

WIPO



SCT/3/3

ORIGINAL: English

DATE: September 28, 1999

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

Third Session
Geneva, 8 to 12 November 1999

INFORMATION ON
THE PRELIMINARY DRAFT CONVENTION
ON JURISDICTION AND THE EFFECTS OF JUDGMENTS
IN CIVIL AND COMMERCIAL MATTERS

Memorandum prepared by the International Bureau

INTRODUCTION

1. The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) studied, at its second session, second part, a number of legal issues related to the use of trademarks on the Internet. The Standing Committee included in its deliberations, *inter alia*, three specific areas of law, that it considered to be also relevant in this context: jurisdiction, applicable law (also referred to as: conflict of laws, choice of law, or private international law *stricto sensu*) and, thirdly, the recognition and enforcement of foreign judgements.
2. As the Standing Committee had not dealt with those areas of law before, many delegations felt that they were not certain to what extent such areas of law were relevant for the use of trademarks on the Internet. Therefore, the Standing Committee asked the International Bureau of WIPO to provide further information and establish a contact with the Permanent Bureau of the Hague Conference on Private International Law.¹
3. The Hague Conference on Private International Law was established in 1893 as an intergovernmental organization whose purpose is to work for the progressive unification of the rules of private international law² by drafting and negotiating multilateral treaties (“Hague Conventions”) in different fields.³
4. At an informal meeting in The Hague on June 30, 1999, the Secretary General and the Deputy Secretary General of the Hague Conference on Private International Law provided officials of the International Bureau of WIPO with topical information about the ongoing work in the field of jurisdiction and the effects of foreign judgements in civil and commercial matters.
5. To inform the SCT, the International Bureau of WIPO has prepared the present document, which summarizes the results that have been achieved so far by the Hague Conference on Private International Law in the field of jurisdiction and the effects of foreign judgements in civil and commercial matters. The summary includes also information that is not directly related to trademark rights, because it is difficult to assess the relevance of specific provisions without a basic knowledge of the overall systematic structure of the draft presently in progress at the Hague Conference on Private International Law.
6. The present document complements the *Study Concerning the Use of Trademarks on the Internet* (WIPO Document SCT/2/9 of May 10, 1999) that the SCT discussed at its last meeting.⁴ In the *Study*, information on jurisdiction and enforcement is provided in paragraphs 39 to 48 (jurisdiction) and paragraphs 67 to 70 (enforcement).

¹ See paragraph 83 of the Draft Report of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, WIPO Document SCT/2/12 Prov. of June 25, 1999, at: <http://sct.wipo.int/eng/sctrfc.html> .

² See Statut de la Conférence de la Haye de Droit International Privé, entered into force July 15, 1955, at: <http://www.hcch.net/f/conventions/text01f.html> .

³ See <http://www.hcch.net/e/members/members.html> for a list of the Member States of the Hague Conference. The Permanent Bureau of the Hague Conference on Private International Law maintains continuing contacts with a number of international organizations, including the United Nations, as well as certain non-governmental organizations. See <http://www.hcch.net/e/infosheet.html> .

⁴ See http://www.wipo.int/eng/document/sct/pdf/sct2_9.pdf ; also available at:

PRESENT HAGUE CONVENTION ON RECOGNITION AND ENFORCEMENT

7. A Hague Convention, presently in force, that addresses the international effects of judgements in civil and commercial matters, is the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, concluded February 1, 1971.⁵

8. The Convention sets standards for the recognition of foreign judgements and the resulting enforceability. It is a single convention (*convention simple*) in the sense that it deals with recognition and enforcement without providing direct grounds of jurisdiction. Thus, national or regional law is the basis for assuming jurisdiction. However, non-compliance of this basis with the standards set by the Convention affects the enforceability of the judgement in other Contracting States. In such a case, a request for recognition and enforcement has to be dismissed by the court addressed. In this context the term “indirect jurisdiction” is used.

9. The *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* has not received much support. It entered into force on August 20, 1979 for two states (Cyprus, Netherlands) and on August 20, 1983 for a third state (Portugal).⁶

10. The Convention falls short of meeting the needs of international trade and business, because it does not directly address the problems which arise from conflicts in jurisdiction between courts situated in different states.

PRELIMINARY DRAFT OF A FUTURE HAGUE CONVENTION

11. The new endeavors presently in progress at the Hague Conference on Private International Law have been initiated by the Government of the United States of America⁷ to obtain multilateral arrangements with European and other countries on the enforcement of judgements.

12. For developing a Preliminary Draft Convention, the Secretary General of the Hague Conference on Private International Law convened a “Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters.” This Special Commission met in June 1997, in March and November 1998 and in June 1999. One further meeting is scheduled for October 1999.

[Footnote continued from previous page]

http://www.wipo.int/eng/document/sct/index_2b.htm .

⁵ See <http://www.hcch.net/e/conventions/text16e.html> .

⁶ See <http://www.hcch.net/e/status/stat16e.html> .

⁷ In a report for the attention of the Special Commission of June 1997, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, preliminary document No 7, paragraph 17, the Permanent Bureau of the Hague Conference on Private International Law refers to a letter from the Legal Adviser (U.S. Department of State) dated May 5, 1992. The said report is available at <http://www.hcch.net/e/workprog/jdgm.html> .

13. The United Nations was represented by an observer from the International Trade Law Branch of the Office of Legal Affairs. The International Trade Law Branch functions as Secretariat of the United Nations Commission on International Trade Law (UNCITRAL).⁸

14. The Special Commission of the Hague Conference prepared a *Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters* (hereinafter referred to as “Prel.Draft”), that the Special Commission is going to finalize at its next meeting in October 1999. The text of the *Preliminary Draft Convention* is attached as Annex to the present document.⁹

15. In October 1996, the Hague Conference on Private International Law decided to include in the agenda of its 19th Session, which will be an ordinary diplomatic session in the year 2000, the consideration and adoption of a *Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters*.

GENERAL APPROACH

Policy considerations

16. The project aims at facilitating the sound administration of justice on a worldwide basis, acknowledging that one of the cornerstones of a proper international administration of justice is jurisdiction. To achieve this goal, the *Preliminary Draft Convention* tries to harmonize jurisdictional rules and to limit the places where proceedings can be instituted to a few appropriate *fora*, thus avoiding an unnecessary multiplicity of proceedings as well as irreconcilable judgements. Furthermore, the *Preliminary Draft Convention* seeks to simplify and expedite the recognition and enforcement of judgements, provided that they comply with the provisions of the future Convention.

17. A number of strategic considerations guided the work of the Special Commission, such as:

- Striking a fair balance between the interests of plaintiffs and defendants.
- Increasing the predictability and certainty of the jurisdictional concepts applied by Contracting States.
- Developing solutions that take into account all legal systems, so that they will be acceptable under all systems.
- Meeting the technical, economic and social requirements of the next millennium.

⁸ See <http://www.uncitral.org/en-index.htm> .

⁹ The text is also available at <http://www.hcch.net/e/workprog/jdgm.html> .

Scope of application

18. Article 1.1 Prel.Draft confines the substantive scope of application of the future Convention to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters. Article 1.2 Prel.Draft lists a number of cases, which are excluded from the substantive scope of application. Most of them are the subject of other international arrangements concerning jurisdictional grounds and/or recognition and enforcement. As regards arbitration and proceedings related thereto, the Special Commission felt that the future Convention should not apply to such proceedings because of the existing conventions and the related instruments, even where an arbitral proceeding intersects with a judicial one.¹⁰

19. As regards the geographic scope of application (Article 2 Prel.Draft), the Special Commission has yet to determine the situations to which the future Convention will apply.

20. With respect to some cases, the Special Commission may also consider whether, in addition to requiring that the court be located in a Contracting State, the defendant must also be located in such state.

Legislative approach

21. The jurisdictional provisions of the *Preliminary Draft Convention* can be grouped as follows:

- “positive” set of authorized grounds of jurisdiction that are compulsory in the sense that the Contracting States have to ensure that their courts assume jurisdiction on such grounds (see Articles 3 to 14 Prel.Draft);¹¹
- “negative” set of exorbitant grounds of jurisdiction, which are prohibited in the sense that no court shall assume jurisdiction on such a ground (see the principle in Article 20.1 Prel.Draft and the illustrative list in Article 20.2 Prel.Draft);¹²
- finally, a “neutral” area, where jurisdiction can be assumed on the basis of the applicable national law (e.g., Article 19 Prel.Draft).¹³

22. Article 20.1 Prel.Draft generally prohibits the assumption of jurisdiction under a Contracting State’s national law, if there is no substantial connection between the state of the *forum* and the dispute. Article 20.2 Prel.Draft lists specific factors, which cannot be used as sole basis of jurisdiction. Should this nevertheless happen, the judgement will have no international effect. Such judgement shall not be recognized or enforced, neither under international nor under applicable national law.

¹⁰ An existing convention, for example, is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See <http://www.uncitral.org/en-index.htm> .

¹¹ As regards the recognition and enforceability, see paragraphs 62 to 66, below.

¹² As regards the recognition and enforceability, see paragraph 59, below.

¹³ As regards the recognition and enforceability, see paragraphs 60 and 61, below.

GENERAL AND SPECIAL JURISDICTION

23. The most salient and fundamental category of jurisdiction among the authorized and compulsory grounds of jurisdiction (“positive list”) is the so-called “general jurisdiction.”

24. As used by the Special Commission, the term “general jurisdiction” is linked to the question whether the court seized of the case is authorized to render a judgement with respect to all claims against a defendant, or whether and to what extent the jurisdiction is limited. A court having “general jurisdiction” is authorized to deal with all claims against a defendant irrespective of their nature. Thus, “general jurisdiction” gives the court the widest possible competence, whereas “special jurisdiction” limits it to claims against the defendant that are specifically related to the events on which jurisdiction is based.

25. The need for a jurisdiction that covers the widest possible range of claims against a defendant is accommodated, as *defendant’s forum*, in Article 3 Prel.Draft. However, to avoid misunderstandings, the term “general jurisdiction” is not used in the text of the *Preliminary Draft Convention*.

Natural persons

26. A natural person can always be sued in the courts of the Contracting State where that person has its “habitual residence.” The Special Commission has deliberately not opted for the place where the person has its “domicile.” Common law systems do not link general jurisdiction to the habitual residence or domicile. However, they do not reject such concepts as an issue of “indirect jurisdiction,” because such concepts are considered reasonable. Therefore, experts from common law countries within the Special Commission also supported the approach taken by the Special Commission, to link “general jurisdiction” to a person’s “habitual residence.”

Legal persons

27. For legal persons or corporate entities as defendants, the *Preliminary Draft Convention* puts forward several identifiers, namely the courts of the state

- under whose law the said entity was “incorporated or formed,” or where it has its “statutory seat,”
- where the entity has its “central administration,” or
- where the entity has its “principal place of business.”

There is no hierarchy among the legal identifier and the two factual identifiers. The plaintiff has the choice.

PARTY AUTONOMY

Choice of court agreement

28. According to Article 4.1 Prel.Draft, the parties are free to choose themselves what courts shall have jurisdiction to settle any dispute arising out of a particular legal relationship, except for “protective” jurisdiction¹⁴ and for exclusive special jurisdiction.¹⁵

29. The respective agreement is subject to certain formalities as set out in Article 4.2 Prel.Draft. The approach taken with respect to formalities is a liberal one. To accommodate the needs of electronic commerce, alternatives to “writing” are included along the lines of the *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* of 1996, as amended by an additional Article in 1998.¹⁶

30. Where a choice of court agreement designates the courts of a Contracting State, the designated courts shall have exclusive jurisdiction, unless the parties have agreed otherwise. Where the agreement designates the courts of a non-Contracting State, all courts of the Contracting States shall suspend proceedings or decline jurisdiction, unless the court chosen has itself declined jurisdiction.

31. It should be noted that the *Hague Convention on the Choice of Court*, concluded November 25, 1965 deals with the matter more specifically.¹⁷ However, this Convention has not entered into force.¹⁸

32. Party autonomy is a basic principle that can be relevant for licensing agreements. In the context of trademark infringement it is less important, because such infringement belongs to the category of “torts” or “delicts” (see paragraphs 45 to 51, below). In cases of “torts” or “delicts” the parties to a dispute can agree on a specific venue for their proceedings only after the allegedly tortious act has been committed.

Appearance by the defendant

33. According to Article 5 Prel.Draft, appearance by the defendant before the court is treated as a tacit acceptance of the jurisdiction of such court, if the defendant proceeds on the merits of the case without contesting jurisdiction at least at the time of his first defense on the merits. A still pending issue is, whether the said rule shall also apply to situations covered by Article 19 or Article 20 Prel.Draft. As Article 5 Prel.Draft is presently drafted, its application seems not to be excluded in such cases.

¹⁴ See paragraph 36, below.

¹⁵ See paragraphs 37 to 42, below.

¹⁶ See <http://www.uncitral.org/en-index.htm> .

¹⁷ See <http://www.hcch.net/e/conventions/text15e.html> .

¹⁸ See <http://www.hcch.net/e/status/stat15e.html> .

SPECIAL JURISDICTION WITH RESPECT TO CONTRACTS

Goods and services

34. Article 6 Prel.Draft provides further jurisdictional options for contractual disputes in matters that are related to the supply of goods, the provision of services, or both. However, if the parties themselves have already made a decision by including an exclusive choice of court clause into their contract, that clause prevails.

35. Article 6 Prel.Draft confers special jurisdiction for contractual obligations concerning:

- the supply of goods on the courts for the place where the goods were supplied;
- the provision of services on the courts for the place where the services were provided;
and
- the supply and provision of both, goods and services, on the courts of the place where the performance of the principal obligation took place.

Protective jurisdiction

36. With respect to contracts concluded by consumers, a protective rule applies that shifts jurisdiction to the place of their habitual residence (see Article 7 Prel.Draft).

EXCLUSIVE SPECIAL JURISDICTION

Registrations and other matters

37. Article 13 Prel.Draft contains for certain types of proceedings a list of four grounds of exclusive jurisdiction. If a case meets the requirements of one of these grounds, other jurisdictional options (based on the principles of general or non-exclusive special jurisdiction) are no longer available.

38. In this respect, the *Preliminary Draft Convention* follows, to a great extent, the model of the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of September 27, 1968,¹⁹ and the *Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* of September 16, 1988.²⁰ Both Conventions control the transnational jurisdiction and enforcement rules of 18 European countries.²¹

¹⁹ See <http://www.law.berkeley.edu/faculty/ddcaron/courses/rp04006.html> .

²⁰ See <http://www.law.berkeley.edu/faculty/ddcaron/courses/rp04007.html> .

²¹ For the ongoing work on revision see European Commission Document COM (1999) 348 final, available at <http://www.europa.eu.int/comm/sg/tfjai/pdf/com1999-348-en.pdf> .

39. Proceedings which have as their object the validity or nullity of entries in public registers, as well as litigation related to the registration, validity or nullity of industrial property rights, are areas where the Special Commission felt that exclusive jurisdiction might be appropriate. Articles 13.3 and 13.4 Prel.Draft read:

“(3) In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

(4) In proceedings which have as their object the registration, validity or nullity of patents, trademarks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction.”²²

40. As Article 13.4 Prel.Draft is presently drafted, it does not cover marks without prior registration, such as common law trademarks, because its scope of application is limited to industrial property rights “required to be deposited or registered.”

41. It is not clear how such cases should be treated. Given the territorial nature of trademark rights, one possibility would be to treat disputes about their establishment (validity/nullity) in the same way as disputes concerning the maintenance (validity/nullity) of registered rights. English courts, for example, have for a long time categorized intellectual property rights that had been granted under the law of another state as “local”, and therefore traditionally declined to entertain actions concerning the rights as such or their infringement (application of the *Mozambique Rule*²³ by analogy²⁴), whereas German courts, for example, have also assumed jurisdiction with respect to the infringement of marks that had been established and maintained under the law of another state.²⁵

42. Further areas of exclusive special jurisdiction are certain disputes related to immovable property (Article 13.1 Prel.Draft), and disputes in respect of the legal personality and authority of corporate entities (Article 13.2 Prel.Draft).

OTHER NON-EXCLUSIVE SPECIAL JURISDICTION

Branches

43. Article 9 Prel.Draft confers special jurisdiction on the courts in a Contracting State where a branch, agency or any other establishment of the defendant (without separate legal personality) is located. However, this jurisdiction covers only disputes that are directly related to the activities of the respective branch, agency or establishment.

²² The question of jurisdiction in cases where a claim is based on the infringement, and a counter-claim on the alleged invalidity or nullity of an intellectual property right, is a still pending issue.

²³ *British South Africa Company v. Companhia De Mocambique* [1893] A.C. 602, HL (E).

²⁴ See for trademarks *LA Gear Inc. v. Gerald Whelan & Sons* [1991] F.S.R. 670, 674.

²⁵ See *Reichsgericht*, decision of July 8, 1930, RGZ 129, 385 [388].

Business activities

44. A previous version of the *Preliminary Draft Convention* also provided for an “activity based” ground of jurisdiction, e.g., for claims arising out of activity “directed” to a country. However, the common practice under U.S. law to base jurisdiction on the criterion of “doing business” did not find sufficient support within the Special Commission. Therefore, the respective Article is no longer included in the “positive” list of grounds of jurisdiction. However, assuming jurisdiction on such ground is not prohibited under Article 20 Prel.Draft either.

“Torts” or “delicts”

45. Article 10 Prel.Draft provides for a non-exclusive special jurisdiction that is specifically based on “torts” or “delicts.” The term *forum delicti commissi* is used in this context.

46. Article 10.1 Prel.Draft, which provides the basic rule, reads:

“The plaintiff may bring an action in tort or delict in the courts of the Contracting 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 [defendant] [person claimed to be responsible] could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that state.”

47. The consequences of applying Article 10.1(a) Prel.Draft to electronic commerce are not entirely clear because of the difficulties in localizing the injuring act.

48. Article 10.1(b) Prel.Draft does not require that the defendant has directed its tortious conduct toward the territory of the *forum state*. Therefore, concerns were expressed with respect to the principle of *due process* in states, where this is a constitutional principle. In an attempt to satisfy such concerns, the “reasonably foreseeable” test has been included in Article 10.1(b) Prel.Draft. This test is also of particular importance for the assumption of jurisdiction in cases where “torts” or “delicts” have allegedly been committed by the use of marks on the Internet.²⁶

49. According to Article 10.3 Prel.Draft, the competence of the court to hear and decide the case is limited in the following way:

“If an action is brought in the courts of a Contracting State only on the basis that the injury arose or is threatened there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that state, unless the [plaintiff] [injured party] has its habitual residence or seat in that state.”

²⁶ See *Study*, WIPO Document SCT/2/9, paragraph 66, p. 22.

50. This limitation includes elements of a pattern that the European Court of Justice developed with respect to injury or damage caused in more than one state.²⁷

51. However, it is important to note that, according to the *Preliminary Draft Convention*, such limitation shall not apply if the [plaintiff] [injured party] has its habitual residence or seat in a state where part of the damage occurred. This rule seems to be of particular importance in cases where a “tort” or “delict,” such as the infringement of a trademark, has been committed by electronic means in electronic commerce. It can be difficult to pin down the location of the defendant’s habitual residence, or the allegedly infringing party may have moved to a place where proceedings are more cumbersome than in other places (safe haven). Compelling the plaintiff in such cases to institute proceedings as many times as there are countries in which injury has been caused,²⁸ may eventually result in denying him real access to justice. The *Preliminary Draft Convention* therefore provides that, if damage has been caused in the state where the [plaintiff]²⁹ [injured party] has its habitual residence or seat, the courts in that state shall have jurisdiction to adjudicate the case in every respect, i.e. also with respect to damage caused in other states.

Provisional and protective measures

52. According to Article 14.1 Prel.Draft, courts having jurisdiction to determine the merits of a case by virtue of Articles 3 to 13 Prel.Draft have also jurisdiction to order any provisional or protective measure.

53. Where a court has no jurisdiction with respect to the merits of the case, Article 14.2 and Article 14.3 Prel.Draft provide:

“(2) A court of the place where property is located has jurisdiction to order provisional or protective measures in respect of that property.

(3) A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 [of Article 14 Prel.Draft] may order provisional or protective measures, provided that

- a) their enforcement is limited to the territory of that state, and
- b) their [sole] purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.”

²⁷ See Case 68/93, *Shevill v. Presse Alliance SA*, Rep.1995, p. I-415.

²⁸ See *Study*, WIPO Document SCT/2/9, paragraph 45, p. 16.

²⁹ For a shift of jurisdiction to the habitual residence of the plaintiff, see also *Study*, WIPO Document SCT/2/9, paragraph 48, p. 16.

Lis pendens and *forum non conveniens*

54. Article 23 Prel.Draft, which is still under discussion, provides a mechanism for cases where parties are engaged in proceedings that take place in different Contracting States, but relate to the same causes of action. In such situations, a complex set of rules applies to the question whether the jurisdiction of the court first seized or of the court second seized shall prevail, to the effect that one court has to suspend proceedings and eventually decline jurisdiction. As a general rule, the court first seized of the case prevails.

55. Also still under discussion is Article 24 Prel.Draft. This complex article is based on the notion of *forum non conveniens*, allowing courts to suspend proceedings and eventually decline jurisdiction on other grounds than *lis pendens*. The application of this Article is limited to exceptional circumstances. This limitation is important for two reasons: Firstly, because civil law countries are unfamiliar with the discretionary element of this concept, and secondly, because there is no uniformity in respect of the *forum non conveniens* doctrine among common law countries either.

56. It should further be noted that the *forum non conveniens* rule, as provided in the *Preliminary Draft Convention*, could not be applied in cases where the parties have agreed on an exclusive choice of court. In such a case the principle of party autonomy prevails.

57. A special safeguard is included in Article 24.5(b) Prel.Draft: The court seized who was about to decline jurisdiction and has therefore suspended the proceedings, shall proceed to adjudicate the case in spite of any exceptional circumstances, if the other court decides not to exercise jurisdiction.

PRINCIPLES OF RECOGNITION AND ENFORCEMENT

58. According to the *Preliminary Draft Convention*, three categories of foreign judgements have to be distinguished:

- decisions that are not to be recognized or enforced, either internationally or under applicable national law, because jurisdiction was assumed on grounds that are prohibited according to the provisions of the “negative” list (Article 20 Prel.Draft) or on grounds that are in conflict with Articles 4, 5, 7,[8] or 13 Prel.Draft;
- decisions that courts of other Contracting States may recognize and enforce, according to their national law, because the court of origin has assumed jurisdiction on the basis of national rules that belong to the “neutral” area;
- decisions that, by virtue of the Convention, enjoy the privilege of a simplified and expedited procedure for recognition and enforcement, because the court of origin has assumed jurisdiction on grounds that are included in the provisions of the “positive” list.

Prohibited recognition and enforcement

59. Article 26*bis* Prel.Draft deals with the first group of cases. A foreign judgement shall neither be recognized nor enforced, if the court of origin assumed jurisdiction on a ground that

- lacks the element of a substantial connection between the dispute and the state of the *forum* (Article 20.1 Prel.Draft), as illustrated by the list contained in Article 20.2 Prel.Draft (see paragraph 22, above);
- is in conflict with the rules on exclusive special jurisdiction (Article 13 Prel.Draft);
- is in conflict with a choice of court agreement (Article 4 Prel.Draft);
- is in conflict with the provisions on tacit acceptance of jurisdiction and the right to contest jurisdiction (Article 5 Prel.Draft);
- is in conflict with the rules on protective jurisdiction for consumer contracts (Article 7 Prel.Draft); or
- [is in conflict with the rules on protective jurisdiction for employment contracts (Article 8 Prel.Draft)].

Recognition and enforcement according to national law

60. For the second group of cases, Article 25*bis* Prel.Draft provides that the provisions of Chapter III, which deals with the recognition and enforcement of foreign judgements, shall not be applicable. As this Chapter of the Convention is not applicable, states will be free to allow recognition or enforcement under their applicable national law. The basis for this is provided in Article 19 Prel.Draft, which reads:

“Subject to Articles 4, 5, 7, 8, 13 and [14], 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 20.”

61. In such cases, it depends upon the applicable national law of procedure, whether and to what extent foreign judgements benefit from rules that are identical or similar to those of Chapter III of the *Preliminary Draft Convention*.

Recognition and enforcement by virtue of the Convention

62. If the court of origin has assumed jurisdiction on grounds that are in full compliance with the provisions of the “positive” list, a judgement based on such jurisdiction qualifies for Chapter III of the future Convention. In this case, the other Contracting States are under an obligation to provide a procedure, by which the judgement will be recognized and enforced almost automatically. However, some restrictions have to be observed.

63. As a general rule, Article 26 Prel.Draft provides that a foreign judgement, even though in compliance with Articles 3 to 14 Prel.Draft, shall only be recognized on the condition that it has the effect of *res judicata* in the state of origin. Moreover, enforcement shall only be granted, if the judgement would be enforceable in the state of origin.

64. In order to strike a fair balance between the desire to facilitate the circulation of judgements, and the equally legitimate desire to stop those that were rendered under unacceptable conditions, Article 27bis Prel.Draft provides a number of grounds for refusal of recognition or enforcement. On such grounds, which normally must be raised by the defendant, the court addressed may refuse the recognition or enforcement of a foreign judgement.

65. Article 27bis.1 Prel.Draft includes the following grounds for refusal of recognition or enforcement:

- proceedings pending before a court of the state addressed, involving the same parties and concerning the same subject matter;
- inconsistency with another judgement;
- lack of notice of proceedings;
- violation of fundamental principles, such as the right to be heard by an impartial and independent court;
- procedural fraud;
- manifest incompatibility with the public policy of the state addressed.

66. If the court of origin has awarded excessive damages, the court addressed may, according to Article 32 Prel.Draft, limit the recognition or enforcement of that decision to the extent that similar or comparable damages would have been due in the state addressed. In doing so, 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 related to the proceedings.

PROCEDURE TO BE OBSERVED

Lex fori

67. So far as the *Preliminary Draft Convention* does not provide otherwise, the procedure for the recognition, the declaration of enforceability or registration for enforcement, and the enforcement of the foreign judgement are governed by the law of the state addressed (Article 30 Prel.Draft). The court addressed shall act expeditiously (see second sentence of Article 30 Prel.Draft).

Verification

68. The verification of the jurisdiction of the court of origin is a cornerstone of the simplified and expedited procedure for the recognition and enforcement of foreign judgements.

69. However, Article 27.2 Prel.Draft provides that, unless a judgement was given by default, the courts verifying the jurisdiction of the court of origin are bound by the findings of fact, on which the court of origin based its jurisdiction.

70. A major advantage of the simplified procedure of recognition and enforcement of foreign judgements is the general rule in Article 27bis.2 Prel.Draft that “there shall be no review of the merits of the judgement rendered by the court of origin.” This rule, of course, applies without prejudice to “such review as is necessary” for the purpose of applying the provisions of Chapter III.³⁰

Documents

71. Article 29.1 Prel.Draft includes detailed provisions as to what documents a party seeking recognition or applying for enforcement shall produce. If the terms of the judgement do not permit the court addressed to verify whether the conditions for recognition and enforcement have been complied with, that court may require further documents as necessary (Article 29.3 Prel.Draft). In order to simplify the procedure, Article 29.2 Prel.Draft, however, provides that “no legalization or similar formality may be required.”

Security, bond or deposit

72. According to Article 31 Prel.Draft, no security, bond or deposit to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence or seat in, another Contracting State. Provisions of this kind are common in Hague Conventions.

Legal aid

73. Article 31bis Prel.Draft provides national treatment with respect to legal aid for proceedings related to the recognition or enforcement of foreign judgements.

74. The SCT is invited to note the content of this document and to comment on it.

[Annex follows]

³⁰ For the grounds of refusal as provided for in Article 27bis.1 Prel.Draft see paragraph 65, above.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

**Preliminary Draft Convention on Jurisdiction
and the Effects of Judgments in Civil and Commercial Matters**

Adopted provisionally by the Special Commission on 18 June 1999¹

CHAPTER I – SCOPE OF THE CONVENTION

Article 1 Substantive scope

1 This Convention applies to civil and commercial matters [before courts of Contracting States]. It shall not extend in particular to revenue, customs or administrative matters.

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;
- d) wills and succession;
- e) insolvency, composition or analogous proceedings;
- f) social security;
- g) arbitration and proceedings related thereto.

3 A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.

Article 2 Geographic scope

[to be considered]

¹ The Special Commission will meet in October 1999 to give its final approval to the Preliminary Draft Convention.

CHAPTER II – JURISDICTION

Article 3 Defendant's forum

Subject to the provisions of this Convention, a defendant may be sued –

- in the case of a natural person, in the courts of the [Contracting State] [place] where that person is habitually resident;
- in any other case, in the courts of the [Contracting State] [place] –
 - 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.

Article 4 Choice of court

1 If the parties have agreed that a court or 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 courts shall have exclusive jurisdiction unless the parties have agreed otherwise. Where such an agreement 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.

- 2 Such agreement shall be valid as to form, if it was entered into or confirmed –
- a) in writing;
 - b) 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.

3 Agreements conferring jurisdiction [and similar clauses in trust instruments] shall be without effect if they conflict with the provisions of Article 7 or 8, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 13.

Article 5 Appearance by the defendant

1 Subject to Article 13, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2 The defendant has the right to contest jurisdiction not later than at the time of the first defence on the merits.

Article 6 Contracts

A plaintiff may bring an action in contract in a Contracting State –

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

Article 7 Contracts concluded by consumers

1 A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the court for the place where it is habitually resident in a Contracting State, if

- a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
- b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2 A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the court for the place of habitual residence of the consumer.

3 The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of forum –

- a) if such agreement is entered into after the dispute has arisen, or
- b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8 Employment contracts

[to be discussed]

Article 9 Branches

The plaintiff may bring an action in the courts for the place in a Contracting State where a branch, agency or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency or establishment.

Article 10 Torts or delicts

- 1 The plaintiff may bring an action in tort or delict in the courts of the Contracting 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 [defendant] [person claimed to be responsible] could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
- 2 The plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury is threatened.
- 3 If an action is brought in the courts of a Contracting State only on the basis that the injury arose or is threatened there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the [plaintiff] [injured party] has its habitual residence or seat in that State.

Article 11 Jurisdiction based on activities

[deleted]

Article 12 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 exclusive jurisdiction.
- 2 In the absence of such designation, proceedings may be brought before the courts of the Contracting State, ...²

Article 12bis Maritime jurisdiction

[to be discussed]

² Three variants were considered by the Special Commission without a final decision being taken.

Variant 1: with which the trust has the closest connection (criteria yet to be determined).

Variant 2: in which the principal place of administration is situated, or, if such place cannot be determined, the Contracting State with which the trust has the closest connection (criteria yet to be determined).

Variant 3: whose domestic law governs the trust.

Article 13 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, the tenant is habitually resident or has its seat in a different State.

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 in which the legal person has its seat have exclusive jurisdiction. In order to determine that seat, the court seised shall apply the law of the State under whose law the legal person was incorporated or formed.

3 In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4 In proceedings which have as their object the registration, validity or nullity of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction.

Article 14 Provisional and protective measures

1 A court having jurisdiction under Articles 3 to 13 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2 A court of the place where property is located has jurisdiction to order provisional or protective measures in respect of that property.

3 A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that

- a) their enforcement is limited to the territory of that State, and
- b) their [sole] purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 15 Multiplicity of defendants

[to be considered]

Article 16 Counter-claims

[to be considered]

Article 17 Warranty and intervention

[to be considered]

Article 18 Related actions

[to be considered]

Article 19 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 13 and [14], 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 20.

Article 20 Prohibited grounds of jurisdiction

1 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 the dispute.

2 In accordance with the preceding paragraph, jurisdiction shall not be exercised by the courts of a Contracting State, in particular, on the basis solely of one or more of the following –

- a) the presence or the seizure in that State of property belonging to the defendant;
- 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;
- f) the service of a writ upon the defendant in that State;
- h) the unilateral designation of the forum by the plaintiff;
- i) proceedings in that State for declaration of enforceability or registration or for the enforcement of a decision;
- j) the temporary residence or presence of the defendant in that State;
- k) the signing in that State of the contract from which the dispute arises.

3 Nothing in paragraph 2 shall prevent the courts of a Contracting State from exercising jurisdiction in respect of a dispute which is directly related to –

- a) property of the defendant which is situated or seized in that State;
- b) the carrying on of commercial or other activities by the defendant in that State;
- c) proceedings in that State for declaration of enforceability or registration or for the enforcement of a decision.

[4 Nothing in this Article shall prevent a party from bringing an action under national law based on a violation of human rights [to be defined].]

Article 21 Margin of manoeuvre of States

[became Article 19]

Article 22 Authority of the court seised

[to be considered]

Article 23 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 [and requests for relief], the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a decision capable of being recognized [under this Convention] in the State of the court second seised [, unless the latter has exclusive jurisdiction under Article 4 or 13].

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised that complies with the requirements for recognition or enforcement [under this Convention].

[3 Upon application of a party, the court second seised may continue to hear 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 a decision on the merits within a reasonable time.]

[4 The provisions of the preceding paragraphs apply to the court second seised in a Contracting State even in a case where the jurisdiction of that court is based on the national law of that State under the provisions of Article 19.]

[5 For the purpose of this Article, a court shall be deemed to be seised –

- 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 the case may be, the universal time is applicable.]]

[6 This article shall not apply if –

- [a) in the action in the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, or]

- b) [the court first seised] [either court], on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute taking into account the requirements of Article 24, the procedural status of the proceedings in the court first seised and any ruling that court has issued in response to a request to decline jurisdiction.]

Article 24 Exceptional circumstances for declining jurisdiction

1 In exceptional circumstances, when the jurisdiction of the court is not founded on [Article 3 other than place of incorporation,] an exclusive choice of court agreement valid under Article 4 [or exclusive jurisdiction under Article 13] [or Articles 7 and 8], a court of a Contracting State seised of a claim may, on application by a party not later than at the time of the first defence on the merits, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another [Contracting] State has jurisdiction and is clearly more appropriate to resolve the dispute.

2 The court shall take into account, in particular –

- a) the inconvenience to the parties in view of their habitual residence or seat;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation 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 or seat of the parties.

4 If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to lodge security sufficient to satisfy any decision of the other court on the merits.

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

- a) it shall decline to exercise jurisdiction if the court of the other [Contracting] 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 to adjudicate the case if the court of the other [Contracting] State decides not to exercise jurisdiction.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 25 Definition of “judgment”

For the purposes of this Chapter, “judgment” means –

- a) any decision given by a court of a Contracting State, 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;
- b) decisions ordering provisional or protective measures in accordance with Article 14, paragraph 1.

Article 25bis Judgments based on Article 19

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 19.

Article 26 General rule

Subject to Article 27bis, a judgment rendered in a Contracting State on the basis of a ground of jurisdiction provided for in Articles 3 to 14 –

- a) shall be recognised in the State addressed if it has the effect of *res judicata* in the State of origin;
- b) shall be enforced in the State addressed provided that it is enforceable in the State of origin.

However, recognition or enforcement may be postponed 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 26bis Judgments not to be recognised or enforced

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 13, or whose application is prohibited by virtue of Article 20, shall not be recognised or enforced.

Article 27 Verification of jurisdiction

1 The court addressed shall verify [*ex officio*] 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.

[3 Recognition and enforcement of a judgment may not be refused on the ground that the court addressed determines that the court of origin should have declined jurisdiction in accordance with Article 24.]

Article 27bis Grounds for refusal of recognition or enforcement

- 1 Recognition or enforcement of a judgment may be refused if –
 - a)* proceedings between the same parties and having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted in accordance with Article 23;]
 - b)* the judgment is irreconcilable with a judgment rendered [between the same parties], 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;
 - c)* the judgment results from proceedings 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;
 - 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;
 - e)* the judgment was obtained by fraud in connection with a matter of procedure;
 - f)* recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

- 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.

Article 28 Judgments rendered by default

[deleted]

Article 29 Documents to be produced³

- 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;]
 - 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 qualified to do so.

- 2 No legalisation or similar formality may be required.

³ The Special Commission could consider the possibility of drafting a transmittal form to be placed in an Annex to the Convention.

3 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 court addressed shall act expeditiously.

Article 31 Costs of proceedings

No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence or seat in another Contracting State.

Article 31bis Legal aid

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

Article 32 Damages

1 In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

- 2 a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.
- b) In no event shall the court addressed recognise 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.

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 33 Severability

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable or registered for enforcement.

Article 34 Authentic instruments

[to be considered]

Article 35 Settlements

[to be considered]

Article 36 Relation with other conventions

[to be considered]

Article 37 Uniform interpretation

[to be considered]

Article 38 Federal clause

[to be considered]

Article 39 Acceptance of adherence

[to be considered]

[End of Annex and of document]