Contracting State has the possibility to opt out completely in respect of consumer contracts and/or employment contracts. A State can only make a declaration under this paragraph if it has also made a declaration under paragraph 1. A State that has decided to make declarations under paragraphs 1 and 2 will be regarded as having opted out completely in respect of consumer contracts and employment contracts under the Convention. Therefore such a State cannot apply Articles 7 and 8, and judgments rendered in other Contracting States under Articles 7 and 8 will not be recognised under the Convention in the State that has taken this reservation.

Paragraph 3 makes it clear that a State making reservations under paragraphs 1 and 2 is to be considered a non-Contracting State in respect of matters covered by the reservation.

**Article 8 Individual contracts of employment**

1. This Article applies in matters relating to individual contracts of employment.
2. An employee may bring a claim against the employer
  - a) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or
  - b) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.
3. An employer may bring a claim against the employee under this Convention only –
  - a) in the courts of the State:
    - i. in which the employee is habitually resident; or
    - ii. in which the employee habitually carries out his work; or
  - b) if the employee and the employer have entered into an agreement to which paragraph 4 b) or c) applies, in the court designated in that agreement.
4. Article 4 applies to an agreement between an employee and an employer only:
  - a) to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or
  - b) if the agreement is entered into after the dispute has arisen; or

to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

**Article 25 Judgments to be recognised or enforced**

"Subject to Article 25 *bis*..."

**[Article 25 bis**

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where:
  - a) the judgment was rendered by the court of origin under Article 7(2) or Article 8(2); and
  - b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.

2. [A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) or Article 8(2) if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]
3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]