

**COMPÉTENCE JURIDICTIONNELLE INTERNATIONALE ET
EFFETS DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE ET COMMERCIALE**

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**INTERNATIONAL JURISDICTION AND
FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

Report drawn up by Catherine Kessedjian

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INTRODUCTION

1 A feature peculiar to private international legal relations is the presence of a number of complicating factors which are absent from purely internal relations. The phenomenon of borders, which is already sensitive when lawyers have to decide which law is to apply, becomes crucial when it comes to deciding which court has jurisdiction to adjudicate in a case, what will be the effects of its decision and, in general, how to resolve the various procedural issues.

2 This is why the Hague Conference, among its various fields of work, has always accorded a place of importance to questions associated with judicial private law. This is evident from the numerous conventions in which, from the outset, the main or secondary theme is jurisdiction or civil procedure.¹

3 The list of work prepared by the Conference on the subject of the recognition of foreign judgments, as reviewed in the Explanatory Report by Mr Charambalos N. Fragistas in connection with the *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*² is impressive. We need only mention the model Convention prepared during the Fifth and Sixth Sessions (1925 and 1928) which has inspired many bilateral conventions; the Convention of 15 April 1958 *concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*, drafted in the course of the Eighth Session (1956); the Convention of 15 April 1958 *sur la compétence du for contractuel en cas de vente a caractère international d'objets mobiliers corporels*, drafted during the Eighth Session (1956); the Convention of 25 November 1965 on the choice of court, drafted at the Tenth Session (1964)³ and the *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, drafted during the Twelfth Session 1972).⁴

4 The experts to the Conference have focused on several occasions on the question of jurisdiction. It is sufficient to recall, for instance, that at the meeting of 30 October 1951, on a proposal by Mr Julliot de la Morandière, they decided to request a study on civil jurisdiction in international sales and on the rules for enforcement in cases of choice of jurisdiction.⁵

5 We also know that the work on recognition and enforcement of judgments and in the matter of contractual choice of court began with the decision voted during the Ninth Session of the Conference⁶ and led to the *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* and its additional Protocol.⁷

6 Despite the abundance of studies during the lifetime of the Conference, none – except in the area of family law – has really proved satisfactory. Some of the texts prepared have come into force, but with only a small number of Contracting States, such as the Convention on the enforcement of judgments and its Additional Protocol on Jurisdiction, which have been ratified only by Cyprus, the Netherlands and Portugal.

7 It is valuable, we think, to look for the reasons why these Conventions, especially the 1971 Convention, have proved unsuccessful. Two main reasons were put forward by the Permanent Bureau in

¹ For instance, the *Convention du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière de divorce et de separation de corps*, text reproduced in J. Koster and F. Bellemans, *Les Conventions de La Haye de 1902 et 1905 sur le droit international privé*, La Haye, Martinus Nijhoff 1921, p. 163 *et seq.*; and the *Convention du 17 juillet 1905 relative à la procédure civile*, *ibidem*, p. 889 *et seq.*, relating to the communication of judicial and extrajudicial documents, rogatory commissions, the *judicatum solvi* surety, free legal aid and physical constraint. It should be noted that this Convention, which came into force on 27 April 1909, replaced the Convention of 14 November 1896 (with the same title), and the Additional Protocol of 22 May 1897.

² *Acts and documents of the Extraordinary Session (1966)*, p. 361.

³ See *Actes et documents de la Dixième session (1964)*, Tome IV, *For contractuel*.

⁴ *Acts and documents of the Twelfth Session (1972)*, Tome IV, *Maintenance Obligations*.

⁵ *Actes de la Septième session de la Conférence de La Haye de droit international privé (1951)*, meeting of 30 October 1951, Tome I, pp. 352 and 353.

⁶ *Actes et documents de la Neuvième session (1960)*, Tome I, p. 313 and *Acts and documents of the Extraordinary Session (1966)*, p. 9.

⁷ *Acts and documents of the Extraordinary Session (1966)*, pp. 348 to 504.

Preliminary Document No 17 of May 1992⁸: "1) the success of the Brussels Convention (which built to a large extent on the Hague Convention and was negotiated in part by the same persons), followed by the Lugano Convention, and 2) its unusual, complex form: Convention, Protocol of the same date and Bilateral Supplementary Agreements". The excessively complex formal structure of the 1971 Convention which, with its Additional Protocol and its method of bilateralisation, actually requires States Parties to negotiate supplementary agreements, and the "vagueness" of the points specified in Article 23,⁹ are certainly pitfalls to be avoided in the future work of the Conference.

8 Important though these reasons may be, and admittedly they may be crucial, we believe there is a further substantial reason underlying the lack of success of the 1971 Convention. If we consider the needs of litigants in international litigation, we see that although it is vital to secure for a judgment obtained in any one country effects in one or more other countries, the first priority is to ascertain which court has international jurisdiction to adjudicate initially on the merits of the case. This, we believe, is by far the most important question for litigants. A claimant wants to be able to take action speedily, in a court close to him and whose rules are familiar to him, in order to protect the rights which he enjoys or thinks he ought to enjoy. As for the defendant, he does not want to have to defend the suit in a court far away from the centre of his personal or economic interests, and he wants the court dealing with the case to uphold his right to adversarial proceedings which respect to the fullest the right of defence. In our view, therefore, the issue is much more one of direct jurisdiction¹⁰ than of the recognition and enforcement of judgments.¹¹

9 It seems beyond doubt that the Brussels Convention and its sister instrument, the Lugano Convention, have enjoyed the success they have because, regardless of their binding character in the context of "building Europe",¹² they have one common characteristic by comparison with the endeavours of the Hague Conference: they are double conventions, in the sense that they primarily regulate the direct jurisdiction of courts in the subjects with which they deal, treating this as a vital preliminary to the effects which arise from the resulting judgments; these effects, it has to be conceded, are merely the natural extension of such jurisdiction. It is because the court which rules on the merits of the case possesses jurisdiction (usually by virtue of the Convention, failing some error on the part of the court seised), that its judgment will, except in limited exceptional cases, take effect on the territory of all the other States Parties.

10 In this respect, it is useful to recall that, within the framework of the Organisation of American States,

⁸ *Proceedings of the Seventeenth Session (1993)*, Tome I, p. 231, No 3 and No 6.

⁹ This excessive complexity is a matter of general agreement. To avoid this pitfall, some of those who advocate a new world convention have suggested that it would be useful to take as a guide the 1958 New York Convention on arbitration, and to produce a simple basic text, containing merely a few broad principles, leaving it to the courts to develop specific rules. This is an attractive idea, and we will attempt to adhere to this approach in spirit, but unfortunately we have to point out that international litigation is somewhat more complex at the end of the 20th century than they were in 1958, and that it is a more complicated business to draft principles on international jurisdiction than on the validity of the arbitration clause, for which just one article will suffice.

¹⁰ In this Report we use the expression "direct jurisdiction" to refer to the jurisdiction of a court adjudicating the merits of a case, as opposed to "indirect jurisdiction", which is used only where a court has to ascertain whether the court of origin had jurisdiction.

¹¹ The "Conclusions of the Working Group meeting on enforcement of judgments" (which met in The Hague from 29 to 31 October 1992) also point in this direction. The Group concluded that a "double" convention has certain advantages by comparison with a single instrument. Such a convention:

— provides more information and predictability to both parties in that it sets out grounds of jurisdiction that are accepted in each State Party to the Convention, as well as grounds that are not accepted, thus making it in many cases unnecessary to review the laws of each country;

— avoids the confusion to which a single convention may give rise due to the fact that its indirect grounds of jurisdiction are sometimes wrongly understood to limit the original forum's assumption of jurisdiction to those bases;

— facilitates, both in time and expense, the recognition and enforcement of judgments, because it relies to a greater extent than a single convention on the findings made by the original court." Cf. "Conclusions of the Working Group meeting on enforcement of judgments", *Proceedings of the Seventeenth Session*, Tome I, p. 257.

¹² In actual fact, only the Brussels Convention is binding in the framework of the European design, since it is contemplated in advance in article 220 of the Treaty of Rome, whereas the Lugano Convention, which is merely an extension of that instrument to non-Member countries of the European Union, and is virtually identical to it, cannot be regarded as binding, although its ratification is strongly recommended.

the Montevideo Convention of 8 May 1979¹³ on the extraterritorial validity of foreign judgments and arbitral awards is a simple Convention. Today, this instrument is in force in the following countries: Argentina, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. It was complemented by the La Paz Convention of 24 May 1984¹⁴ on international jurisdiction for the extraterritorial validity of foreign judgments providing for rules of indirect jurisdiction which, although widely signed, has only been ratified by Mexico and, thus, has not entered into force.

11 Within NAFTA, the States Parties have preferred to recommend arbitration and other alternative methods for dispute resolution. As regards ASEAN, for the time being, there is no convention binding the States Parties¹⁵ but one author has already recommended that such a project be undertaken which, at first, could be limited to the effects of judgments although bearing in mind the "model" of the Brussels and Lugano Conventions.¹⁶

12 But neither should we ignore one further reason for the lack of success achieved in this area, one which has to do with the particular character of the enterprise. As Mr Fragistas pointed out in his Explanatory Report on the 1971 Convention: The recognition of foreign judgments presupposes that confidence is placed not only in the law ? as applied by the foreign court, but also in the ability and the integrity of the judges who have handed down the judgments, and even in the factual circumstances in which proceedings are held in the country of origin of the judgment ? States place great emphasis on the origin [of the foreign judgment], *i.e.*, of the country in which it was delivered. This is why they are reluctant to apply to the treatment of foreign judgments an egalitarian system which would apply without distinction to all foreign judgments, from whichever country they originate.¹⁷

13 The same idea underlies some of the literature on this topic, when asserting that the recognition and enforcement of foreign judgments impinges on State sovereignty. In fact, it is not the recognition and enforcement themselves which cause the difficulty, but the fact that the court addressed implicitly recognises that the merits of the case were "better" adjudicated, in a procedural sense, by the court of origin, and hence that court was "more appropriate".¹⁸ By the same token, one may doubt that *comitas gentium* or comity is a valid and efficient basis for national decisions in matters relating to international jurisdiction or to the effects of judgments.¹⁹

14 In this connection, it is revealing to compare the system set up for the recognition and enforcement of arbitral awards by the New York Convention of 1 June 1958²⁰ with the lack of a generalised system for foreign judgments. Once States have decided that their sovereignty is not under threat from the growth in forms of private justice such as arbitration, they lose virtually all interest in the outcome of the award, in the sense that it is not considered liable to impinge on this celebrated sovereignty unless, exceptionally, through

¹³ UNTS No 51 OEA/Ser. A/28.

¹⁴ UNTS No 50 OEA/Ser. A/28.

¹⁵ Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand and Viet Nam. Cambodia will possibly join ASEAN in 1997.

¹⁶ P.M.C. Koh "Foreign Judgments in ASEAN – A Proposal" *I.C.L.Q.* 1996, p. 844-860. In Singapore, a foreign judgment can only be recognised through registration if the country of origin is bound with Singapore by a reciprocal agreement. Such agreements exist with the United Kingdom, Ireland, Hong Kong, Australia, New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei, New Guinea and India (except for the states of Jammu and Kashmir). These agreements are an extension of the *Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, Singapore Statutes, 1985 Rev. Ed.)*. For all other countries, the applicable text is the *Reciprocal Enforcement of Foreign Judgments Act (Cap 265, Singapore Statutes, 1985 Rev. Ed.)*.

¹⁷ *Acts and documents of the Extraordinary Session (1966)*, p. 360. Translation by the Permanent Bureau.

¹⁸ See also the statements by some experts, including those from Japan and Austria, during the debates in the First Committee on 20 May 1993, *Proceedings of the Seventeenth Session*, Tome I, pp. 328 and 329.

¹⁹ See the present controversy among Circuit Courts in the United States and compare *Laker Airways v. Sabena* 731 F2d 909 (D.C. Cir. 1984) and *Gau Shan v. Bankers Trust* 956 F2d 1349 (6th Cir. 1992) with *Kaepa v. Achilles* 76 F3d 624 (5th Cir. 1996), notably. Although certain decisions in the United Kingdom also refer to the concept of *comity* (for example, *E.I. Dupont de Nemours v. Agnew* [1987] 2 Lloyd's Rep. 585), it would seem that the House of Lords has not drawn any specific conclusions from that concept.

²⁰ *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

considerations of public policy. Moreover, it is clear that the very significant expansion of arbitration, especially in international litigation in commercial cases, is partly due to the fact that there is no multilateral instrument for foreign judgments akin to the 1958 New York Convention. However, modern-day practitioners of international trade admit that arbitration, despite all its positive features, is not always the ideal method of settling disputes; some cases do not lend themselves to arbitration procedure.

15 Hence national courts still have a very important role to play in private international relations. Litigants must be able to predict with a significant degree of certainty which court has jurisdiction to adjudicate in a dispute which will arise or has already arisen. They must also be able to access all the levels of jurisdiction available on the territory of the country in which the case has been decided on its merits; but afterwards, they must benefit from the effects of the judgment, in other States if necessary, and without having to start cumbersome and complex proceedings over again. As common law lawyers say, everyone is entitled to their "day in court", but once this right has been exercised before a given court, the litigant concerned must not be allowed to bring suit afresh, even in a court of a foreign State. This is a matter of saving every tighter public funds and of ensuring the proper administration of justice, which must not stop at the territorial borders of States, since everyone faces the same difficulties in achieving the effective organisation (in terms of both time and money) of the justice public service.²¹

16 This is why it is useful to bring the issue back to the drawing-board and to design a new multilateral Convention for this purpose. The needs of international trade, the ever-growing interrelation of international economic activities and their greater complexity in comparison with the situation which existed thirty years ago, call for a new structure of international litigation that arbitration cannot furnish as and by itself. In addition, the ever more frequent occurrence of mass tort actions in matters of products liability, environment or banking, to cite but a few examples, calls for truly international solutions. Indeed, it is not infrequent that several courts are simultaneously requested to adjudicate in actions arising from the same facts or juridical acts. Likewise, some courts have developed an extensive understanding of their international jurisdiction. To tackle these situations, a legal standard collectively created by States within the ambit of the Hague Conference, seems to be the most adequate solution.

17 The origin of the endeavours now in progress at the Hague Conference on private international law is a proposal by the United States, in the letter from the Legal Adviser dated 5 May 1992, to which the Permanent Bureau refers in Preliminary Document No 17 of May 1992.²² This proposal was discussed at the meeting of the Special Commission on General Affairs and Policy of the Conference, which met from 1 to 4 June 1992, and which resulted in a decision to set up a small Working Group. This group met at The Hague from 29 to 31 October 1992.²³

18 The Group unanimously agreed that it was desirable to seek to negotiate, in the Hague Conference, a multilateral Convention on the recognition and enforcement of judgments.²⁴ The Group also recognised that a simple Convention, such as the 1971 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, would be insufficient²⁵ even though, in the wider context of the Conference, it was felt that a full double Convention²⁶ would be too ambitious. It therefore expressed a

²¹ See the report by Lord Woolf of 26 July 1996 "Access to Justice", on the reforms needed in the United Kingdom, referred to in the information letter from Herbert Smith in December 1996. Suffice it to note here that the European Court of Human Rights has decided that eight years and eight months for court proceedings to be concluded (from first instance to cassation included) is too long a period which violates the principles of the European Convention on Human Rights. See *Duclos v. France*, decision No 723 of 17 December 1996. On this issue, see *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l'homme*, Brussels, Bruylant 1996.

²² *Proceedings of the Seventeenth Session*, Tome I, p. 231.

²³ See Recommendations and decisions of the Special Commission on General Affairs and Policy of the Conference, *Proceedings of the Seventeenth Session*, Tome I, p. 255.

²⁴ See the "Conclusions of the Working Group meeting on enforcement of judgments", Prel. Doc. No 19 of November 1992, prepared for the Seventeenth Session, *Proceedings of the Seventeenth Session*, Tome I, p. 257.

²⁵ *Ibidem*. A "simple convention" is understood as a convention which is confined to provisions on the effect of judgments. In this type of convention, the jurisdictional rules are "indirect".

²⁶ A "double" convention has a part dealing with direct jurisdiction, and another part on the effects of judgments. This second part does not contain any further grounds of indirect jurisdiction, since the jurisdiction of the original court

"preference for a convention which would offer some of the advantages of a double convention, while at the same time having a greater degree of flexibility than that available with a convention of the Brussels/Lugano type".²⁷

19 The following points were discussed by the Working Group, and its Conclusions can be summarised accordingly:

- the Convention should be a double instrument, but possibly including a non-exhaustive white list (mixed Convention),²⁸ a system which was preferred by the Working Group;
- the State addressed would have authority to control the grounds of jurisdiction;
- the scope of the instrument should be confined to civil and commercial matters, but this concept must be clarified. It is possible that questions relating to the status of individuals would be excluded;
- a number of jurisdictional bases were reviewed, roughly following the model of the Brussels Convention. Similarly, the excluded bases of jurisdiction were reviewed in the light of the list contained in the Brussels Convention. Special attention focused on the ground of jurisdiction, known in English as *doing business*, and which could be translated by *entreprendre des activités commerciales*.²⁹ The Working Group did not reach agreement as to whether this ground of jurisdiction should be included in the list of grounds of exorbitant jurisdiction, use of which would be prohibited for the purposes of the Convention.³⁰

20 After a full and absorbing discussion in the First Commission³¹ the Seventeenth Session of the Conference decided to include in the agenda of the Conference the question of the recognition and enforcement of foreign judgments in civil and commercial matters. It asked the Secretary General to convene a Special Commission, as soon as is feasible, "*charged with studying further the problems involved in drafting a new Convention, on the basis of a document prepared by the Permanent Bureau, taking into account the discussions of the Seventeenth Session; making proposals with respect to the work which might be undertaken; suggesting the timing of such work.*"³²

21 In line with this decision, the Secretary General called a meeting of a Special Commission from 20 to 24 June 1994, to discuss the following points: the nature of any future convention; the substantive scope of a Convention; grounds of direct jurisdiction which might be included; other grounds of jurisdiction; grounds of jurisdiction which should not be used as bases of general jurisdiction; the application of jurisdictional rules; the recognition and enforcement of decisions; and the procedure for recognition and enforcement.³³

22 On the basis of these discussions, the content of which will be further considered below, the Special

will be verified, if this is intended, by means of the grounds of direct jurisdiction set out in the first part of the Convention.

²⁷ *Proceedings of the Seventeenth Session*, Tome I, p. 259. The Conclusions of the Working Group on this subject are summarised more squarely (? "*the Conference should aim to adopt a 'mixed convention'*") at the First Commission meeting held during the Seventeenth Session, cf. Minutes No 3, *Proceedings of the Seventeenth Session*, Tome I, p. 327.

²⁸ The "white" or "green" list comprises all the grounds of direct jurisdiction authorised by the Convention, by contrast with the "black" or "red" list, comprising the prohibited grounds of jurisdiction. A "mixed" Convention would authorise Contracting States, under certain specifically defined conditions, to use other grounds of jurisdiction than those contained in the green list. The consequences of using these grounds become evident when the resulting judgment is recognised or enforced, since it will not automatically enjoy the effects of the Convention.

²⁹ In the French version of the "Conclusions of the Working Group meeting on enforcement of judgments", "doing business" is translated by *traiter des affaires*. Cf. *Proceedings of the Seventeenth Session*, Tome I, p. 260.

³⁰ For the grounds of jurisdiction to be excluded from the future Convention, see *infra* No 135, *et seq.*

³¹ See *Proceedings of the Seventeenth Session*, Tome I, pp. 327-333.

³² *Proceedings of the Seventeenth Session*, Tome I, p. 43.

³³ See "Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters", Prel. Doc. No 2 of December 1995, compiled by the Permanent Bureau for the Special Commission of June 1996; its essentials will be covered below.

Commission, in the light of a proposal by four delegations,³⁴ concluded that it would be "*advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters and recommended that the Special Commission on General Affairs and Policy of the Conference propose this question to be included in the Agenda for the future work of the Conference at the Eighteenth Session*".³⁵

23 The Special Commission also decided on the future timetable of work. It took the view "*that it would be useful for the Commission to be convened again before the Eighteenth Session in order to examine certain questions in more detail on the basis of new documents prepared by the Permanent Bureau and expressed the wish that the Special Commission on General Affairs and Policy of the Conference takes a decision to that effect*".³⁶

24 In June 1995, the Special Commission on General Affairs and Policy of the Conference reiterated the importance of the subject; heard a statement by the Expert for France, on behalf of the Member States of the European Union; welcomed the statement, and invited the Permanent Bureau to make a further study in preparation for a meeting of a new special preparatory commission, to be held in 1996.³⁷

25 This meeting took place from 4 to 7 June 1996. The key questions discussed related to the possibility of the court's declining jurisdiction (theory of *forum non conveniens*, *lis alibi pendens*, related actions); judgments awarding excessive or multiple damages; the criteria of verification by the court addressed of the decision of origin (jurisdiction of the court of origin; law applied by the court of origin; procedure followed and right of defence; public policy of the State addressed, especially with regard to judgments rendered by default; independence and impartiality of the court of origin); and the scope of application of the Convention.³⁸

26 The Eighteenth Session decided to include on the agenda of the Nineteenth Session the question of jurisdiction, of recognition and the enforcement of judgments in civil and commercial matters.³⁹ The Secretary General accordingly convened a Special Commission to be held from 17 to 27 June 1997, for which this Preliminary Report has been drawn up.

27 This Report will deal with the substantive issues in the logical order in which they are to feature in the future Convention, *i.e.*, its substantive and geographical scope (Chapter I), direct jurisdiction (Chapter II), recognition and enforcement of the judgment (Chapter III), implementation and uniform interpretation (Chapter IV).⁴⁰

CHAPTER I – SCOPE OF THE CONVENTION

28 The Convention will apply in international litigation, *i.e.*, in cases between parties who are all subjects of private law, or who are acting for private activities. This would exclude all cases involving a State or a State entity, or any other entity acting on behalf of the State in public service missions.⁴¹ Probably, the Convention will not contain such a definition but the Explanatory Report could say something about this

³⁴ Working Document No 2, submitted by the experts for France, Spain, Switzerland and the United States.

³⁵ Doc. cit. *supra*, note 33.

³⁶ *Ibidem*.

³⁷ "Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference", Prel. Doc. No 9, December 1995, p. 9.

³⁸ The Conclusions of this second meeting of the Special Commission were set out in Prel. Doc. No 12 of August 1996, prepared for the Eighteenth Session; the essential points will be covered in this Report.

³⁹ See Part B of the Final Act of the Eighteenth Session, 19 October 1996.

⁴⁰ We will not deal with the final clauses, including the federal clause, although they may be of some significance. However, the question of non-unified systems will be discussed *infra* Nos 76 *et seq.*

⁴¹ The difficulty of defining such notions as a "State entity" or a "public service activity" is well known. These definitions are usually found in the law on immunities, as part of the law applicable to the entity which claims to be covered by an immunity.

question which takes greater actuality with the massive privatisation trend which we witness today. In that respect, one may question whether the distinctions proposed by the European Court of Justice in the *Eurocontrol*⁴² and *Rüffer*⁴³ cases and the elements to be considered to apply these distinctions are adapted to the present evolution.

29 There are several possible definitions of the concept of "international litigation". First, a litigation may be regarded as international if it relates to a subject, an action or a cause which is itself international. For instance, if the litigation relates to a contract, it will be international if the contract is itself an international one. However, it is possible for an international litigation to arise from a purely national activity. For example, in the context of a purely domestic contract, a dispute may arise at a time when one of the parties is located⁴⁴ abroad. This will also be the case if damage is sustained beyond a national border, although the whole of the activity originally took place in the domestic arena. Finally, a case may also be international because it involves different legal or judicial systems, the points of contact of the dispute being situated on more than one national territory, as is the case when a foreign judgment must develop effects on a territory other than that where it was rendered although, at the outset, the litigation was purely internal. In view of these various possibilities, it would be preferable for the Convention not to provide a definition, thus leaving it to the court dealing with the case to decide, in the light of the circumstances, whether it is an international one. Moreover, the omission of any definition of the international character of the litigation concerned is in line with the tradition followed by the Hague Conventions.

30 On the contrary, two questions will probably have to be discussed at a very early stage by experts to the Special Commission. These are the substantive scope of the Convention (Section 1) and its geographical scope (Section 2).

SECTION 1 – SUBSTANTIVE SCOPE

31 The preparatory work of the Working Group and of the two Special Commissions has shown that, despite unanimous agreement in principle that the Convention should apply to "civil and commercial matters", in practice the question is rather more complicated. As a result of the work of the Special Commission in June 1994,⁴⁵ it appears to be settled that the following should constitute exceptions:

- civil status and legal capacity of natural persons;
- matrimonial property regimes;
- wills;
- succession to the estates of deceased persons;
- bankruptcy and other similar procedures;
- social security;
- arbitration.

32 These are excluded either because they are covered by other international instruments⁴⁶ or because they raise particular problems and thus require a special regulatory framework of their own.

⁴² 14 October 1976, case No 29/76, *Report*, p. 1541 and 14 July 1977, joint cases No 9 and 10/77, *Report*, p. 1517.

⁴³ 16 December 1980, case No 814/79, *Report*, p. 3807.

⁴⁴ We are intentionally using here the neutral, concrete term "located", in order to avoid the tricky issue of the legal definition of that location, discussed *infra* No 93 and footnote No 124.

⁴⁵ *Cf.* the Conclusions drawn up by the Permanent Bureau, doc. cit. *supra* note 33, p. 13, No 7.

⁴⁶ Notably, in the matter of bankruptcy, these include the Council of Europe Convention, signed at Istanbul on 5 June 1990; the Convention concluded in the framework of the European Union on 25 September 1995; and the drafts prepared by a Working Group set up by UNCITRAL to prepare a model law, *cf.* General Assembly document No A/CN.9/WG.V/WP.48, dated 21 November 1996 (original English). Mention must also be made of the work of the American Law Institute, which is confined at present to the three member countries of NAFTA (Canada, Mexico and the United States), *Transnational Insolvency Project*, principal reporter Professor Westbrook. As for arbitration, it is clearly the 1958 New York Convention and the 1961 Geneva Convention which immediately spring to mind. In this area, the Explanatory Report could explain further this exclusion as the European Court of Justice did in the *Marc Rich* case (25 July 1991, case No C 190/89, *Report I*, 3855) and as shown by the commentaries which followed that decision.

33 In the following discussion, we will confine ourselves to the subjects which have still to be discussed subsequent to the work of the Special Commissions of June 1994 and June 1996, already referred to.

§ 1 – PROCEEDINGS INVOLVING PECUNIARY INTERESTS

34 In the light of the comments in the introduction to this section, the Convention would deal only with proceedings involving pecuniary interests; it would therefore exclude most questions covered by family law,⁴⁷ except perhaps those relating to maintenance obligations.⁴⁸

35 However, the inclusion in the future Convention of proceedings concerning maintenance obligations may prove problematic, especially in view of the existence of the two Hague Conventions of 15 April 1958 on the recognition and enforcement of decisions concerning maintenance obligations for children, now in force in 18 Member States⁴⁹ of the Conference and one non-Member State,⁵⁰ and of 2 October 1973 on the *Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, now in force in 17 Member States of the Conference.⁵¹ Whereas the 1958 Convention is restricted solely to maintenance obligations towards children, the 1973 instrument covers both these and obligations towards adults, including maintenance obligations between spouses or ex-spouses. The two Conventions are framed according to the model of so-called "simple" conventions, adopting as the main ground of indirect jurisdiction the court of the maintenance creditor, *i.e.*, the forum of the plaintiff.

36 Both the Brussels and the Lugano Conventions cover maintenance obligations, providing for direct jurisdiction grounds for proceedings of this kind. Alongside the general jurisdiction of the domicile of the maintenance debtor, the defendant to the action (Article 2), the Conventions also confer jurisdiction on the courts of the creditor's domicile (Article 5.2). Jurisdiction grounds as provided for in the Brussels and Lugano Conventions have the following result: the maintenance *creditor* has a choice when he or she wants to go to court to obtain a maintenance order, but the maintenance *debtor* has no such option; if he or she wants to take out proceedings to review a maintenance order, according to the Brussels and Lugano Conventions the only court open is that of the maintenance creditor, defendant to the action (Article 2); he or she cannot use the forum prescribed in Article 5.2, not being the *creditor* of the maintenance.

37 It is clear then that the direct jurisdiction with regard to maintenance obligations introduced by the Brussels and Lugano Conventions is in harmony with the Hague Conventions of 1958 and 1973, and there seems to be no conflict between the two systems. Moreover, the Hague Conventions specifically state that they give way to any other instrument which may be invoked in order to obtain recognition and enforcement (Article 23 of the 1973 Convention, Article 11 of the 1958 Convention), whereas the Brussels and Lugano Conventions specify that their provisions may be replaced by those of any convention on a specific subject to which the State of origin and the State addressed are Parties (Article 57). Given this mutual *renvoi* provision, it is ultimately for the parties to opt for enforcement under either the Hague Conventions or the Brussels and Lugano Conventions.⁵²

38 Finally, we note that the Inter-American Convention on support obligations, prepared under the auspices of the Organisation of American States (OAS) and concluded at Montevideo on 15 July 1989 – a Convention so far ratified only by Mexico and Guatemala – also establishes direct jurisdiction in this field. Its Article 8 provides that the creditor may choose among various competent judicial or administrative

⁴⁷ This was also the view of the Working Group, *cf. Proceedings of the Seventeenth Session*, Tome I, p. 259.

⁴⁸ The Working Group did not comment on this point, other than to indicate that the question of the ground of jurisdiction would be a difficult one to answer, and probably did not lend itself to being modelled on article 5.2 of the Brussels Convention. The two Special Commissions of June 1994 and June 1996 were divided on the issue.

⁴⁹ Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Netherlands, Norway, Portugal, Slovak Republic, Spain, Suriname, Switzerland, Sweden, Turkey.

⁵⁰ Liechtenstein.

⁵¹ Czech Republic, Denmark, Finland, France, Germany, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom.

⁵² On all these issues, see Michel Pelichet, "Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance", Prel. Doc. No 1 of September 1995 for the Special Commission of November 1995, to be published in *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous*.

authorities:

- a those of the State of domicile or habitual residence of the creditor;
- b those of the State of domicile or habitual residence of the debtor; or
- c those of the State to which the debtor is connected by personal links, such as possessing property, receiving income or obtaining financial benefits.

39 The decision to include maintenance obligations in a future worldwide Convention raises a serious difficulty, since some States, in general and as a matter of principle, do not accept the forum of the plaintiff. Were the attitude of these States to prove unshakable, the only alternatives open to the negotiators of the future Convention would apparently be:

- a for the future Convention to apply to proceedings concerning maintenance obligations, but providing direct jurisdiction only for the forum of the maintenance debtor or for one which the defendant has accepted either expressly, or by pleading the merits without reservations as to jurisdiction. However, this would be a retrograde solution by comparison with the two Hague Conventions, a regrettable backward step which would raise a serious conflict of laws;
- b for maintenance obligations to be excluded from the scope of the future Convention.

§ 2 – TORT

40 It may seem strange to wonder whether the future Convention should deal with the issue of civil liability in tort. However, the problems arise not so much from the subject-matter itself, as from the complexity of some of the disputes engendered by it, and the content of the judgments involved.⁵³ In fact, where the tort concerns only one perpetrator and one victim, and the legal relationship remains strictly two-sided, it is relatively easy to find a jurisdictional rule. The difficulties caused, even under this scenario, by a mobile conflict (where the victim moves and the damage worsens after the move) can also be resolved.⁵⁴ Likewise, a rule may be relatively easily tailored for "distant torts" when its effects are felt at several points of impact even though there is only one victim. If the topic of civil liability in general were omitted from the future Convention, it would be deprived of much of its usefulness.⁵⁵

41 On the other hand, disputes involving a multiplicity of parties (often the victims), all of whom want to take proceedings in their own courts, are much more problematic, the defendant being compelled to defend his interests in many different courts. If the Convention is also to cover these cases of multiple litigation in matters relating to tort or quasi-tort, thought should be given to including, perhaps, a clause providing for a different ground of jurisdiction than the one chosen in cases where there is only one claimant and one defendant.⁵⁶ Indeed, the balance of competing interests is not the same in the two instances. This difference necessarily entails a separate solution for each kind of case.

42 A further issue arises from group actions where there is joint representation, or actions for restraining injunctions, such as may occur under the law on product liability, environmental law and, in general, under consumer law. From the claimant's standpoint, these "class" actions may be complicated still further by the need to sue several defendants. This will be the case, for instance, where there is an air crash and liability has to be determined as between the airline, the pilot, the various control tower operators involved, the

⁵³ Cf. Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 261. The Special Commission of June 1994 noted especially the difficulty of enforcing judgments awarding excessive or punitive damages; cf. doc. cit. *supra* note 33, p. 15, No 9. This question was discussed at length during the Special Commission of June 1996; cf. doc. cit. *supra* note 38, pp. 17 and 19, Nos 21-27. We will address the question of the enforcement of these judgments in Chapter III of this Report, in Nos 157 *et seq.*

⁵⁴ Cf. *infra* Nos 121 and 122.

⁵⁵ Cf. Conclusions of the Special Commission of June 1994, doc. cit. *supra* note 33, p. 15, No 9.

⁵⁶ Cf. *infra* Nos 121 and 122.

aircraft manufacturers and/or the manufacturers of some of the plane's components. To exclude these actions *a priori* from the scope of the future Convention, would seem to seriously undermine its practical usefulness. Such actions will in fact be dealt with mainly by national courts, as arbitration is unsuitable for proceedings of this kind. It cannot offer an appropriate solution for such disputes, which must always remain within the jurisdiction of national courts. The work done in drafting the future Convention is an ideal framework for attempting solutions to questions which are undeniably extremely complex. Yet the complexity of the problems encountered should not preclude attempts to find a solution.

43 As regards actions brought under environmental law, it might be tempting to exclude them because the Eighteenth Session of the Conference decided "*to retain in addition in the Agenda for the work programme of the Conference the question of the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage*".⁵⁷ The initial preparatory work on the subject by the Permanent Bureau shows that issues of environmental damage raise complex problems, which call for comprehensive solutions with regard to conflicts of jurisdiction, applicable law and co-operation.⁵⁸ Having said this, it would seem regrettable were the future Convention on jurisdiction and the effect of foreign judgments wholly to exclude actions for damages incurred as a result of environmental harm. Nor should actions for restraining injunctions be excluded; in this field, they are not dealt with by specialised courts. It would be sufficient that the future Convention remain silent on the subject, neither excluding nor expressly including environmental law, so that future litigation in this field would proceed according to the rules of the Convention, provided the rules are framed to enable these cases to be covered. These provisions would be adopted without prejudice to decisions taken when the Conference places on its agenda the preparation of the special Convention on the environment. In any event, the latter Convention, being in the nature of a *lex specialis*, is perfectly capable of offering solutions different from those adopted for the general Convention now in preparation. Moreover, the work impending in the context of the future Convention on jurisdiction and the effects of judgments will undoubtedly help to advance the work on the environment Convention. We therefore suggest that this topic should not be excluded from the substantive scope of the future Convention.

§ 3 – COMPETITION LAW⁵⁹

44 Certain misunderstandings have arisen in the past when discussing whether to include within the scope of the future Convention questions relating to competition. There are in fact two different issues: 1) actions brought under competition law *stricto sensu*, usually applications for restraining injunctions, which mostly fall within the purview of independent administrative authorities, and which have their own rules of procedure with a grouping of litigation both at first instance and on appeal before specialised courts; 2) actions for damages in contract or tort, brought by an economic operator against his contractual partner or one of his competitors, and relying either on a breach of competition law *stricto sensu* or on what is traditionally known as unfair competition. Although it has to be recognised that the two areas of law, competition law *stricto sensu* and the law on unfair competition, are akin in many respects as far as their economic objectives and key principles are concerned,⁶⁰ they are clearly separate as regards litigation cases and the nature of the cases brought.

45 As for the first category, *i.e.*, competition law *stricto sensu*, it would be useful to try to adopt rules which would offer a criterion for international jurisdiction, especially the precise meaning of the so-called

⁵⁷ Part B, Final Act of the Eighteenth Session, The Hague, 19 October 1996.

⁵⁸ Cf. "Note on the law applicable to civil liability for environmental damage", Prel. Doc. No 9 of May 1992, *Proceedings of the Seventeenth Session (1993)*, Tome I, *Miscellaneous*, p. 187; "Note on the law applicable and on questions arising from conflicts of jurisdiction in respect of civil liability for environmental damage", Prel. Doc. No 3 of April 1995, to be published in *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous; Internationales Umwelthaftungsrecht I* under the direction of Christian von Bar, Cologne, Carl Heymanns Verlag KG 1995, 295 p.

⁵⁹ It is not the first time that the Conference undertakes work in this area, even if until now, the subject was considered as delicate and difficult. Cf. Adair Dyer, "Exploratory study on conflicts of jurisdiction occasioned by the extraterritorial application of laws relating to competition and similar laws of economic regulation" in *Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous matters*, pp. 143-157.

⁶⁰ See the trend in France, especially with Law No 96.588 of 1 July 1996 on fairness and equilibrium in trade relations, *JORF* 3 July 1996.

theory of "effect". In any event, in this area as in others, judicial co-operation is required. Increasingly, activities by economic operators bring into play the competition laws of several States at once. Hence there is a definite need for improved co-ordination of the international jurisdiction of the specialised courts in these various States, so

as to avoid a plurality of actions or, if these are inevitable, to authorise courts to work together and thus avoid burdening operators with irreconcilable decisions.⁶¹ This judicial co-operation is normally transnational, because of the diffuse character of competing economic activities. Moreover, it is quite possible that the future Convention, if it includes provisions on co-operation, will offer certain guidelines and pointers to the courts dealing with issues of competition law *stricto sensu*. However, as these proceedings are often of an administrative or quasi-administrative kind, it would perhaps be preferable to exclude them⁶² or, at least, not to include them specifically.

46 Finally, purely civil law actions for damages, brought by one operator against another, based on a breach of competition law or acts of unfair competition, are not by nature different from any other kind of action for tort⁶³ or contractual liability. There is no particular reason to exclude these actions as such from the scope of the future Convention, and it is not particularly relevant whether they are based on competition law. It is not even certain that specific criteria for an appropriate form of jurisdiction in such cases would be useful, although, for the sake of argument, we will be putting forward some ideas on this subject.⁶⁴ Is it desirable to define the frontier which divides this category of proceedings from the former one mentioned above? The Special Commission which met in June 1996 suggested that such a definition can perhaps be given "through the intermediary of a precise definition of the concept of the court"⁶⁵ dealing with the case, and by defining the concept of an "action for breach of competition law". On reflection, we think it is preferable not to encumber the text of the Convention and, as for environmental issues, neither exclude nor include expressly competition within the substantive scope of the instrument, leaving the courts to make the appropriate delimitation in the light of the cases submitted to it.

§ 4 – FISCAL MATTERS, CUSTOMS DUTIES AND FINES

47 In civil law countries these topics have always been treated as a matter of public law, whereas in common law countries, which do not distinguish between private and public law, tax law in particular belongs to the "civil law".⁶⁶ These matters are not included in the Brussels and Lugano Conventions. The *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, concluded on 1 February 1971, also provides that the Convention does not apply to "decisions for the payment of any customs duty, tax or penalty".⁶⁷

48 It must be remembered that these matters are usually covered by a clause, albeit a general and relatively not very binding one, on judicial and administrative co-operation in the recovery of such duties, taxes and fines, by means of many bilateral conventions on taxation and establishment which States have concluded over a period of more than thirty years. This network of substantive conventions is now so dense

⁶¹ It should also be pointed out that co-operation agreements have already been signed in this field among administrative authorities responsible for competition, such as the agreement between the United States Department of Justice and the Commission of the European Communities.

⁶² This was the predominant view in the course of the Special Commission of June 1996, *cf. doc. cit. supra*, note 38, p. 25, No 39.

⁶³ For a number of examples of interlocutory proceedings in competition law cases, see Joël Cavallini, *Le juge national du provisoire face au droit communautaire – Les contentieux français et anglais*, Brussels, Bruylant 1995, esp. pp. 93-112.

⁶⁴ *Cf. infra*, Nos 129 *et seq.*

⁶⁵ *Cf. doc. cit. supra*, note 38, p. 25, No 39.

⁶⁶ See the Schlosser Report on the Convention concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on judicial jurisdiction and the enforcement of decisions in civil and commercial matters, and the Protocol on its interpretation by the Court of Justice, *OJEC C 59/71* of 5 March 1979, pp. 82 and 83.

⁶⁷ Article 1, No 3.

that it would probably be undesirable to introduce new rules, which would only upset the working of the co-operation arrangements already in existence among the tax authorities of the various States. For this reason, we think it would be wise to exclude these subjects from the scope of the future Convention.

§ 5 – INTELLECTUAL PROPERTY

49 As in the case of competition law, the Special Commission was very reluctant, in June 1996, to include this topic in the future Convention.⁶⁸

50 However, as with competition law, it is not so much the subject itself but certain actions associated with intellectual property rights which ought to be included in the future Convention. We will consider these actions below when dealing with the grounds of direct international jurisdiction.⁶⁹ Thus, we think that, as for matters referred to in preceding paragraphs, no specific exclusion should be included in the Convention.

§ 6 – PROVISIONAL OR PROTECTIVE MEASURES

51 The Special Commission concluded, in June 1996, that it was probably appropriate to include one or several clauses on these measures.⁷⁰ We would emphasise the importance of these measures in international litigation, as the direction and outcome of the proceedings on the merits will often depend on them.⁷¹ In our view, if it is to be useful the Convention must include such provisions, and below we suggest some of the lines they might take.⁷²

SECTION 2 – GEOGRAPHICAL SCOPE

52 Here we come to one of the most difficult issues involved in the preparation of the future Convention. The first question which arises is the criterion or criteria for applying the Convention. As a Convention which will comprise direct forms of jurisdiction, it will have to be applied primarily by courts dealing with cases which involve a foreign element. It would be unthinkable for the Convention to apply if the court seised is not situated on the territory of a Contracting State. But since the Convention is to include rules for cases of *lis pendens*, for choice of court clauses and for the enforcement of decisions, the criteria for its application will have to be examined separately for each of these.

53 Moreover, as we know the Brussels and Lugano Conventions, for all jurisdictional rules except those on exclusive jurisdiction and the validity of clauses on choice of court, apply only where the defendant is domiciled on the territory of a Contracting State. This restriction on the applicability of the Brussels and Lugano Conventions is not entirely satisfactory, and is the source of frequent criticism of the two instruments, which leave to non-treaty law all actions brought against defendants not domiciled on the territory of a Contracting State.

54 But the criteria chosen for applying the future Convention must enable it to be applied in a harmonious and distributive manner with the Brussels and Lugano Conventions, avoiding conflicts of treaties. This is

⁶⁸ Cf. doc. cit. *supra* note 38, p. 25, No 41.

⁶⁹ Cf. *infra*, No 90.

⁷⁰ Cf. doc. cit. *supra*, note 38, p. 25, No 40.

⁷¹ The importance of these measures was brought out by the work of the Committee on civil and commercial procedure of the International Law Association. The Resolution adopted by the ILA during its meeting in Helsinki, held 12-17 August 1996, is annexed to the present Report. We can draw some leading ideas from Lawrence Collin's study "Provisional and Protective Measures in International Litigation" RCADI, vol. 234 (1992, Tome III) pp. 9-238. Other works may be cited among which those of Sebastian Gronstedt, *Grenzüberschreitender einstweiliger Rechtsschutz*, Francfort-sur-le-Main 1994; Bernhard-Rudolf Heiss, *Einstweiliger Rechtsschutz im europäischen Zivilrechtsverkehr* (Art. 24 EuGVÜ), Berlin 1987; Anke Eilers, *Massnahmen des einstweiligen Rechtsschutzes im europäischen Zivilrechtsverkehr, Internationale Zuständigkeit, Anerkennung und Vollstreckung*, Bielefeld 1991. (Some valuable ideas will also be found in the study by P. de Vareilles-Sommières, "La compétence internationale des tribunaux français en matière de mesures provisoires", *Rev.crit.dr.int.pr.*, 1996, p. 397 et seq.)

⁷² Cf. *infra*, No 126.

why, after due reflection, it was felt that the future Convention should not be modelled on the general criterion for applying the Brussels and Lugano Conventions. This would make it possible to find ready and harmonious solutions, such as those suggested below.

55 As regards all the rules of direct jurisdiction (except for *lis pendens*) the only criterion for geographical application of the new Convention should be the one proposed above, *i.e.*, that the court seised should be situated on the territory of a Contracting State.⁷³ In relation to the Brussels and Lugano Conventions, its application will be distributed as follows:

C.S.	=	N.C.	? N.C.
D.	=	N.C.	
C.S.	=	N.C.	? N.C.
D.	=	B/L	
C.S.	=	N.C. + B/L	? B/L
D.	=	B/L [with or without N.C.]	
C.S.	=	B/L	? Non-treaty law of C.S.
D.	=	N.C. and outside B/L	
C.S.	=	N.C. + B/L	? N.C.
D.	=	outside B/L	
C.S.	=	B/L	? Non-treaty law of C.S.
D.	=	outside B/L and outside N.C.	

C.S. = *Court seised*

D. = *Defendant*

N.C. = *Contracting State of the new Convention*

B/L = *Contracting State of Brussels and/or Lugano*

In a way, this system amounts to saying that the new Convention replaces the non-treaty law of the State of the court seised with regard to direct jurisdiction.

56 As regards *lis pendens*, the Convention must provide that it will apply only if the two courts between which there is a *lis pendens* are situated in two Contracting States of the new Convention. Consequently, the application of the new Convention and of the Brussels and Lugano Conventions will be distributed as follows:

C ₁	=	N.C.	? N.C.
C ₂	=	N.C.	
C ₁	=	N.C. + B/L	? B/L
C ₂	=	N.C. + B/L	
C ₁	=	N.C. + B/L	? N.C.
C ₂	=	N.C.	
C ₁	=	B/L	? Non-treaty law of C ₁ for C ₁ and of C ₂ for C ₂
C ₂	=	N.C.	[except where there is a bilateral agreement between C ₁ and C ₂] ⁷
C ₁	=	N.C.	? Non-treaty law of C ₁ for C ₁ and of C ₂ for C ₂
C ₂	=	B/L	[except where there is a bilateral agreement between C ₁ and C ₂]

⁷³ One of the inconveniences of such a rule relates to the impossibility for the court seised of using the exorbitant bases of jurisdiction excluded by the Convention although the Convention designates a court situated on the territory of a non-Contracting State. Views on whether such a consequence must be reserved or not will probably differ.

⁷⁴ Deux sortes d'accords bilatéraux peuvent exister: 1) ceux liant deux Etats contractants de la nouvelle Convention et qui auront été autorisés par elle auront priorité; 2) ceux qui pourraient être conclus par les Etats de T₁ et de T₂ qui, à titre transitoire, s'entendent pour appliquer la règle de litispendance de la nouvelle Convention alors même que seulement un d'entre eux est partie à cette Convention. Pour cela une disposition spéciale devra autoriser un Etat contractant à conclure un tel accord qui pourrait être fait sous forme de simple échange de lettres avec copie au dépositaire de la Convention ou au Bureau Permanent de la Conférence.

C₁ = Court [first] seised
 C₂ = Court [second] seised
 N.C.= Contracting State to the new Convention
 B/L = Contracting State to the Brussels and/or Lugano Conventions

57 As regards the choice of court clauses, the criterion for application should, again, be the same as for the rules of general jurisdiction, *i.e.*, that only the court seised which has to decide on the validity of a choice of court clause has to be situated on the territory of a Contracting State. This rule would apply whatever the location of the chosen court and even if the court seised is not the court chosen. In relation to the Brussels and Lugano Conventions, the application of the new Convention would be as follows:

C.S.	=	N.C.	? N.C.
C.C.	=	B/L	
P.	=	B/L	
C.S.	=	B/L	? Non-treaty law of C.S.
C.C.	=	N.C.	
P.	=	B/L or N.C.	
C.S.	=	B/L + N.C.	? B/L
C.C.	=	B/L [+ N.C.]	
P.	=	B/L [+ N.C.]	

C.S.= Court seised
 C.C.= Chosen court
 P. = One of the parties to the choice of court agreement
 N.C.= Contracting State to the new Convention
 B/L = Contracting State to Brussels and/or Lugano

58 Finally, as regards the enforcement of decisions, preference should be given to the criterion whereby the State of origin and the State addressed must both be contracting parties to the new Convention in order for its provisions on the recognition and enforcement of decisions to apply. The distribution as between the new Convention and the Brussels and Lugano Conventions will then be as follows:

S.O.	=	N.C. + B/L	? N.C.
S.A.	=	N.C.	
S.O.	=	N.C.	? N.C.
S.A.	=	N.C. + B/L	
S.O.	=	B/L + [N.C.]	? B/L
S.A.	=	B/L + [N.C.]	
S.O.	=	B/L	? Non-treaty law of S.A. except where there is a bilateral agreement or a unilateral declaration by S.A. that it will apply N.C.
S.A.	=	N.C.	
S.O.	=	N.C.	? Non-treaty law except by bilateral agreement
S.A.	=	B/L	

S.O.= State of origin
 S.A.= State addressed
 N.C.= Contracting State to the new Convention
 B/L = Contracting State to Brussels and/or Lugano

CHAPTER II – DIRECT INTERNATIONAL JURISDICTION

59 The achievements of the Special Commission on direct international jurisdiction will be especially important, because of the many pressing practical demands, yet also highly confrontational in nature, since the interests of the claimant and those of the defendant are, in essence, diametrically opposed, and the primary role of the State is to offer the fairest balance achievable between these diverging interests. But it has to be admitted that there is considerable confusion nowadays in this area, outside the geographical sphere of the Brussels and Lugano Conventions. The result is a proliferation of cases which are intended to "block" proceedings already in progress abroad, or expected to be instituted abroad (*anti-suit injunctions* or

actions for declaratory judgments, for example).⁷⁵ Such actions are not, in our view, admissible in the relatively organised international framework which would take shape with the new Convention.⁷⁶

60 Before turning to the grounds of jurisdiction which may be laid down in the future Convention, or excluded from it (sections 2, 3 and 4), it is useful to recall some principles relating to the influence of public international law on the determination of the jurisdiction of States, and to touch on the question of the general or special character of the jurisdictional rules to be devised, especially in the light of the special problems posed by federal States, and the nature of the jurisdictional rules – whether rigid or flexible – or the restrictions which should accompany them (section 1). We conclude with some brief comments on co-ordination in the matter of concurrent jurisdiction (section 5) and the impact of the double or mixed structure of the future Convention (section 6).

SECTION 1 – GENERAL PRINCIPLES

§ 1 – INFLUENCE OF PUBLIC INTERNATIONAL LAW⁷⁷

61 When sovereign States meet in order to negotiate together an international treaty comprising private international law provisions, they effect a merger between the sources and the function of the rules of private international law. The Special Commission responsible for preparing the new Convention consisting of provisions on international jurisdiction therefore finds itself in an "ideal" position. The States represented on this Special Commission must ascertain for themselves how much room for manoeuvre public international law gives them to do so. Within this margin of freedom, they must observe both self-restraint and reasonable conduct.

62 Public international law does not authorise a State, beyond the limits which it sets for them, to lay down a norm or to permit one of its institutions to define norms⁷⁸. The crux of the problem is therefore how to sanction such breaches of public international law. As Pierre Mayer rightly points out, it may be possible to pin responsibility on a State but, in practice, the few diplomatic protests voiced have had hardly any impact.⁷⁹ The sanctions are to be found much more on a practical level, since other States may refuse to recognise jurisdiction exercised in this manner, either by authorising their own courts to find they have jurisdiction in the same case, or by refusing to give effect to a judgment delivered by the courts of a State which has declared itself competent outside the limits of public international law; or, perhaps, by combining both kinds of sanction, which in practice are often found together. This type of sanction is effective in an

⁷⁵ For "anti-suit injunctions" in US law, see A.N. Vollmer "US Federal Court Use of Anti-suit Injunction to Control International Forum Selection" in J. Goldsmith (ed.) *International Dispute Resolution: The Regulation of Forum Selection*, 1997, p. 237 *et seq.*

⁷⁶ Cf. doc. cit. *supra*, note 38, p. 15, No 17. To convince oneself of the delicate and complex character of anti-suit injunctions, it is sufficient to read the saga in the *Airbus Industry v. the Patels* case in which no less than three procedures are respectively pending in India, in Texas and the United Kingdom (cf. *Airbus Industry Gie. v. Patel & others* (*The Times*, 12 August 1996)). We are of the opinion that if a convention had existed on jurisdiction, such multiple procedures could have been avoided.

⁷⁷ There is a vast literature on the impact of public international law on private international law, especially on the determination of international jurisdiction. In the following discussion, we have drawn mainly on the following works: Batiffol: "Les sources internationales du droit international privé", *Cours IHEI* 1969-70; "Point de contact entre le droit international public et le droit international privé", *Mélanges Yanguas Messia*, Madrid 1972, p. 77; Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des cours de l'Académie de La Haye* 1964, vol. 111, p. 1; Mayer, "Droit international privé et droit international public sous l'angle de la compétence", *Rev.crit.dr.int.pr.*, 1979 p. 1, 349 and 537; McLachlan, "The Influence of International Law on Civil Jurisdiction", *Annuaire de La Haye de droit international*, 1993, p. 125; Trooboff "The Growing Interaction between Private and Public International Law", *Annuaire de La Haye de droit international privé*, 1994, p. 107; de Vareilles-Sommières, *La compétence normative de l'Etat en matière de droit privé – droit international public et droit international privé*, thesis, Paris I, 1992; Meessen (Editor), *Extraterritorial Jurisdiction in Theory and Practice*, Kluwer Law International, 1996.

⁷⁸ This is why one may say that public international law is a "law of the limits" (*Grenzrecht*).

⁷⁹ Pierre Mayer, *op. cit. supra*, note 76, p. 22 and note 28.

indirect sense, since it does harm to some private operators while protecting others. Several judicial systems will therefore be acting concurrently, with the inevitable consequences of wasted time, inefficiency in the administration of justice, and extra cost at a time when all public budgets are severely restricted, when case dockets for most courts are overloaded, not to say saturated, and when national courts have ever greater difficulty in reaching their decisions within reasonable time limits.

63 For this reason, it is worth examining which are the principles or indeed the rules of public international law which can provide a better definition of State jurisdiction. The best starting point is, of course, the judgment of the Permanent Court of International Justice in the *Lotus* case⁸⁰: "*Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable*". One must therefore ask whether the jurisdiction of States is not more accurately defined by public international law.⁸¹ One State can only use the power which it was conferred by rendering judgments within the limits of that power. When the State defines rules of direct international jurisdiction, it allows judges and litigants to know in advance the hypothesis in which the State has the intention to exercise the powers which it enjoys under public international law.

64 An immediate conclusion from the foregoing is that one of the fundamental principles which ought to guide States in delimiting the direct jurisdiction of their courts is predictability. Because the jurisdictional rules are there to focus the attention of litigants on those instances in which courts may reach a finding on their substantive rights, the rules must be clear and precise, formulated so as to enable litigants to decide in advance, if possible with total certainty, which court will be able to render the anticipated judgment.

65 The basic rules derived from public international law can be summarised as follows:

a Every State has exclusive power to organise its own affairs;⁸² this means that it can create institutions for the purpose of stating the law as it understands it, define the circumstances in which these institutions may act, and determine the normative process, notably as concerns procedure.⁸³ However, this power is constrained by the fundamental right of citizens to enjoy equal and effective access to justice.⁸⁴

b According to traditional theory, States have jurisdiction over people and property located on their territory (territorial jurisdiction); over their nationals, even those not present on their territory (personal jurisdiction); and in respect of their public services, although this type of jurisdiction is often controverted.⁸⁵ This threefold definition of types of jurisdiction is far from adequate to constitute the basis for the many grounds of jurisdiction which have been developed by private international law. Its essential shortcoming is that it was devised as a corollary to the principle of State sovereignty.⁸⁶ But the value of this triptych is the

⁸⁰ Judgment No 9 of 7 September 1927, PCIJ series A, No 10, *Rev.crit.dr.int.pr.*, 1928, p. 354, note by Donnedieu de Vabres.

⁸¹ Pierre Mayer (*op. cit. supra*, note 76, pp. 15 and 16), explains that the term "international jurisdiction" is not appropriate, since it is not for States, but for public international law, to determine jurisdiction. An agreement between two or more States cannot increase or decrease the jurisdiction accorded to each of them by public international law. If the jurisdiction based on the nationality of the plaintiff is not recognised by public international law, an agreement between two States to the effect that their respective courts will be "competent" if the plaintiff is one of their nationals is merely a double misuse of "competence". "A treaty is, in fact, nothing other than a collective decision on the use – right or wrong – which States Parties will make of their jurisdiction. It carries with it an obligation on every State, vis-à-vis the others, to keep its courts within the limits set for it by the treaty, and not to challenge the use made by others of the authority they are recognised to enjoy." (Translation by the Permanent Bureau.)

⁸² See Thierry, Combacau, Sur, Vallée, *Droit international public*, p. 234.

⁸³ See Pierre Mayer, *op. cit. supra*, note 76, p. 374.

⁸⁴ Universal Declaration of Human Rights, esp. Articles 8 and 10. The European Convention on Human Rights, in Article 6.1, stipulates that the plaintiff and the defendant must enjoy equal treatment.

⁸⁵ Pierre Mayer, *op. cit. supra*, note 76, p. 540.

idea that there has to be some "substantial" or "significant" connection between the forum and the case.

Undoubtedly, some grounds of jurisdiction can be linked either to the territorial jurisdiction or to the personal jurisdiction recognised in public international law. Notably, the jurisdiction granted to the courts of the defendant's domicile, and the *forum arresti*, come under the heading of territorial jurisdiction. However, the *forum patrimonii* is not related to either of the types of jurisdiction mentioned in b) above, and therefore seems to be excluded. It is doubtful whether the jurisdiction of the courts of the place where a tort or quasi-tort was committed, or the capacity of the parties to elect a forum, can be classified as grounds of jurisdiction under public international law. For these, it is probably best to look for other principles of public international law.

c Contemporary authors, inspired by key texts on civil and political rights, agree that States have jurisdiction of a kind which can be described as "proximity", whereby every State must be able to entertain a court action having a significant link with its territory, either through the circumstances of the case, or because of the connections of the parties to the case. This rule, called the "significant connection" rule, could be regarded merely as a modern version of the traditional rule explained above. While losing somewhat in precision, it represents a gain in flexibility and in the capacity to adapt to the increasingly complex and interlinked facts of international life and relationships.

66 The implications of this for the work of the Special Commission may be summarised as follows: 1) predictability for litigants should, wherever possible, be given priority; 2) it must be ascertained that every jurisdictional rule admitted does in fact disclose a significant connection between the forum, the circumstances of the case and the parties to the dispute; 3) all forms of jurisdiction not disclosing such a significant link must be excluded; 4) in case of doubt, provision should be made for an exceptional clause which is sufficiently well defined to safeguard the requirement of predictability.

§ 2 – RIGID OR FLEXIBLE JURISDICTIONAL RULES? (*FORUM NON CONVENIENS*)⁸⁷

67 In comparative law, there are two major contrasting systems: that of civil law countries which prefer rigid rules of jurisdiction; and the system of common law countries, which prefers flexible rules of jurisdiction.

68 In the countries which prefer rigid rules, once the court has ascertained that it has jurisdiction under the applicable rules of international jurisdiction, it has neither the right nor the power to decline jurisdiction, for whatever reason. The advantage of this system is, of course, the high degree of certainty offered to the litigants, and its virtually total predictability. Its disadvantage is well known: the rules of jurisdiction are framed in an abstract sense, in the hope that they will fit the largest number possible of actual cases, but without any potential adaptation *a posteriori* to the concrete case of which the judge is seised; adaptation which may exceptionally be rendered necessary by the too abstract nature of the rule. The systems based on this tradition have developed a rule of substitution, in order to offset the most flagrant types of injustices which would result from a negative conflict of jurisdictions. To avoid a possible denial of justice, the court must rule that it has jurisdiction if no other court is competent or cannot be effectively seised of the case⁸⁸ and if there is no other criterion on which to base its jurisdiction in the case concerned. This rule is accepted as a ground of indirect jurisdiction in the Interamerican Convention on Jurisdiction.⁸⁹

⁸⁶ See M. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des Cours de l'Académie de La Haye*, 1964, Vol. 111, p. 1, page 22.

⁸⁷ Annex II to this Report is a lecture given by the writer to the Sokol Colloquium at Charlottesville, Virginia, United States, in March 1996, offering some thoughts on a possible approach to the issues related to seising an inappropriate court. "Judicial Regulation of Improper Forum Selections" in J. Goldsmith (ed.) *International Dispute Resolution: The Regulation of Forum Selection*, 1997, p. 273 *et seq.*

⁸⁸ The notion of a "court which cannot be effectively seised" is difficult to define. Must there be a substantive, objective impossibility, or only a subjective one? There is little case law on this point, and scholars take different views. For the further work of the Special Commission, experts are invited to address to the Permanent Bureau a brief note on "denial of justice", as a subsidiary ground of jurisdiction as applied in their own countries (see Annex III). In the light of these replies, an analytical report will be drawn up by the Permanent Bureau and distributed to experts.

⁸⁹ Article 2.

69 As regards the countries in the common law tradition, they exercise considerable flexibility in practice in applying the rules of international jurisdiction, thanks to the mechanism of *forum non conveniens*. In this regard, we would simply refer the reader to the four documents prepared, respectively, by Australia, Canada, the United States and the United Kingdom for circulation to the experts of the Special Commission which met at The Hague in June 1996.⁹⁰ The reader may also wish to consult the Report prepared by Professor J.J. Fawcett, entitled *Declining Jurisdiction in Private International Law*.⁹¹

70 The issue which now concerns us is whether a theory similar to that of *forum non conveniens* has a rightful place in a Convention on jurisdiction and the enforcement of judgments, and whether it would be desirable.⁹² If so, one must then ask what specific elements the future Convention should include as guidance for a court confronted with an issue of *forum non conveniens*.

71 This topic was touched upon during the proceedings of the Special Commission of June 1994⁹³ and that of June 1996.⁹⁴ As we know, in the context of the Brussels and Lugano Conventions, the question was raised whether room should be made for the theory of *forum non conveniens*. The Convention itself is silent on the subject. So is the Jenard Report,⁹⁵ for the simple reason that, initially, the six States which negotiated the 1968 Convention among themselves were not familiar with the theory of *forum non conveniens*. The Schlosser Report⁹⁶ on the Convention of 9 October 1978 concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom deals with this question,⁹⁷ in light of the fact that Ireland and the United Kingdom had initially asked for the text of the Convention to be adapted to include the theory of *forum non conveniens*. Professor Schlosser explains that Contracting States to the Brussels Convention are not only empowered, but actually bound, to exercise the jurisdiction conferred on them by the Convention; that the plaintiff must be certain that the court has jurisdiction; that time and money must not be squandered in considering and appraising the jurisdiction of the court; that the applicability of a foreign law may not be taken into consideration for the purposes of the Convention; that the choice which is deliberately given to the plaintiff by the rules of the Convention must not be suborned by applying a theory of *forum non conveniens*; the fundamental rules warranting the application of the doctrine of *forum non conveniens* are largely overridden by the Convention's own rules (such as the outlawing of exorbitant fora, the unified concept of domicile⁹⁸). Professor Schlosser therefore concludes that in the light of these arguments, Ireland and the United Kingdom gave up the idea of adapting the text of the Convention on this point.⁹⁹

72 Although Professor Schlosser, as Rapporteur for the Convention on the accession of the Kingdom of

⁹⁰ Cf. Annexes A, B, C and D to Prel. Doc. No 3, dated April 1996.

⁹¹ *Report to the XIVth Congress of the International Academy of Comparative Law*, Athens, August 1994, Clarendon Press, Oxford, 1995, reproduced as Annex E to Prel. Doc. No 3, April 1996.

⁹² The Working Group did not express a view on this question; cf. *Proceedings of the Seventeenth Session*, Tome I, p. 261.

⁹³ Cf. doc. cit. *supra*, note 33, p. 21, No 32.

⁹⁴ See Prel. Doc. No 3, April 1996, entitled "Note on the question of '*forum non conveniens*' in the perspective of a double convention on judicial jurisdiction and the enforcement of decisions", drawn up by the Permanent Bureau, and Conclusions, doc. cit. *supra* note 38, pp. 9-13, Nos 5-10.

⁹⁵ OJEC C 59 of 5 March 1979, p. 1.

⁹⁶ OJEC C 59 of 5 March 1979, p. 71.

⁹⁷ *Idem*, § 76 to 81 inclusive.

⁹⁸ This second reason is partly false, since the provisions on the definition of domicile in the Brussels Convention (Articles 52 and 53) refer back either to the internal law, or to the private international law of the court seised, or that of the State in which the domicile is situated, if different from that of the court seised.

⁹⁹ OJEC C 59 of 5 March 1979, § 78.

Denmark, Ireland and the United Kingdom to the Brussels Convention, seemed somewhat hostile to the theory of *forum non conveniens* for the purposes of the Convention, as writer and academician he takes a more tolerant approach.¹⁰⁰

73 We think all the reasons he gives in his report, representing the attitude of the civil law countries, still hold good. However, the proceedings of the two Special Commissions of June 1994 and June 1996 have shown that although it may be unacceptable in the context of a double Convention to adopt a general principle of *forum non conveniens*, it might be feasible to apply it by way of exception and in certain specific cases.¹⁰¹ In the light of the discussions within the Special Commission, it seems possible to achieve a consensus, by restricting the application of a mechanism similar to *forum non conveniens* to the instances of concurrent jurisdiction contemplated in the Convention, while excluding it from proceedings brought before a court with exclusive jurisdiction.¹⁰² However, there was a lengthy and inconclusive discussion of the question whether a mechanism such as the *forum non conveniens* could be admissible when the court addressed is that of the defendant's domicile.¹⁰³

74 Introducing a mechanism similar to that of the *forum non conveniens* would require the experts to resolve the following questions:

- the factors to be taken into account by the court seised when declining jurisdiction;
- the factors which the court seised may not rely upon in declining jurisdiction (for example, the nationality of one or other of the parties, or the law applicable to the merits);
- the question whether the court seised must act alone, or must consult and act in co-operation with the other court or courts which may have jurisdiction to deal with the case in issue;
- the mechanism for transferring the case to the court regarded as being the most appropriate to decide the case;
- the residual jurisdiction which the court initially seised may reserve to itself after deciding to transfer the case;
- the impact of the transfer on statute of limitation;
- the consequences of such a transfer for the effects to be given to the judgment in the other Member States of the Convention, and especially as regards the verification of the jurisdiction of the court of origin by the court addressed.

75 At all events, even if the new Convention were to adopt a *forum non conveniens* clause, this should not operate in favour of a court situated on the territory of a non-Contracting State. If it did, one of the key purposes of the new Convention would be defeated.¹⁰⁴

§ 3 –GENERAL AND SPECIFIC RULES? THE SPECIAL STATUS OF STATES WITHOUT A UNIFIED SYSTEM¹⁰⁵

76 The real issue in private international law is deciding which national judicial system has jurisdiction to resolve an international dispute (general jurisdiction). However, the question of which court, within the appointed judicial order, specifically has jurisdiction (venue) is normally a matter for the internal law of the State whose judicial system has been appointed by the rule on general jurisdiction. This is standard practice

¹⁰⁰ Cf. the discussion at the Colloquium held at Charlottesville, United States, in March 1996 (Sokol Colloquium) on *International Dispute Resolution: The Regulation of Forum Selection*. The papers presented at the colloquium, without the discussions, are published by Transnational Publishers Inc. Irvington, New York, 1997.

¹⁰¹ Doc. cit. *supra* note 33, p. 21, No 32, and doc. cit. *supra* note 38, p. 11, No 7.

¹⁰² *Ibidem*, p. 13, No 9.

¹⁰³ *Ibidem*, p. 13, Nos 9 and 10.

¹⁰⁴ Doc. cit. *supra* note 38, p. 15, No 16.

¹⁰⁵ This question was left outstanding by the Special Commission of June 1996, cf. doc. cit. *supra* note 38, p. 23, No 33.

with regard to subject matter jurisdiction. The latter, from the international point of view, does not require the parties to ponder any complex issues. But there may be considerable difficulty where the jurisdiction concerned is territorial. Indeed, a few kilometres apart, it may be fundamentally different to have one's case decided by one judge or the other.

77 This is even more complicated for States without a unified system of law. For these States, subject matter jurisdiction is bedeviled by another issue, the jurisdictional system of the court which has to deal with the case, whether a federal court or a national or regional court. Unlike the traditional rules for attributing jurisdiction, the procedures followed by either of these categories of courts may differ fundamentally, and may result in dramatically different outcomes to the dispute. It is probably impossible to settle issues like this through the Convention's provisions. However, they should be kept in mind when endeavouring to solve all the other issues, especially with respect to territorial jurisdiction, in order to avoid exacerbating the uncertainty for the parties.

78 As regards territorial jurisdiction, we think it is extremely important, indeed of the very essence of the Convention, that the parties should know in advance, with virtually total certainty (except where exceptional clauses are included, or in the case of a mixed Convention) which court has territorial jurisdiction to hear their case. In this respect, we think that, in the matter of territorial jurisdiction, the Convention should adhere strictly to rules of specific, rather than general, jurisdiction.¹⁰⁶ This means that for all the States Parties, once the court has been appointed under a rule of the Convention, no "transfer" would be possible within that State by virtue of any internal, inter-State or interregional rules which may apply.

§ 4 – LIMITS TO THE SCOPE OF JURISDICTION?

79 Normally, once a court is appointed to exercise jurisdiction under the rules of the Convention, that court must be able to adjudicate the whole of the case between the parties, whatever the nature of the claims.

80 However, in some instances jurisdiction may be limited to certain clearly defined causes of action. For example, in defamation cases, if the victim sues before the courts of his/her habitual residence, his/her action may be limited to the damage which he/she claims to have suffered on that territory, excluding any other kind of damage. On the other hand, if he/she decides to proceed at the place of the causal act or at the place where the defendant has his/her habitual residence, the action may be expanded to cover all the damage suffered on any territory.

81 Each ground of jurisdiction will therefore have to be examined to see whether it allows the whole of the case which has arisen between the parties to be adjudicated, or, on the contrary, only certain well-defined kinds of action. This also applies to the rules on defamation, unfair competition, and provisional or protective measures, to cite only a few examples.

SECTION 2 – VARIOUS ADMISSIBLE GROUNDS OF JURISDICTION¹⁰⁷

82 We will consider the grounds of jurisdiction in descending order of their weight of the imperative character. However, some kinds of jurisdiction may variously be assigned to one or other of the following headings: exclusive jurisdiction, protective jurisdiction, elective jurisdiction or others.

§ 1 – EXCLUSIVE JURISDICTION¹⁰⁸

¹⁰⁶ This means that a formula such as the one used in Article 2 of the Brussels and Lugano Conventions would not be adopted for the new Convention.

¹⁰⁷ Only the Special Commission of June 1994 has tackled this question. In what follows, we will indicate which grounds of jurisdiction were the subject of a consensus and which are still undecided.

¹⁰⁸ The Working Group concluded that some forms of jurisdiction may be exclusive in character, especially in real estate cases, trust cases and choice of court: *Proceedings of the Seventeenth Session*, Tome I, p. 261.

83 Most legal systems embrace the concept of exclusive jurisdiction. Such forms of jurisdiction are called "exclusive" because they automatically invalidate any contractual or tacit choice of court; they do not allow for any *lis pendens*, since they cannot admit any "competition" with other jurisdictions,¹⁰⁹ and they prevent any joinder through related causes of action. Were the new Convention to include this concept of "exclusive jurisdiction",¹¹⁰ the courts of States Parties to the Convention would have to comply faithfully with these rules, declaring themselves *proprio motu* without jurisdiction if seised in breach of these rules. The rules are warranted by the fact that, in the light of the particular features of the case in issue, the court appointed under the chosen ground of jurisdiction is the only one able to adjudicate the case effectively, this being a pledge that justice will be properly dispensed. However, the Convention should then spell out what is to happen if the ground of exclusive jurisdiction relevant in the case in question is situated on the territory of a non-Contracting State. In that case, in the framework of a worldwide Convention, and in view of the claimant's interest in obtaining a judgment which will be readily enforceable, the Convention could provide for a subsidiary rule of jurisdiction which would enable the case to be kept within the sphere of application of the Convention, or at least would do so as often as possible, since it is not entirely certain that the subsidiary criterion will confer jurisdiction on a court in a Contracting State. The disadvantage of this formula is that the judgment delivered by the court with jurisdiction under this subsidiary criterion will probably not be recognised by the forum of exclusive jurisdiction.

A) Jurisdiction with respect to immovable property

84 It may be thought necessary to provide that the court where the immovable property is situated has jurisdiction to entertain disputes relating to real property rights.¹¹¹ Such jurisdiction could be confined to disputes concerning the possession or ownership of the property.¹¹² It is less obvious whether jurisdiction in matters of real property should also apply to disputes arising from leases on real estate.¹¹³ There are different kinds of leases: residential, occupational or mixed leases, commercial or office leases, leases on rural property. This kind of jurisdiction may offer an advantage where the dispute is connected with the manner in which the lease is being performed in the property in question, or where it concerns repairs or damage caused by the tenant, or the eviction of the tenant. All such disputes call for site reports, and these can best be made at the place where the property is situated. However this advantage, in the context of the Hague Conventions, loses much of its attraction since it is probable that the States Parties to the future Convention will also be Parties to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.¹¹⁴ Moreover, notorious difficulties have arisen with this form of jurisdiction where the lessor and the lessee are both situated on the territory of the same State, which is a different one than that in which the property is situated. As we know also, some writers prefer the court of the place where the property is situated not to have jurisdiction for issues concerning the amount and payment of the rent. All these difficulties may prompt experts to refrain from providing for exclusive jurisdiction in the case of leases on real estate. If that is the decision, it will be necessary to monitor closely how the court addressed applies any rules of public policy on real estate leases which are applicable at the place where the property is situated. The court having jurisdiction should ensure that its decision complies with the public policy because if, as is very likely, the judgment is to be enforced at the place where the

¹⁰⁹ However, it is conceivable that in rare cases several exclusive jurisdictions may be in competition. For example, this will be the case when a dispute concerns real estate which extends on both sides of a border.

¹¹⁰ As well as the Conclusions of the Working Group, see those of the Special Commission of June 1994, doc. cit. *supra* note 33, pp. 17 and 19, No 21, and of the Special Commission of June 1996, doc. cit. *supra* note 38, p. 15, No 15.

¹¹¹ *Cf.* the Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 259, and Conclusions of the Special Commissions of June 1994, doc. cit. *supra* note 33, p. 17, No 15.

¹¹² See Article 5.4 of the bilateral Convention between France and Canada of June 1996, and the Conclusions of the Special Commission of June 1994, doc. cit. *supra*, note 33, p. 17, No 15.

¹¹³ This question was reserved by the Special Commission of June 1994, doc. cit. *supra* note 33, p. 17, No 15.

¹¹⁴ The Convention of 18 March 1970, which came into force on 7 October 1972. The States which have ratified it are: Czech Republic, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovak Republic, Spain, Sweden, Switzerland, United Kingdom, United States. The States which have acceded to the Convention are: Argentina, Australia, Cyprus, Latvia, Mexico, Monaco, Poland, Venezuela, and the following non-Member Countries: Barbados, Estonia, Singapore.

property is situated (especially if it is not enforced voluntarily by the losing party), this judgment would remain a dead letter if it were to defy the public policy of the State where the property is situated.

85 Finally, if the Convention provides for exclusive jurisdiction in matters of real estate, it will have to specify whether it covers also contractual or personal actions or trust cases where these are connected with, or instituted at the same time as an action concerning real estate.

86 If the experts were to decide that jurisdiction in real estate matters is not exclusive, it should appear at least as an optional special jurisdiction. In such a case, we could imagine to empower the judge of the defendant's habitual residence to decline jurisdiction and direct the parties to the court of the place where the real estate is situated.¹¹⁵

B) Jurisdiction with respect to companies (corporations)

87 The topic of civil or commercial companies or other entities possessing legal personality of a relatively extensive kind is complicated by the hybrid nature of companies which derive at one and the same time from contract and from an institution. Depending how liberal States are in their attitude towards companies, their legal systems will emphasise the contractual aspect (for the more liberal among them) or the institutional aspect (for the less liberal ones). Every country has some form of public register, sometimes kept by public service staff or by private individuals to whom this public service is entrusted. One might therefore think that all disputes concerning the existence of companies, their validity or their registration, should be brought before the courts of the place where the company is listed or registered, *i.e.*, the place where the relevant register is kept.¹¹⁶ Unfortunately, we know that this is sometimes an artificial place, because companies can easily detach their statutory headquarters or place of registration from their actual headquarters or the place where their activities are mainly carried on. If the experts decide to make provision for exclusive competence in this field, they must spell out the kinds of case in which this form of jurisdiction will come into play, leaving all other cases to the jurisdiction of courts provided by other rules.¹¹⁷

For instance, it may be felt that the courts of the place of registration or the statutory headquarters should not deal with disputes associated with the decisions of company bodies, or with the liability of company directors, since it is probably better to adjudicate such matters at the place where the company carries on most of its business or has its main centre of interests.

88 It should also be made clear what is meant by the term "corporation". Is this notion to be extended to cover groups of any kind, including non-profit associations? *A priori*, nothing prevents such an extension but for the instances where these groupings are not registered.

C) Jurisdiction with respect to public registers

89 As decided by the Special Commission in June 1994,¹¹⁸ it may be felt necessary to have exclusive jurisdiction for courts dealing with disputes relating to the validity and effects of entries in public registers. This form of jurisdiction would be conferred on the courts of the place where the register with the contested entry is situated. The registers concerned are land or mortgage registers, registers of patents and copyright and generally speaking, any kind of public registration.

D) Jurisdiction with respect to intellectual property

¹¹⁵ On this mechanism, see *supra* Nos 67 *et seq.*

¹¹⁶ The Working Group suggested opting for the head office of a company or another legal person for the purpose of the validity or dissolution of these entities, without making such jurisdiction exclusive: *Proceedings of the Seventeenth Session*, Tome I, p. 261. The Special Commission of June 1994 suggested "*assuming jurisdiction founded on a link between a corporation or other legal entity and the forum ? this link might be the seat (statutory or factual), the place of incorporation, the principal place of business, or some other criteria*" (*cf. doc. cit. supra* note 33, p. 15, No 13), without defining which actions would be affected by this jurisdiction. However, it mentioned the possibility of exclusive jurisdiction in connection with the validity or dissolution of corporations, without specifying the chosen ground of jurisdiction (*ibidem*, pp. 17 and 19, No 21).

¹¹⁷ *Cf. infra*, Nos 103 *et seq.* and Nos 115 *et seq.*

¹¹⁸ *Doc. cit. supra* note 33, pp. 17 and 19, No 21.

90 The term "intellectual property" covers all intangible rights derived from patents, trademarks, designs and models, and copyright or other equivalent rights. These rights may lead to litigation of various kinds. One initial category concerns the validity of the rights which have to be registered. As we have said above, a dispute of this nature must normally be submitted to the courts of the place where registration was carried out.¹¹⁹ A second category has to do with infringements of intellectual property rights by imitation.

These are generally actions in tort; they do not require special provisions of their own. A third category may occur when the rights have been assigned or licensed. These are actions in contract which must comply with the general or specific rules for actions in contracts.

E) Jurisdiction with respect to the enforcement of judgments

91 Since the enforcement of judgments, when it is not voluntary on the part of the losing party, calls for specific measures which sometimes involve the forces of law and order, exclusive jurisdiction could be given to the courts of the place at which the measures will actually be carried out, *i.e.*, where the judgment will actually be enforced.¹²⁰

§ 2 – PROTECTIVE JURISDICTION

92 These forms of jurisdiction are called "protective" because they take account of the weaker position of one of the parties to the proceedings, on the basis that the weaker party deserves to be treated differently from the other parties, and to enjoy the benefit of special kinds of jurisdiction. Essentially, there are three groups of people to be protected: workers, holders of insurance policies, and consumers.¹²¹ Before we turn to the possible jurisdictional rules for each of these categories of plaintiff, we should emphasise that only individual actions brought by these persons on their own behalf¹²² should come within the reach of these forms of jurisdiction. A special place must be accorded to collective or joint actions¹²³ which raise different issues and must, in our view, be tackled by other means.

A) Workers

93 Workers' individual actions could be brought in the court of the place where the work is performed, this being the court closest to the worker, provided the worker does his or her work in one place only.¹²⁴ If the worker does not work in one place only, jurisdiction could be given to the court of his habitual residence at the time the action is brought.¹²⁵ Choosing the habitual residence of the worker at the time the case is

¹¹⁹ Here we note that the Brussels and Lugano Conventions grant exclusive jurisdiction in this case, but this is not the position of the Working Group. *Cf. Proceedings of the Seventeenth Session*, Tome I, p. 261.

¹²⁰ The Special Commission of June 1994 thought exclusive jurisdiction would be possible in this area, but did not specify the base of jurisdiction; doc. cit. *supra*, note 33, pp. 17 and 19, No 21.

¹²¹ The Working Group proposed only workers and consumers, *Proceedings of the Seventeenth Session*, Tome I, p. 261. The Special Commission added insured persons for some types of insurance, and maintenance creditors if this subject was covered in the Convention, doc. cit. *supra* note 33, p. 19, No 22. However, the possible bases of jurisdiction were not discussed.

¹²² If the consumer or holder of insurance has assigned his action to a third party who is pursuing it in his stead, there is no special reason to protect this third party, except to enable him to benefit, under the action, from the personal advantages proper to the assignor.

¹²³ *Cf. infra* No 102.

¹²⁴ Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 261.

¹²⁵ Two points must be clarified here as regards the concept of "habitual residence". First, it will have been noted that we prefer this term to the expression "domicile" as used in the Brussels and Lugano Conventions. This is because we think this notion of habitual residence is now more generally accepted and admitted in the various legal systems than the notion of domicile. Moreover, the Brussels and Lugano Conventions, as indicated above, (see *supra*, No 71, note 97) have failed in their attempt to unify the notion of domicile. One may wonder whether the Convention ought to include a definition of the concept of "habitual residence". Traditionally, the Hague Conventions offer no definition.

brought, rather than his or her residence at the time the contract of employment is concluded, has the advantage of being more faithful to the aim of protecting the worker. If the worker performs his or her work in several places,

some of which are not situated on the territory of a State Party to the Convention, but the worker has his or her habitual residence on the territory of a State Party to the Convention, it would be appropriate for the court to have jurisdiction for the whole of the case, not just for those parts of it which relate to work done on the territory of the Contracting States.¹²⁶

94 However, it might perhaps be possible not to provide for a different criterion depending on whether or not the worker performs his or her work in a same place. Indeed, if the criterion chosen is that of the worker's "actual centre of professional activities", it would cover all possible cases. It is not certain, then, that it would be useful to provide another optional jurisdiction in favour of the court of the place where is situated the undertaking having recruited the worker.

95 Should we authorise choice of court clauses in employment contracts? Some of the scholarly writings on the topic have shown that for senior executives, expatriation contracts of employment were genuine negotiated contracts, and that a clause for choice of jurisdiction in these contracts does not carry the disadvantages it may have for other categories of workers. However, the Convention would probably become too complex if, within a single category of persons, further distinctions had to be made. One could perhaps include a provision to validate clauses on choice of court in contracts of employment, while accompanying this provision with a *forum non conveniens* analysis in favour of the worker. A court seised under this choice of court clause would decline jurisdiction if it was clear, when the proceedings began, that the court would have significant disadvantages for the worker.¹²⁷

96 As for group actions, especially those which bring together workers who may be located on the territory of several contracting or non-Contracting States but who have the same employer, such cases should be brought to the courts of the place where the defendant is situated. In fact, as soon as highly vulnerable people for whom the effort has been made to create protective rules come together, and are enabled to take joint action, they lose much of their vulnerability; the respective weight of the parties is once more virtually equal, and there is no reason not to require the defendant to be sued before his own courts. The question then arises of what will happen if such a court decides in law that the group action is inadmissible, a conclusion which it might reach for a number of different reasons.¹²⁸ However, it could be spelt out in the Convention that a court seised of a group action of this kind is not to declare it inadmissible for the sole reason that it is not covered by the local procedural law. *A priori* it seems difficult to go further than this.

B) Holders of insurance policies and/or insured persons

97 It may be thought that this category should cover, not only the insurance policy holder, but also the beneficiary of the insurance contract, who may not necessarily be the same person. However, we believe it is necessary to exclude those who hold insurance for professional reasons or in connection with professional activities, who do not necessarily need special protection. Apart from professional insurance, it does not seem desirable to exclude any other type of insurance (civil liability insurance, home insurance, personal accident insurance, life insurance, etc.).

The most recent Convention, adopted on 19 October 1996, on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, is no exception.

¹²⁶ It should be pointed out here that the Brussels and Lugano Conventions also give jurisdiction to the courts of the place where the establishment engaging the worker is situated.

¹²⁷ The texts of the Brussels and Lugano Conventions differ on this point. Whereas the Lugano Convention prohibits any choice of court before the dispute takes place, the Brussels Convention, as amended by the San Sebastian Convention, complements this restriction with an option: if the clause is invoked by the worker (and only by him or her) to address a court other than the one appointed under the Convention provisions, the clause will be valid, even if it was concluded before the dispute arose. It should be noted that in its original version, the Brussels Convention did not include any restriction on choice of court clauses in employment contracts.

¹²⁸ The local procedure may not provide for group actions. Moreover, the action may be found inadmissible because of lack of capacity to act, lack of interest to act or other requirements relating to the causes of action; it is difficult to define what these may be, or indeed the law applicable in the context of the future Convention.

98 In such cases, the best rule of protection seems to be that conferring jurisdiction to the court of the claimant's habitual residence at the time the action is brought.

99 Should choice of court be allowed in this case? We would incline towards the negative answer, except where the choice is made after the dispute has arisen. But in this case, we still have doubts, as experience shows that, even when the dispute has taken shape, the holder or beneficiary of the insurance does not always understand the implications of the specific issues of procedure and jurisdiction involved, and may give his consent, even after a dispute has begun, without really grasping the significance of such consent. We could make the admission of choice of court in this matter subject to the same rule as that proposed above for workers. That rule allows the judge to decline jurisdiction if the choice of court reveals to be too "unjust" for the policy holder.

C) Consumers

100 The term "consumer" should be understood as meaning a person who acts for family or personal purposes, by contrast with any person or entity acting for professional purposes. Moreover, jurisdiction introduced to protect the consumer must be individual to him, and not be used for anyone acting on behalf of the consumer or in his stead.

101 It will probably be necessary to decide what kind of contracts or legal operations are covered by the jurisdictional rule chosen. It may be felt that any dispute arising from a contract for goods or services entered into by the consumer must be submitted to the court appointed under the treaty clause. It may be asked whether the contract must necessarily be one between the consumer and a professional, or whether it is also admissible for jurisdiction to cover contracts between consumers themselves (for instance, the sale by an individual of a second-hand car to another individual¹²⁹). As for the jurisdictional rule itself, it seems preferable to confer jurisdiction on the court of the consumer's habitual residence,¹³⁰ whether the consumer is the plaintiff or the defendant. Moreover, reference ought to be made to the habitual residence at the time proceedings are started, not the one which exists on the date when the contract is concluded, for the same reasons as already given for workers, although the degree of predictability for the co-contractor of the consumer is less than for the employer; possibly, therefore, a distinction is needed between the two categories of cases.

102 As regards group actions, protection for the consumer is guaranteed by the fact that his rights will be protected by the group action itself, and he will not as an individual have to endure the complications, cost and difficulty of pursuing an action on his own. To this extent, we feel that the reasons for having a particular rule of jurisdiction when the consumer has to face his co-contractor alone disappears when his rights are protected by a group action. This is why we think it would be preferable to revert in such cases to the classic rule of *forum actor sequitur*, giving jurisdiction to the courts of the defendant's habitual residence. Of course, the court must not be allowed to dismiss the group action solely because it is unfamiliar to the local law.¹³¹ The Convention must be clear on this point. But abolishing any alternative forum may be difficult to accept since most existing associations are territorially limited for their activities. However, we already see associations whose goals are multinational and which may represent consumers residing in several countries. If we were to maintain an alternative forum at the consumer's residence, then the association could institute action in many fora. This being so, the scope of the action which they would be authorised to undertake before any of those fora would have to be limited.

§ 3 – CHOICE OF COURT¹³²

¹²⁹ If the reason for the protection is based on the idea that one party to the case is weaker than the other, it seems unlikely that this situation would fit the theory.

¹³⁰ Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 261.

¹³¹ Unfortunately, this is fairly frequent, particularly when the law applicable to the substance of the action is a foreign law. This is why an effort for harmonisation is attempted within Europe. This issue may necessitate further study.

¹³² The Special Commission of June 1994 admitted in principle the jurisdiction of the court chosen by the parties, but reserved its position as to the specific conditions applicable. See doc. cit. *supra* note 33, p. 17, No 19.

103 Although the validity of a choice of court by the parties when the dispute falls into an area covered by exclusive or "protective" jurisdiction may be viewed restrictively, in all other cases it is probably best to take a liberal approach to the validity of such clauses. There are four key issues to be dealt with: the validity of the contractual clause concluded before any dispute arose; tacit choice of court; the admission of an agreement on jurisdiction in areas other than contracts and the impact of the doctrine of *forum non conveniens* or *lis pendens* on the choice of forum.¹³³

104 But before turning to these questions, some explanation is required of the circumstances in which the Convention's provisions on choice of court may be applied. It seems preferable for such a provision to apply regardless of who the parties to the dispute are, and even if they are not domiciled in one of the Member States of the Convention, provided that the chosen court or the court seised is situated on the territory of a State Party to the Convention. This proposal is prompted chiefly by the need for unification, which practitioners feel when they apply to a court for a ruling on the validity of a clause on choice of court. However, one must not disregard the consequences of such a choice. Unless otherwise specified in the Convention, it is possible that such a rule might apply to purely internal contracts. Perhaps this is not the intended result. In that case, it should be made clear that the rule enshrined in the Convention on the validity of choice of court will apply only where the contract is an international one. This notion will be decided by the court, when adjudicating the case, in the light of the circumstances prevailing at the time when the contract came into force, whatever changes may have occurred between the date of conclusion of the contract and the date of the dispute such as a transfer, which has altered the foreign element in the contract.

A) Validity of the contractual clause on the choice of court

105 This type of clause has become very prevalent in international contracts, to a point where there no longer seems any need to question its validity in principle. It seems natural for the Convention to include a provision on the formal validity of such clauses, and to specify in which circumstances they will apply.¹³⁴ As for the lawfulness of the clause, since the Convention forms a single whole all its clauses will be lawful, and the text need not state this explicitly. There remains the question of substantive validity, as distinct from formal validity, and it may be asked whether it is necessary to provide for this separately.

a) Formal validity

106 Developments in domestic law concerning the formal validity of choice of court clauses indicate that the main emphasis is now on the availability of proof that each party gave free and informed consent to the jurisdictional choice. The burden of proving such consent must lie with the party seeking to rely on the clause vis-a-vis his co-contractor. The conditions of formal validity specified in the Convention must do no more than assist the process of furnishing proof. It may however be thought that the clause in the Convention could be non-exhaustive, since technological advances and progress in the conclusion of international contracts may result in the Convention provisions becoming obsolete or out-of-date, unless care is taken to state that they are merely examples of what may be acceptable as proof of consent. Consent must be treated as sufficiently proven if the clause is part of a written document signed by the parties; if it has been referred to in correspondence exchanged between the parties confirming the contractual agreement, without protest by the party against whom it is to be used; if it features in the general contractual terms of one of the parties, provided these general terms have been addressed, before the contract was concluded, to the party against whom the clause is to be invoked; and if the parties to the contract have formed the habit of always including the same choice of court clause. Such a habit will be held to exist between the parties if at least some contractual relations have been established prior to those in dispute. If proof is made that the extended jurisdiction clause is in regular and familiar use in the branch of activity and the type of contract in question, this clause likewise must be admitted. This will be the case where, in a particular branch of activity, it is customary to confer jurisdiction on courts (for instance,

¹³³ Although the Working Group thought Article 17 of the Brussels/Lugano Conventions could be used as a model for the future clause (*cf. Proceedings of the Seventeenth Session, Tome I, p. 259*) we think it is necessary to examine in more detail some issues not expressly covered in this text.

¹³⁴ As we have seen *supra* No 57, the only condition for the application of the Convention's rule could be that the court seised must be situated on the territory of a Contracting State.

maritime courts) with special competence in that field. This usage will therefore be fairly limited in scope. On the other hand, if usage relates to the form of the contract (a contract concluded rapidly between absent parties, bearing solely on the essential clauses), reference to another document for all other contractual clauses will only serve to prove consent if this other document is of international significance (for example, the contractual terms set by international organisations or non-governmental organisations, the International Federation of Consulting Engineers (FIDIC), etc.). Finally, if consent can be proved by any other means allowed under the law of the court seised, it should be possible to accept the choice.

b) Substantive validity and lawfulness

107 Turning to the role of national law in issues of substantive validity and lawfulness, we feel it is more consistent to say that the future Convention forms a single whole, and that States Parties cannot use their national laws, even for these two issues. Indeed, as regards substantive validity, the fact that specific clauses in the Convention forbid the use of such clauses in a number of specific instances shows that the conditions of substantive validity have been settled by the Convention, and the various national legal systems have nothing further to say on the question. The same conclusion suggests itself with regard to lawfulness. In fact, bearing in mind the substantive scope of the Convention, the questions concerning the lawfulness of the clause to be admitted in the various fields covered by the Convention may be regarded as settled. The only remaining area of uncertainty is whether the clause is admissible in company statutes of commercial companies or other groups. Perhaps a commentary in the Explanatory Report will suffice to resolve this question.

B) Tacit choice of court

108 Whether or not tacit choice of court may be permitted is a key issue in the legal regime for the objection to international jurisdiction. Depending on whether tacit choice is allowed, the defendant is required to submit his intended objection to jurisdiction either *in limine litis*, or at any time during the proceedings. Many national systems have a requirement that any objection of want of jurisdiction must be raised before any defence on the merits. Otherwise, the defendant is regarded as having accepted jurisdiction, and cannot afterwards contest it, either in the proceedings before the court of origin or even before the court which is addressed in order to give effect to the judgment in another country. For the defendant, therefore, the rule of tacit choice is a draconian one. It raises numerous difficulties for the right of defence, even if the defendant is present in person in the court seised. A defendant who is a natural person may well be unaware that there can be a challenge to jurisdiction, and that if no challenge is raised before a defence on the merits is begun, he will forfeit this right. When the defendant is not present but is represented by a lawyer, as is now the case in most international proceedings, especially commercial cases, issues of representation will arise. The Special Commission, in June 1994, went so far as to conclude that "*in the case of a convention intended to be worldwide, concern should be given to verifying that the appearance is indeed voluntary and not dictated by circumstances or by an abuse of economic power ? or other unfair means*"¹³⁵.

109 Hence the problem has more to do with defining the concept of "appearance" than with admitting the actual rule.¹³⁶ Several solutions may be envisaged:

1) When the defendant is represented, a representation clause could be inserted into the Convention requiring an express *ad litem* authorisation. A provision such as this would probably be difficult to implement, and would conflict with a number of legal systems in which advocates who are duly registered with the local bar association do not need to appear before the court with an express *ad litem* mandate. Furthermore, the Convention should not have to go into such detail, overburdening the text to no real purpose.

2) Whether the defendant is represented or appears in person, the court could be placed under an

¹³⁵ Doc. cit. *supra* note 33, p. 17, No 20.

¹³⁶ The Working Group took the view that the rule ought to be admitted, even accompanied by some restrictions such as those in Article 10.6 of the 1971 Hague Convention. *Proceedings of the Seventeenth Session*, Tome I, p. 259.

obligation to ascertain *proprio motu* that the appearance is valid, and also that it is free and informed. However, the court could also be left free of any such obligation, with the option of checking if the circumstances warrant it. The Explanatory Report would then include examples of such circumstances, such as, for instance, the defendant being a natural person, the nature of the dispute and the amount of money involved.

110 At all events, we think it would be regrettable if the Convention made no provision for tacit choice, as this would mean that the court seised would always have to ascertain for itself that it has jurisdiction, thus overloading the proceedings, and perhaps to no purpose. In any case, even if a tacit choice rule is decided upon, it cannot apply against exclusive or protective jurisdiction. The Convention must make this clear. In these various instances and categories of jurisdiction, the court must necessarily ascertain *ex officio* that it does in fact have jurisdiction, failing which the benefits of exclusivity or of the protection sought would be destroyed. If this is not done, we would take the risk to nullify the advantages of exclusivity or protection sought.

C) Choice of court in matters not pertaining to contracts

111 Is it possible to allow a choice of court when the case is not one of contract? We believe that in all cases except those which call for exclusive or protective jurisdiction, there is no reason not to allow the parties to make a choice of court *a posteriori*, *i.e.*, when the dispute has already arisen. In that case, should the court chosen by the parties be required to have a connection with the circumstances of the case, so as to avoid some courts becoming centres of litigation for reasons which are not always clear? It must be admitted that the concept of a "neutral court" may be of value in international trade, especially when the parties do not want to entrust their case to any of their own courts, and are also reluctant to go to arbitration. However, we also know that when legal funds are tight some courts are unwilling to deal with cases unconnected with their own territory, even if using a court may actually help to generate local economic activity (the use of local barristers, experts, hotels and restaurants, etc.).

D) Choice of court clauses and forum non conveniens or lis pendens

112 This question was tackled for the first time by the Special Commission in June 1996.¹³⁷ It was generally agreed that the autonomy of the choice made is primordial, and that it must be respected and protected from any interference by the courts; their only task should be to decide on the validity of the choice of court, in the light of the Convention criteria. Although the principle itself seems beyond question, it has nonetheless been rightly suggested that for the sake of proper international administration of justice, in some cases valid choice of court clauses could be declared ineffective. One such case would be, for instance, when proceedings are taken out by a third party (the end user of the product) against one of the parties to the contract; the latter could then start interlocutory warranty proceedings against his co-contractor, in spite of being already committed to him by a choice of court clause, while the co-contractor would be unable to set up the clause against him. This is because it may be useful, both for the third party who is not a party to the clause, and for the sake of saving resources in the legal systems which may be involved in the proceedings, to have all the issues adjudicated at the same time, in the same proceedings and by the same court.

113 The Special Commission also suggested that the future Convention should deal with the question of interference by *lis pendens* with a choice of forum. This raises the more general question of whether the court chosen by the parties in their choice of forum clause has exclusive jurisdiction or not. If it has, there will be no *lis pendens*. If it does not, *lis pendens* may be admitted, and should be regulated in the same manner as for other cases of *lis pendens*.

114 It should also be considered how far the choice of a forum by the parties excludes any recourse to another forum to request provisional or protective measures. Article 6.4 of the Hague Convention of 25

¹³⁷ Doc. cit. *supra* note 38, pp. 13 and 15, Nos 12 to 14 inclusive.

November 1965 on the choice of court offers guidance on this question.¹³⁸

§ 4 – OTHER JURISDICTION

115 In this part of the report we will consider what kinds of jurisdiction the Convention may provide, either as rules of principle, available to both plaintiff and defendant, or as an option for the plaintiff. First, however, it must be asked whether it is desirable to give the plaintiff a free choice of court, and what balance should be struck between the interests of the plaintiff and those of the defendant.

A) *The balance between plaintiff and defendant*

116 Considering the respective rights of the plaintiff and the defendant, inevitably means questioning whether either of them actually needs protection. *A priori*, as soon as we have admitted protective jurisdiction of the kinds proposed above,¹³⁹ we may ask whether it is necessary to pursue the task of protection by offering the plaintiff a choice between the traditional jurisdiction, at the domicile of the defendant, and optional jurisdiction such as those in the Brussels and Lugano Conventions, especially Article 5. We think the reply to the question should depend on whether the Convention is to include a theory similar to *forum non conveniens*.¹⁴⁰ In fact, the jurisdiction of the defendant's habitual residence, which in theory may seem to respect completely the interests of all concerned and a balance among them, may sometimes in practice prove inequitable. We then have two alternatives. Either we decide to create optional forms of jurisdiction for the plaintiff – which would risk tipping the balance rather too far on his side,¹⁴¹ so that a theory similar to *forum non conveniens* would have to be introduced to mitigate this drawback in appropriate cases – or the plaintiff could be denied any optional jurisdiction, the traditional jurisdiction at the habitual residence of the defendant being retained, with perhaps a larger number of special rules.

117 If experts opt for the former alternative, they must be especially vigilant when framing the provisions for adoption. Experience has shown that rules such as Article 5.1 or 5.3 of the Brussels and Lugano Conventions are difficult to use, and often result in unsatisfactory outcomes.¹⁴²

B) *Jurisdiction in contract*

118 If it is decided to include a special jurisdiction rule for contracts,¹⁴³ we should not take the text of Article 5.1 of the Brussels Convention as a model.¹⁴⁴ It seems reasonable to propose that the court

¹³⁸ Article 6: "Every court other than the chosen court or courts shall decline jurisdiction except – ... (4) for the purpose of provisional or protective measures."

¹³⁹ See *supra*, Nos 92 *et seq.*

¹⁴⁰ See the developments *supra*, Nos 67 *et seq.*

¹⁴¹ This is the case, obviously, with the Brussels and Lugano Conventions which, especially with the interpretations given by the Court of Justice of the European Communities, give the plaintiff a broad range of options; they offer a bonus for speed and encourage a "race to court".

¹⁴² As regards Article 5.1, the criticisms are too numerous to mention here. As for Article 5.3, the many judgments of the Court of Justice of the European Communities, which have never repeated the solution used in the first one (*Bier B.V. c Mines de Potasse d'Alsace* (1976) Rec. p. 1735) show that the rule is not really satisfactory. The Working Group recognised this, also concluding that Article 10.4 of the 1971 Hague Convention was too restrictive; *Proceedings of the Seventeenth Session*, Tome I, p. 259.

¹⁴³ Neither the Working Group nor the Special Commission of June 1994 reached any conclusion on including a special jurisdictional rule: *cf. Proceedings of the Seventeenth Session*, Tome I, p. 261 and doc. cit. *supra* note 33, p. 19, No 23. The Special Commission of June 1996 did not discuss this question.

¹⁴⁴ This view was expressed by the Working Group, at least with regard to the different jurisdiction depending on the various contractual obligations, *Proceedings of the Seventeenth Session*, Tome I, p. 261.

appointed should have jurisdiction to resolve all disputes arising from a contract, including issues of validity and interpretation, bearing in mind that one of the objectives of the future Convention should be to concentrate litigation in the place of a single appropriate forum, rather than letting it be split up according to the particular contractual obligations concerned.

119 What court should be given jurisdiction under the Convention? *A priori*, the court of the place where the contract is performed seems the most appropriate, since it is at the place of performance that the contract has its centre of gravity, its place in the legal and economic order of the country. It will also, most probably, be the locus of interaction of the various parties to the contract, since at least one of them is likely to be present on the territory where the contract is performed. Choosing the place of performance has numerous advantages, but it also presents certain drawbacks. For instance, in a complex contract, there will be several places of performance, according to the various contractual obligations. One possibility would then be to say that the place of performance, as referred to in the Convention, is the place of the "characteristic obligation" of the contract. However, this concept of a characteristic obligation is often arbitrary, and does not necessarily represent the economic reality of the contract. Moreover, some legal systems, especially common law ones, do not have the notion of a "characteristic performance", and admittedly, this is often more of a legal fiction than a concrete reality. If such an approach were adopted, the Convention would also have to decide whether the choice by the parties of a place of performance of a specific obligation, or of the contract as a whole, can influence the rule of jurisdiction even though the clause whereby the choice has been made of a place of performance does not comply with the conditions of validity required for the choice of forum clause.¹⁴⁵

120 In view of these difficulties which may not be possible to overcome, the Special Commission may perhaps adopt a minimalist provision applying only to certain types of contracts and would prefer an enforcement situs easily defined in practice: 1) the effective delivery locus of the thing or the property ; 2) the place of performance of the service. This provision could avoid any debate on the characteristic obligation or on the characterisation of the contract. When the contract at stake does not permit the use of the rule, jurisdiction would be defined by the subsidiary rule which is always available.¹⁴⁶

C) *Jurisdiction in tort*¹⁴⁷

121 It would not be sensible, in this regard, to take as a model Article 5.3 of the Brussels Convention: seemingly, it offers a simple and practical rule, but in reality, it cannot work properly in complex proceedings, as shown by the very first decision rendered by the European Court of Justice interpreting this provision. It makes too much room for concurrent jurisdiction, and cannot therefore be satisfactory; indeed until now, the Court has always declined to repeat this solution, while not rejecting it out of hand.¹⁴⁸

122 If it is decided to include a ground of jurisdiction for tort, it would probably be best to draft a detailed clause listing all the major categories of disputes known to occur in this field.¹⁴⁹ If the dispute involves only two parties, a victim and a perpetrator, it could be decided to give jurisdiction to the court of the victim's domicile, provided this was foreseeable from the defendant's point of view. On the other hand, if the perpetrator was unable to foresee this jurisdiction (if he did not know the

¹⁴⁵ The ECJ, in a decision of 20 February 1997 (case C-106/96 *Mainschiffahrts-Genossenschaft EG (MSG) v. Les Gravières Rhénanes SARL*) decided that a contractual clause of this nature, exclusively geared towards the definition of the situs of the forum, is not valid if it does not conform to the conditions of validity provided for in Article 17 of the Brussels Convention.

¹⁴⁶ See *infra* No 133.

¹⁴⁷ The Special Commission in June 1994 concluded that the *forum delicti commissi* is admissible only if the situation is one within a single State. But it reserved entirely the question of the ground of jurisdiction which should be chosen for torts committed at a distance, *cf. doc. cit. supra* note 33, p. 17, No 17.

¹⁴⁸ *Bier c. Mines de Potasse d'Alsace*, 30 November 1976, case 21/76, Rec. 1735. We note that the Court has already had to give a ruling, on six occasions, on the wording of Article 5.3, and it is still seised with other prejudicial questions.

¹⁴⁹ Much work has been done by the committee on international civil and commercial procedure of the International Law Association, resulting in a publication: C. McLachlan and P. Nygh (eds.) *Transnational Tort Litigation – Jurisdictional Principles*, Clarendon Press, Oxford 1996, 245 p.

habitual residence of the victim, as will be the case if the victim travelled to the territory where the accident occurred), one may ask whether it would be better to opt for the jurisdiction of the place where the harmful event occurred. A provision of this kind would make it possible to solve the tricky question of damage caused on one side of a border, whereas the causal fact took place on the other side. Indeed, in all cases of pollution the defendant, the author of the pollution, can be presumed to know that his polluting act could affect victims habitually residing beyond the border separating him from them. The same will apply to acts of defamation via the press, television or the Internet, and acts of unfair competition on several different markets. The real difficulty with rules of this kind is the actual definition and proof of the notion of predictability and knowledge.

D) *Jurisdiction in matters concerning branches*

123 A rule could be accepted known as "*gares principales*", whereby the plaintiff can bring a "parent company" defendant before the court of the place of establishment, of the branch or other centre of activity, as long as the dispute arose from the activities of that establishment, branch or centre.¹⁵⁰ Caution will probably be needed in defining what is meant by a "branch, establishment or centre of activity", and perhaps it will be necessary to decide whether it is advisable to exclude all activities undertaken in the form of a separate legal person (subsidiary), on condition this separate legal person is not purely fictitious, *i.e.*, a "front" intended to protect the real defendant, who is solvent, from being sued.¹⁵¹ Likewise, we should ask ourselves whether the mere presence of an agent in charge of the commercialisation of a foreign company's products would suffice to sue the latter before the court of the country where the agent is located.

E) *Jurisdiction in matters of trusts*

124 It is probably necessary to provide a special jurisdictional rule for trust cases, as the Working Group and the Special Commission in June 1994 admitted,¹⁵² without however reaching any conclusion on the content of the rule. In devising it, account will be taken of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, which emphasises the voluntary nature of trusts. Apparently, all legal systems which recognise trusts allow a choice of court for disputes internal to the trust. Hence the new Convention should likewise include a choice of court clause. If no choice is made, jurisdiction should be given to the place of the "centre of gravity" of the trust.¹⁵³ In our view, it is possible to keep the four elements proposed in Article 7 of the Hague Convention on trusts, as a basis for determining the centre of gravity of the trust. It must also be decided which categories of trust are covered by the Convention. To ensure consistency with the 1985 Hague Convention, it would be preferable to confine the application of the rule to "trusts created voluntarily" in writing. However, this rule would have the disadvantage of excluding trusts created expressly under the law; although there are not many of these, they can engender disputes within the scope of the Convention.¹⁵⁴ Certain other questions will have to be

¹⁵⁰ Conclusions of the Special Commission of June 1994, doc. cit. *supra* note 33, p. 15, No 14.

¹⁵¹ This is a delicate issue. It is clear that the possibility, for an enterprise, of placing activities within a separate legal entity with its own legal personality must not be removed by a jurisdictional rule disregarding this legal personality, thus "lifting the veil" automatically, regardless of the circumstances. On the other hand, the very idea of a "fictitious" entity varies from one legal system to another, and is not necessarily applied in the same way in all areas (bankruptcy, civil liability, maritime transport, to mention only three examples). Our view is that the solution could be for the Convention's rule to mention only the kinds of entity which do not have a separate legal personality, leaving it to the national law of each Contracting State to extend if it so wishes the jurisdictional rule to cases where the separate legal entity is fictitious, since this is not a unified concept. This solution should be explained in the Explanatory Report, giving examples from the case law in which entities have been found to be fictitious, as a guide for practitioners. For this purpose, experts to the Special Commission in June 1997 are invited to send the Permanent Bureau a note in reply to the questions put in Annex IV to this Report. When these replies have been received, an analytical summary will be drawn up by the Permanent Bureau and sent to all participants.

¹⁵² *Proceedings of the Seventeenth Session*, Tome I, p. 261, and Conclusions of the Special Commission of June 1994, doc. cit. *supra* note 33, p. 17, No 16.

¹⁵³ The expression "centre of gravity" seems to us to be more accurate than the term "domicile" appearing in Article 5 of the Brussels and Lugano Conventions. The Schlosser Report (*OJEC* c 59 of 5.3.79, p. 71 *et seq.*) contains some enlightening comments on the English theory of this concept.

¹⁵⁴ For an explanation of the reasons for the wording in the Brussels Convention, see Schlosser Report, *OJEC* c 59 of 5.3.79, pp. 71-105 *et seq.*

clarified, such as the exclusive or non-exclusive character of the jurisdiction¹⁵⁵ and the possibility of exclusive jurisdiction coming into play for property matters where the dispute relates to an immovable constituted as a trust.

F) Related actions

125 The question of related actions must also be studied. A jurisdictional rule based on this concept could be useful, not to say essential, in a Convention such as the one now under preparation. Related actions must be defined; the relationship may be based on identical facts and/or identical law in proceedings which have been or may be instituted. However, it may be asked whether jurisdiction based on related causes of action has to be autonomous, or whether it should be included as one of the factors to be taken into consideration by the court when examining the possibility of a *forum non conveniens*. We feel, however, that the characteristics of the theory of *forum non conveniens* are such that an independent rule on related actions may still be necessary, even if the Convention contains a rule on the *forum non conveniens*.¹⁵⁶

G) Provisional and protective measures

126 As for rules of jurisdiction concerning provisional and protective measures, we think these are essential, especially in the international arena, bearing in mind the complexity of cases and the increased facility for persons (especially legal persons) to distribute their assets, in countries which are difficult of access as well, either because of special legal rules or because of a banking system which continues to favor secrecy. In this regard, it will be helpful to consider the ILA Resolution adopted by the Sixty-seventh Conference held at Helsinki, on a proposal by the Committee on international civil and commercial procedure, concerning provisional and interim measures in private international litigation.¹⁵⁷ Some of these principles may be unfamiliar to legal systems in the Roman law tradition, but on the whole they strike a fair balance between the respective interests of the plaintiff and the defendant, and they offer a definition of provisional and interim measures which is very useful for the purposes of the Special Commission.

H) Jurisdiction in matters regarding maintenance (support) obligations

127 If the experts decide that the future Convention is to deal with maintenance obligations,¹⁵⁸ the question will then arise of defining the maintenance creditor, and especially the notion of a spouse (should this be confined to married or formerly married couples, or should it be extended to other relationships?). It will also be necessary to enquire whether a creditor can include relatives in the direct or collateral line of descent.

128 As for the jurisdictional rule which might be adopted, it will necessitate an in-depth discussion of advantages and inconveniences resulting from adopting the habitual residence of the maintenance creditor as the main forum as discussed above.¹⁵⁹

I) Jurisdiction in competition

129 If the Special Commission decides to include a special clause on actions in competition, it will have the choice of providing jurisdiction, not only in the traditional sense for the court of the defendant's habitual residence,¹⁶⁰ but also for the court of the place where the act of unfair competition occurred, of the place where the victim suffered damage, or of the place where the effects of the act of unfair competition are felt. A study of comparative law shows that, in varying degrees, the different legal systems allow for any of

¹⁵⁵ The Working Group thought jurisdiction in trust cases could be exclusive, *cf. Proceedings of the Seventeenth Session*, Tome I, p. 261.

¹⁵⁶ See "Note on the question of '*forum non conveniens*' in the perspective of a double convention on judicial jurisdiction and the enforcement of decisions" prepared by the Permanent Bureau, Prel. Doc. No 3, April 1996.

¹⁵⁷ The principles in this Resolution are reproduced in Annex I to this Report.

¹⁵⁸ *Cf. discussion supra Nos 34 et seq.*

¹⁵⁹ *Cf. supra Nos 34 et seq.*

¹⁶⁰ *Cf. infra No 133.*

these jurisdictions to be used alternately. Most of the time, when jurisdiction is given to the court of the place where the victim suffers damage, or of the place where the effects of the act of unfair competition are felt, this jurisdiction is limited to actions for damage suffered at this place, because of the strict territorial extent of the act of competition. If the victim wants the whole of the damage compensated, he will have to apply to as many courts as there are places where damage has occurred.

130 If we seek to use a jurisdictional criterion based on an economic analysis of competition law cases, the starting point has to be that competition can only exist where there is a market. But the market exists only if both parties to the action are present in it, either through an establishment, a branch or a subsidiary, or because their products or services are already being offered to customers there. If this premise is accepted, the most appropriate forum, both for compensating damage suffered by the victim and making restraining orders, is the court situated on the territory of the market where both parties are present (in the economic sense of the term), where the act of competition was carried out or where the local rules of competition law or unfair competition have been breached. This forum has many advantages: 1) it is predictable both for the plaintiff and for the defendant, who are economically active in the market concerned; 2) the plaintiff and the defendant must have anticipated the risks inherent in the law applicable to the place where the act of competition took place; 3) the forum situated close to the facts is the best placed to appraise the impact on the market and on the victim of the acts of which the defendant is accused, and can easily find evidence on which to base its decision; 4) this forum can also, since the defendant is present, order him to suspend the activity in question; 5) damages can be assessed comprehensively, as the economic calculation will be made on the basis of the local market, and extrapolated to the other markets according to the market share held by the plaintiff and the defendant, and the potential harm suffered by the plaintiff in the light of its market share.

131 Introducing this criterion does not completely dispose of the possibility that several markets may be affected at the same time, on which the plaintiff and the defendant are present in equal measure. In that case, the plaintiff could be allowed the choice of suing in either of the markets concerned. It would be for the chosen court to apply by distribution the laws of the various markets concerned, in order to ascertain that the contested act is indeed a breach of competition rules in each of the markets concerned.

132 Finally, if the proposed criterion cannot be applied because the plaintiff is not yet present in the market, but had simply intended to sell a product on it in future (which would be the case with a counterfeit product not yet marketed), the victim could always sue at the place of the defendant's habitual residence (natural person) or at the place of the principal place of business or head office of the defendant (legal person).

J) Jurisdiction of the defendant's habitual residence

133 Some readers will probably be surprised that we accord such belated recognition to the jurisdiction of the court of the defendant's habitual residence. There are several reasons for this: 1) this jurisdiction is unquestionable, and unquestioned even if common law systems do not have this jurisdiction as such but do not reject it as an indirect jurisdiction, because it is considered reasonable; 2) it is a "general" jurisdiction, in the sense that all actions, of whatever kind and without limit, can be brought before this court; 3) in practice, it is a residual jurisdiction, as the plaintiff will always hesitate to take up the legal cudgels on the defendant's grounds. The place to be assigned to it in the future Convention should not involve significant legal or practical consequences. In this sense, it is a didactic approach.

K) Other jurisdiction under domestic law

134 Depending on whether it is decided to make the new Convention a strict double Convention or a mixed Convention, this heading will be either irrelevant or necessary. If there is a strict double Convention, Contracting States will no longer be able to authorise their courts to exercise jurisdiction otherwise than as provided by the Convention. On the other hand, if it is to be a mixed Convention, it will be necessary to include a provision to govern the freedom of the courts. There will of course be an impact on judgments rendered under these forms of jurisdiction.

SECTION 3 – EXORBITANT AND EXCLUDED BASES OF JURISDICTION¹⁶¹

135 For the Convention to be both attractive and useful to litigants, it must include a list of exorbitant forms of jurisdiction the use of which is prohibited under the Convention. Indeed, if we have a double Convention, this list exists only for pedagogical reasons. It is then a narrative norm since all jurisdictional grounds not authorised by the Convention are automatically excluded. On the contrary, if we have a mixed Convention, the list of excluded jurisdictional grounds is essential and truly normative.

§ 1 – METHODOLOGY

136 In compiling this list, some guidance might be found in the method adopted by the Brussels and Lugano Conventions. This method is a two-stage one: 1) each State represented at the Diplomatic Session which adopts the text of the Convention will declare which forms of exorbitant jurisdiction in its national rules it intends to discard for the purpose of the Convention. At an early stage during the negotiations preceding the Diplomatic Session, States will be invited to make known the list of grounds of jurisdiction which they wish to have included in this Convention clause. This list will be particularly necessary for all States whose position on this question is not yet known, unlike the States Parties to the Brussels and Lugano Conventions, whose lists are already familiar. It seems evident that the more accurate and complete the list is, the more attractive the Convention will be for litigants. However, by contrast with the Brussels and Lugano Conventions, the list would be drawn up in abstract terms, not expressly quoting national rules; 2) the list must not be regarded as an exhaustive and closed affair. Hence the text of the clause comprising the list must include the phrase "for instance", thus enabling all litigants, when facing what they regard as an exorbitant form of jurisdiction when the Convention falls to be implemented, to seek to have it recognised by the court as such. The question then arising is whether the Convention should include a general definition of what is to be understood as an exorbitant form of jurisdiction, in order to provide some guidance for a court facing such a request from a litigant.

137 Another method, which does not necessarily exclude the first, would consist of offering a general definition, supplemented by examples of exorbitant forms of jurisdiction. It would then be for each party to raise the issue of the exorbitant nature of the jurisdiction relied on against him, on a case-by-case basis, and for the court in making its decision to draw upon the examples given in the Convention in order to determine whether a provision in its law actually matches what is set out in the Convention. This latter system has the advantage that it does not compel States to proceed by means of declarations, a procedure which might well deter some of them from acceding to the Convention. However, it has one major drawback, namely that the outcome of the issue is less certain for the litigant, and that international proceedings will absorb more time and effort.

§ 2 – DEFINITION OF THE CONCEPT OF "EXORBITANT JURISDICTION"

138 We venture to suggest here one possible definition of exorbitant jurisdiction: jurisdiction is exorbitant when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute.

§ 3 – EXAMPLES OF EXORBITANT GROUNDS OF JURISDICTION¹⁶²

¹⁶¹ The list of exorbitant grounds of jurisdiction might conceivably appear only in the part of the Convention dealing with the effects of foreign judgments, thus being prepared only for the court addressed (*cf.* suggestion by the Permanent Bureau, Prel. Doc. No 1, May 1994 for the Special Commission of June 1994). However, we think it is preferable to place it in the first part of the Convention, dealing with direct international jurisdiction; as we have said above, this would increase the degree of predictability for the litigant, who must know, as soon as he starts proceedings on the merits in the country of origin, whether or not he is before a competent court, thus enabling him from the start to avoid seising a court which does not have international jurisdiction.

¹⁶² The Permanent Bureau of the Hague Conference (Prel. Doc. No 17 of May 1992) has already explained that there is a list of exorbitant grounds of jurisdiction in Article 4 of the Additional Protocol to the 1971 Hague Convention, and that this list carries international authority as a codification of the reasons for jurisdiction which are not acceptable internationally. This was used as a basis for the work of the Working Group, which is discussed below.

139 By summarising the conclusions of the Working Group and the Special Commission of June 1994, we can compile a list of the following grounds of jurisdiction:¹⁶³

- the mere presence of property belonging to the defendant to justify general jurisdiction, but no agreement has been reached as to which actions can be authorised by way of exception (e.g. Art. 4 a of the Additional Protocol to the 1971 Hague Convention);
- the nationality of one of the parties;
- the domicile/habitual residence of the plaintiff, except in the cases specified in the Convention;
- "doing business" or "*entreprendre des activités commerciales*" as a general ground of jurisdiction (e.g. Art. 4 d of the Additional Protocol to the 1971 Hague Convention), although there has been no consensus on this point;
- the service of a writ, a summons or other document instituting proceedings during a temporary stay by the defendant (Art. 4 e of the Additional Protocol to the 1971 Hague Convention), although no agreement has been found on exceptions under this heading;¹⁶⁴
- unilateral designation of the court by the plaintiff (for example, on an invoice), without any consent by the defendant;

140 The following grounds of jurisdiction could be added to this list:

- the mere presence of a product manufactured by the defendant which has caused damage on another territory, although he could not anticipate that this product would be found on this particular territory;
- the rendering of a provisional or protective measure in order to adjudicate on the merits;
- the enforcement or registration of a judgment in order to adjudicate on additional or supplementary claims.

SECTION 4 – COMPLEX JURISDICTION

141 One must ponder the value and the feasibility of including, in a worldwide Convention, provisions on a plurality of defendants, counterclaims, or warranty proceedings or applications to intervene. The Working Group concluded that these provisions are "incompatible" in the expanded framework of the future Convention¹⁶⁵ although the Special Commission of June 1994 contemplated them, with some experts arguing, however, that these grounds of jurisdiction could create problems at the worldwide level.¹⁶⁶

§ 1 – PLURALITY OF DEFENDANTS

142 If we pursue in the line of thought followed since the beginning of this Report, *i.e.*, that the Convention must facilitate the sound administration of justice, a clause could be included concerning a plurality of defendants. But we readily admit that this form of jurisdiction poses special problems when implemented at a worldwide level, because of the increased distance existing between potential defendants and the competent court. This is why certain conditions could be set for this form of jurisdiction: 1) It could be operated only if claims against multiple defendants are based on the same subject-matter and, to avoid the notion of "cause" peculiar to some legal systems, if it arises from the same facts. The court would therefore be required to make a very concrete appraisal. 2) The forum of the plurality of defendants could be limited to the habitual residence of one of them, thus excluding all specific fora. However, such an exclusion would perhaps run counter to the idea of protecting the categories of litigants for whom protective rules of jurisdiction have been devised. One may therefore consider the desirability of making room for a plurality of

¹⁶³ *Proceedings of the Seventeenth Session*, Tome I, p. 261, and doc. cit. *supra* note 33, pp. 19 and 21, Nos 24-30 inclusive.

¹⁶⁴ As we know, the Supreme Court of the United States revived this form of jurisdiction in the case of *Burnham v. Superior Court* 110 S. Ct. 2105 (1990), but this is a purely domestic case. However, some writers (*cf.* for instance, G. Born, *International Civil Litigation in United States Courts*, 3rd ed. pp. 76 and 77) seem to think that following *Burnham*, personal jurisdiction based on the service of the writ would be regarded as admissible even in an international context, but the decisions of courts on the merits such as they are known at present all concern exceptional circumstances.

¹⁶⁵ *Proceedings of the Seventeenth Session*, Tome I, p. 259.

¹⁶⁶ *Cf.* doc. cit. *supra*, note 33, p. 17, No 18.

defendants in all the cases of jurisdiction contemplated in the Convention, including cases of exclusive jurisdiction. 3) Fraud would be reserved under the general principle proposed.¹⁶⁷ 4) A plaintiff who is linked to a defendant by a valid choice of court clause could not sue that defendant before another court, even by virtue of a plurality of defendants.¹⁶⁸ 5) In order to be permitted to sue defendants before the chosen court, the plaintiff would have to show that otherwise, the judgment obtained would remain a dead letter. 6) Finally, the plurality of defendants could be left to the discretion of the court addressed, without making it a binding rule, in which case each of the factors listed above would serve only as guidance to the court seised.

§ 2 – COUNTER-CLAIMS

143 The court seised of a principal claim must be authorised to consider any counter-claim submitted by the defendant. Here again, one must ask whether this form of jurisdiction should be accompanied by restrictive conditions. At all events, it may be felt, for example, that the only kind of counter-claim admitted should be one relating to the same facts as the principal claim, as proposed by the Special Commission in June 1994.¹⁶⁹

§ 3 – ACTION ON A WARRANTY OR GUARANTEE OR IN ANY OTHER THIRD PARTY PROCEEDINGS¹⁷⁰

144 It is in the interest of a proper administration of justice that a party should be able to take warranty or guarantee proceedings involving a third party, so that all the issues connected with the same facts can be adjudicated together. We realise, however, that this ground of jurisdiction is not admitted by all legal orders. If a decision is taken to include this ground in the future Convention, the circumstances which allow its application must be discussed and, probably, defined.

§ 4 – COMPLEX JURISDICTION AND FRAUD

145 It will probably be necessary to specify that all complex forms of jurisdiction are inapplicable when it is shown that their use by a party or a third party is the result of fraud or is intended to defraud. It would seem particularly unfortunate to reserve fraud to certain clauses only. The principle *fraus omnia corrumpit* must remain a general principle of law, transcending all the provisions of the Convention which might give rise to a situation of fraud. This is the case, notably, when a transfer of action or of contract, or a subrogation occurred only with the aim to create a link for jurisdiction which did not exist before.

§ 5 – COMPLEX JURISDICTION AND CHOICE OF COURT

146 A decision must also be taken on the hierarchy to be established between the rules of complex jurisdiction and the existence of a choice of court clause binding one of the parties to a case to a third party. Two clearly opposing interests must be taken into consideration: the interest in a proper administration of justice, which would call for complex forms of jurisdiction to be given priority over the working of the jurisdictional clause; the interest in the parties being able to predict the jurisdiction of the court, which would tend to give priority to the extended jurisdiction clause over the complex forms of jurisdiction. In favour of the former, it has to be admitted that most of the time, a third party will be involved for the very reason that the question of implementing a complex jurisdiction has arisen. But the working of a choice of court clause only concerns the parties to that clause; in no case can it be extended to third parties.

SECTION 5 – CONCURRENT JURISDICTION

147 Whatever the nature of the future Convention (double or mixed), there will always be concurrent jurisdictions, especially if a large number of special jurisdictions and some complex

¹⁶⁷ Cf. *infra*, No 145.

¹⁶⁸ Cf. *infra*, No 146.

¹⁶⁹ Cf. doc. cit. *supra* note 33, p. 17, No 18.

¹⁷⁰ This point was not mentioned by the Special Commission in June 1994.

jurisdictions are contemplated. If the Convention is a mixed Convention, the instances of concurrent jurisdiction will be even more frequent.¹⁷¹ It is therefore essential to include a clause to govern this issue¹⁷² so as to avoid a multiplicity of proceedings totally or partially repetitive, and to avoid that irreconcilable decisions be rendered.

148 One method might be to give priority to the first court seised.¹⁷³ However, as some experts pointed out during the debates in the Special Commission of June 1996, this method is not satisfactory, as it encourages the parties to a dispute to hurry to one of the competent courts, ignoring the preliminary steps of conciliation or friendly settlement solely in order to take a stance as quickly as possible on jurisdiction. Moreover, this method further emphasises the advantage of being the plaintiff in the suit.

149 A second method might be to allow the two proceedings to run their course and wait for the first judgment to be rendered so that it be pleaded as *res judicata* in the still-pending proceeding. This method presents the advantage not to oblige the judge to decide on the jurisdiction but upon the judgment. The inconvenience is to favour the "rush to the judgment" at the detriment, perhaps, of a calm dispensation of justice.

150 On the other hand, another method might be suggested, favouring dialogue between the two or more courts addressed. This dialogue should enable the judges in these courts, or their deputies, to consider together which court is best placed to adjudicate. Of course, the parties will have been asked to give their views on the question, so that the decision takes these into account. This decision should be taken within a relatively brief time, so as not to drag out the proceedings unduly. Of course, we are aware that this method is more cumbersome and awkward to operate than the simpler, automatic *a priori* method of the "court first seised". However, we are also aware that the differences among legal systems regarding the concept of "seisin" (a court being seised of a case) often give rise to difficulty in defining exactly what is meant by the "court first seised". The alternative method proposed has the merit that it does not give rise to this problem, while leaving intact the procedural rights of States Parties to the Convention.

SECTION 6 – "DOUBLE" OR "MIXED" CONVENTION?

151 As indicated above,¹⁷⁴ the Working Group expressed a preference for the future Convention being a mixed Convention, *i.e.*, including at the same time permitted grounds of jurisdiction which would facilitate recognition and enforcement of the judgment by virtue of the Convention; a list of exorbitant and prohibited grounds of jurisdiction which would result in non-recognition or enforcement under the Convention; finally, the possibility for the court of origin to accept jurisdiction under other rules of its national law not included in the treaty's list of authorised forms of jurisdiction; this, from the viewpoint of the recognition and enforcement of the judgment, would leave the court addressed free to give or refuse to give effect to this judgment.

152 When this point was discussed during the Special Commission of June 1994, a relatively large number of experts expressed their preference for negotiating *a priori* a double Convention which would allow for the attempt to achieve the most ambitious objective, *i.e.*, abolishing the largest possible number of exorbitant forms of jurisdiction, and specifying in as many cases as possible which kinds of jurisdiction are authorised under the Convention, so as to clarify in as many instances as possible the international jurisdiction of the courts.

153 These same experts were afraid that were negotiations for the future Convention to start with the idea

¹⁷¹ Cf. Prel. Doc. No 17 of May 1992, No 15, *Proceedings of the Seventeenth Session*, Tome I, p. 235.

¹⁷² Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 261; from the Special Commission of June 1994, doc. cit. *supra* note 33, p. 21, No 31, and the Special Commission of June 1996, doc. cit. *supra* note 38, p. 13, No 11.

¹⁷³ This is done in the Brussels and Lugano Conventions, in Article 21 with all the difficulties inherent to the definition of the notion of the "seisin" of the court.

¹⁷⁴ *Supra*, No 18.

that it would be a "mixed" Convention, there might be too little desire to compromise on the part of some delegations when it came to the overall objective of the negotiations.

154 This is why the Conclusions of the Special Commission of 1994 showed a clear tendency to reject the possibility of negotiating a mixed Convention, calling instead for a strict double Convention.¹⁷⁵

155 This question was not tackled afresh as such during the discussions in the Special Commission in June 1996.

156 In the context of the start of negotiations based on the work of the Special Commission due to meet in June 1997, it is important to spell out that the maximum goal (a strict double Convention) could continue to underlie the programme of work, in order not to sap the will for compromise on the part of delegations, and to secure at the outcome of the negotiations the adoption of a text which will give litigants the greatest possible degree of predictability.

CHAPTER III – EFFECTS OF FOREIGN DECISIONS¹⁷⁶

157 The effects to be given on the territory of one State to a decision rendered by a court in another State will probably have to be treated differently, depending on whether the context is that of a strict double Convention or a mixed Convention. After commenting briefly on the concept of a "decision" (section 1), we now turn to the extent of the effects to be given to the foreign judgment (section 2), ending with the verification of the judgment by the court addressed (section 3) and some procedural issues (section 4).

SECTION 1 – GENERALITIES

§ 1 – CONSEQUENCES OF A STRICT DOUBLE OR MIXED CONVENTION

158 If it is decided, in the first part of the Convention to leave States Parties some room for manoeuvre in applying rules of jurisdiction other than those contemplated in the Convention, the resulting judgments should not enjoy the benefit of the conditions of recognition and enforcement set out in the Convention. States should know that if they let their courts use forms of jurisdiction not covered in the Convention, even though these are not prohibited, they run the risk that these judgments may continue to follow an ordinary law procedure in third States, including States which are also parties to the future Convention.

159 On the other hand, if it is decided that the Convention is to be a strict double instrument, all judgments from States Parties to the Convention must enjoy the benefit of the provisions in Chapter II of the Convention concerning the effects of foreign judgments, provided they have not used one of the prohibited forms of jurisdiction.

§ 2 – DEFINITION OF THE CONCEPT OF "FOREIGN DECISION"

160 The future Convention should include a definition of the concept of a "foreign decision". On the other hand, the question remains whether this should cover authentic instruments (as defined in Article 50 of the Brussels and Lugano Conventions). The Working Group took the view that this question ought to be studied in the context of the future Convention.¹⁷⁷ However, there was no mention of judicial settlements, which also deserve attention and could usefully be included.

A) Foreign decision

¹⁷⁵ Doc. cit. *supra*, note 33, p. 13, No 6.

¹⁷⁶ On this point, the Conclusions of the Working Group are very succinct; they do not seem to reflect the whole of the difference between the restricted framework of the Brussels and Lugano Conventions, and the Convention now in preparation. *Proceedings of the Seventeenth Session*, Tome I, p. 263. On the other hand, the Special Commission of June 1996 did a great deal of work on these questions. Its conclusions will be referred to in what follows.

¹⁷⁷ *Proceedings of the Seventeenth Session*, Tome I, p. 263.

161 It must first be explained that the decision must have been rendered in another Contracting State, thus leaving intact the internal law of each State as regards decisions from non-Contracting States. Although sometimes, in other settings,¹⁷⁸ it has been proposed that room should also be made for decisions from non-Contracting States, the interests involved in the framework of the future Convention do not seem to be such as to warrant this approach.

162 As for the concept of "decision", this is understood in the generic sense of the term, to cover all decisions, bearing on subjects covered by the Convention, which are handed down by a court of any kind,¹⁷⁹ and however the decision is called under the law of the State of origin (judgment, ruling, order, etc.). Injunctions, which often accompany decisions on the merits, should also be included, except those relating only to the jurisdiction or seisin of a foreign court, such as "*anti-suit injunctions*",¹⁸⁰ for the reasons given above.¹⁸¹ The experts should discuss the possibility to include the decisions rendered in matter of proof, which pose specific difficulties with regard to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

B) *Authentic instruments*

163 The inclusion of authentic instruments in the future Convention could be guided by the Brussels and Lugano Conventions.¹⁸²

164 In this respect, it should be noted that many States cover authentic instruments in their legal systems. The executory force of these acts may vary from one State to the next but, as with judicial decisions, we believe they should carry the same executory force as in the State of origin. To this extent, there should be no difficulty in giving effect to authentic instruments throughout the territories of the Contracting States, even on the territory of Contracting States where the practice is unfamiliar. However, for the latter, a special clause should be included to enable them not to give effect to a foreign authentic instrument if their legal system does not allow them to admit such an act, as being incompatible with their internal law. This clause would supplement the provision on acts contrary to public policy found in the Brussels and Lugano Conventions. This notion of being contrary to public policy relates, in fact, to the substance of the authentic instrument rather than to its inclusion, in a procedural sense, in the legal system of the State addressed. Moreover, the Convention should provide, as a condition for the recognition and enforcement of an authentic instrument, that it must satisfy the conditions for its authenticity in the State of origin.

165 Finally, all the provisions dealing with the issues of the burden of proof, the document to be produced on enforcement, legalisation or other formalities which may be necessary under the Convention, would be applicable *mutatis mutandis* to authentic instruments.

C) *Settlements in court*

166 As we have said in respect of authentic instruments, it seems that the clause in the Brussels and

¹⁷⁸ The debates during the Eighteenth Session showed that superior interests, such as the interest of the child, might ultimately make it necessary to recognise the decisions of non-Contracting States under the Convention. However, this solution was not admitted in the end (*cf. Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*). In any case, such overriding interests are not involved here.

¹⁷⁹ Thus a decision making an award in a civil case, but which emanates from a criminal court, must be enforced under the Convention.

¹⁸⁰ Here we note that the experts to the Special Commission in June 1996 (doc. cit. *supra* note 38, p. 25, No 40) expressed doubt about the possibility of enforcing injunctions under the Convention. It was pointed out that the *Full Faith and Credit Clause* in United States federal law does not cover decisions of this type.

¹⁸¹ *Cf. supra*, No 59.

¹⁸² For a recent example of the enforcement of such an act in the Franco-German context, one may consult the judgment of the French Cour de Cassation Civ. 1, 12 January 1994, *Rev.crit.dr.int.pr.*, 1994, p. 557, note Ch. Pamboukis.

Lugano Conventions on court settlements (Article 51) is a useful provision which would be compatible with the enlarged framework of the future Convention.

167 Many countries are familiar with court settlements although, here again, they do not all have the same executory force in all systems. For instance, in Germany and the Netherlands court settlements are automatically enforceable.¹⁸³

168 A provision exactly parallel to the one adopted for authentic acts could be included for court settlements.

SECTION 2 – SCOPE OF EFFECTS

169 Except in the United States, the question is rarely raised of the law applicable to the extent of the effects of foreign judgments. However, we think this is a very important question, which is too often concealed behind a procedural description of the issues of recognition and enforcement of judgments. It is in fact standard practice to argue that only the State addressed has the right to define the rules applicable to the recognition and enforcement of foreign judgments on its territory. This is true of the procedure, the conditions for the verification of the foreign judgment, and the list of elements to be verified. It will not necessarily be true of the extent of the effects given to foreign judgments. Thus it is said, in some legal systems, that the foreign judgment cannot have more effects in the State addressed than in the State of origin. If this rule is admitted, several consequences follow from it:

1) If the judgment is not final¹⁸⁴ in the country of origin, it could be enforced in the State addressed provided it has provisional executory force in the State of origin, and the court addressed attaches guarantees to the enforcement of the judgment so that if the judgment is invalidated abroad, a party who would have benefited unjustifiably from enforcement may, without difficulty or delay, reimburse sums paid or reverse a prior enforcement.¹⁸⁵ This rule, which is purely optional for the court addressed, would have the advantage of prohibiting a party who has lost the case in the State of origin from deliberately sheltering his assets while appealing or using another form of review intended to block a procedure for recognition and enforcement abroad.

2) The court addressed must not be authorised to supplement or amend the foreign judgment except in circumstances where the foreign court could itself intervene. Hence it will probably be impossible to admit any additional claims at the stage of proceedings in the State addressed.

3) The duration of validity of the judgment must be that applicable in the State of origin (period after which the judgment lapses).¹⁸⁶

4) The extent of the effects of *res judicata* on claims which could have been, but have not, been made abroad must be determined by the law of the State of origin.

5) Effects with regard to third parties, whether application may be made to vacate judgment or other effects of *res judicata* in respect of persons who are not parties *stricto sensu* to the foreign proceedings, but are represented in practice or by virtue of the law, must be appraised in the light of the law of the State of origin.

170 On the other hand, it must be possible to admit that the State addressed may give factual effect, title effect, probatory effect or mere recognition to elements in a foreign judgment, by virtue of its own law, even if such effects are not known abroad. Such questions do not call into question the judgment as such, but

¹⁸³ Cf. Jenard Report on the Brussels Convention, OJEC C 59 of 5 March 1979, p. 1, on p. 56.

¹⁸⁴ The notion of a "final decision" poses difficulty since it is not uniformly understood by all legal systems.

¹⁸⁵ The Special Commission of June 1994 decided instead to exclude the enforcement of non-final decisions except for maintenance obligations, if these are to be included, cf. doc. cit. *supra*, note 33, p. 23, No 35.

¹⁸⁶ In this respect, it would be very useful for the Permanent Bureau to produce an analytical document on the periods after which judgments lapse in each Member State. The assistance of delegations in this regard would be welcome.

only some of its constituent elements, certain aspects of the facts which underlie it, certain arguments which may be useful in the legal reasoning applied by a court which has to adjudicate in another case. It would be a good thing if the Convention could take a position on these issues, which are too often ignored and which can give rise to litigation or, at least, if the Explanatory Report states clearly the room for manoeuvre left to States Parties.

171 As regards the distinction to be drawn between "recognition" and "enforcement", the Convention could adopt the following principles:

1) recognition would not be granted "automatically", but should ensue from the verification of the foreign decision by the court seised of the case during which recognition is invoked;¹⁸⁷

2) if recognition is granted "automatically", it must be retroactive to the date of the judgment in the State of origin when it is granted in the State addressed. This means that the decision of recognition is only declaratory, not constitutive;

3) recognition does not therefore require any special procedure such as exequatur or registration, but does call for a form of verification, which could be less stringent than that required for enforcement;

4) enforcement normally requires a separate procedure before a special court, whatever the form taken by this procedure (exequatur, action on the judgment, registration, etc.).

SECTION 3 – VERIFICATION OF THE FOREIGN JUDGMENT

172 By way of introduction, we now turn to the question mentioned by the Special Commission in June 1996: whether there should be two separate verification systems, one applicable to judgments rendered in adversarial proceedings, the other to judgments delivered by default.¹⁸⁸ This distinction exists in the Brussels and Lugano Conventions, as verification of the former category of decisions is virtually absent. But as we will explain, the approach followed in the new Convention enables us to state that there will be verification of the decision of the State of origin, even if it has been made in adversarial proceedings. Hence it is no longer warranted to distinguish these from default decisions, except perhaps on factual grounds, as we explain below.¹⁸⁹ Moreover, as the Special Commission of June 1996 stated,¹⁹⁰ if such a distinction were adopted, there will have to be a definition of "default judgment", which is a very difficult notion to define, and may create more problems than it solves.

§ 1 – LEGAL FRAMEWORK FOR VERIFICATION

A) *Ex officio* role of the court

173 It must be asked whether the court of the State addressed must proceed with verification *ex officio*, or if it must wait for proof to be furnished by one of the parties to the case before proceeding to the verification.¹⁹¹

174 Although it may be thought that verification of the foreign judgment is absolutely necessary before giving effect to it in the State addressed, one may nevertheless question the need to impose an *ex officio* obligation on the court addressed. Here we can sense the extent to which State sovereignty is called into

¹⁸⁷ The principle of automatic recognition was mentioned by the Special Commission of June 1994, but without going into detail, *cf. doc. cit. supra*, note 33, p. 23, No 33.

¹⁸⁸ *Cf. doc. cit. supra*, note 38, p. 23, No 37.

¹⁸⁹ *Cf. infra*, No 180.

¹⁹⁰ *Ibidem*.

¹⁹¹ The allocation of the burden of proof among the parties to the case will be discussed *infra*, Nos 175 *et seq.*

question in the context of the recognition and enforcement of foreign judgments. Attitudes towards this question tend to be theoretical and academic. However, it seems mistaken to believe that enforcement on a territory other than that on which a judgment has been rendered is a challenge to State sovereignty. Most of the time, the only interests involved are private ones. Usually, the effect given to a foreign judgment on a territory will have no consequences except for the party who has lost the case abroad. Public interests are rarely in issue. This is why, except in rare cases which can well be covered by the plea of public policy, we think it is preferable to consider that pleas based on the elements of verification of the foreign judgment should be left almost entirely to the parties, without the court intervening *ex officio*.¹⁹² The only exception, as we have just said, is the verification of public policy, which must in fact be carried out *ex officio*, since otherwise this would simply deny the logic and nature of a plea of public policy.

B) Allocation of the burden of proof

175 A plaintiff who, let us suppose, has an interest in relying on the foreign decision and has probably therefore won the case abroad,¹⁹³ must be given preferential treatment when he has to begin again with proceedings because of the enforcement of the decision abroad.

176 However, from the viewpoint of the defendant, *i.e.*, the party who has lost the case abroad, it may be thought that if the foreign proceedings were "proper", he must not be able to recommence proceedings on the whole case before the court addressed. This is why minimal demands will be made of the plaintiff before the court addressed (proof of the existence of the judgment; translation, if required, into the language of the country addressed and, in the case of default proceedings abroad, proof that the defendant was properly notified, that the notice did actually reach him, that he understood that he had to defend the case abroad and was given the time necessary to prepare his defence).

177 Once this proof has been furnished by the plaintiff, the onus lies on the defendant to prove that the foreign judgment does not comply with the verification criteria set by the Convention.

§ 2 – CRITERIA FOR VERIFICATION

178 Among the criteria discussed below, there is no provision for a review of the decision as such, in its substance. Although, as far as we know, this point has not yet been dealt with directly by the Special Commissions of 1994 and 1996, we think a review of the merits of the foreign decision ought to be prohibited by the future Convention.

A) Jurisdiction of the court of origin

179 In the expanded geographical context in which we are working, it does not seem inconsistent to require a check on the jurisdictional rules used by the court of origin,¹⁹⁴ even in the context of a strict double Convention. For this purpose, the Working Group suggested that "the plaintiff might ask the court of origin to specify in its judgment the grounds upon which the court has assumed jurisdiction, or might have assumed jurisdiction".¹⁹⁵ One may indeed query the effect of the *res judicata* with respect to the jurisdiction

¹⁹² This method seems to have been accepted by the Special Commission of June 1996, at least as regards jurisdiction, *cf. doc. cit. supra* note 38, pp. 23 and 25, Nos 31 to 38.

¹⁹³ Unless his action is one for ineffectiveness, *i.e.*, an action for a declaration that the judgment is not entitled to recognition, in which case the assumption is reversed.

¹⁹⁴ Conclusions of the Working Group, *Proceedings of the Seventeenth Session*, Tome I, p. 259 and Conclusions of the Special Commission of June 1994, *doc. cit. supra*, note 33, p. 23, No 34.

¹⁹⁵ *Proceedings of the Seventeenth Session*, Tome I, p. 261, No 13. We are not persuaded such a provision would be useful. In fact, there is no procedural rule to prevent a party from "requesting" the court to act in this sense, without any guarantee that the court will agree. On the other hand, if the provision were stricter and required the court to spell this out, to add further to the task of the court in this way may run counter to some of the Convention's provisions (for

of the original court. If the defendant has not raised this question abroad, it seems reasonable that he should not be allowed to raise it at the stage of taking effect in the State addressed.¹⁹⁶ On the other hand, if the defendant has challenged abroad the jurisdiction of the court of origin and has lost abroad, he must be permitted to return to the issue before the court addressed, as it is possible that the original court wrongly held that it had jurisdiction under the Convention. Obviously, if a uniform interpretation of the Convention is achieved,¹⁹⁷ as certain experts felt to be desirable, the circumstances in which the court addressed will arrive at a different conclusion from the original court will be very rare. Nevertheless, jurisdiction, as we have already said, remains the cornerstone of a proper international administration of justice. In this light, we think it is reasonable to permit verification notwithstanding the jurisdictional rules framed in the Convention.

180 On the other hand, it does not seem difficult to admit, as the Special Commission did in June 1994,¹⁹⁸ that the findings of facts on which the original court based its jurisdiction remain unchallenged, as indeed provided by the 1971 Hague Convention except for decisions by default. This point does not seem to require further discussion following the work of the Special Commission in June 1996.¹⁹⁹

B) Law applied by the court of origin

181 Many legal systems do not know this element of verification of the foreign decision. In many respects, we think it is supererogatory. It is too akin to a review on the merits to be permissible in the context of a Convention.²⁰⁰ Even if, in fact, the outcome of the case often depends on the law applied, it may nevertheless be felt that in many cases the result will not necessarily be "unjust". Except in cases where this outcome would actually be unjust, it may be thought that the plea of substantive public policy²⁰¹ should be sufficient. One may query the verification of the law applied for incidental questions relating to subjects not covered by the Convention, as contemplated in Article 27.4 of the Brussels and Lugano Conventions. Experts may wish to consider which specific cases would result from excluding such verification; in the light of the drawbacks and advantages of the rule, in cases studied *in concreto*, the decision may be either to include or to omit a clause on this point. In any event, even if such verification is provided for, the non-recognition should not be compulsory for the court addressed.

C) Reasoning of the decision of origin

182 The requirement that judicial decisions state the grounds on which they are based differs considerably from one legal system to another. Also, the verification of the reasoning of the foreign court is too close to a review of the merits to be admissible in a Convention. Moreover, one may wonder what purpose is served by the reasoning of the foreign judgment in the context of the verification. If one considers each of the elements which might be selected for verification under the Convention, none calls for a verification in the actual reasoning of the judgment. It will therefore probably be best not to provide for such verification in the framework of the Convention.²⁰²

instance, on tacit extension of jurisdiction). Moreover, this might unnecessarily complicate the original proceedings, especially by setting off an adversarial debate on a point not raised by the parties. Finally, it may alter the nature of the rules of jurisdiction and the role of the court by compelling it to adjudicate *ex officio*.

¹⁹⁶ We assume here that the first part of the Convention will contain a rule on tacit choice of court, *cf. supra*, No 108.

¹⁹⁷ *Cf. infra*, No 200.

¹⁹⁸ Doc. cit. *supra*, note 33, p. 23, No 34.

¹⁹⁹ *Cf. doc. cit. supra*, note 38, p. 21, No 30.

²⁰⁰ The Special Commission of June 1996 achieved virtual consensus on this point, *cf. doc. cit. supra*, note 38, p. 23, No 34.

²⁰¹ *Cf. infra*, No 187.

²⁰² Some experts on the Special Commission of June 1996 said, however, that the reasoning might be needed in

D) Procedural public policy

183 The verification of the procedural public policy seems to be the cornerstone of the future Convention. What decides the justice or injustice of a court procedure is not so much the outcome of the case, as the manner in which the proceedings are held. The notification of the defendant, the time allotted to him to prepare his defence, the strict respect for the principle of an adversarial hearing, the neutrality of experts called, the possibility of furnishing proof, the neutrality of the courts, the independence of the judges;²⁰³ we think all these questions should form part of the verification by the court addressed, or at least be discussed in the Explanatory Report.

184 Indeed, we do not believe it is adequate simply to state that the proceedings must be proper and equitable. It must also be specified what this means. Views on this differ too much from one country to another for us not to make the effort to reach agreement on the key points included in the concept of equitable proceedings or due process in the common law countries, notably the United States.

185 An explanation of what is meant by "due process" or any equivalent expression, could appear not in the Convention itself, but in the Explanatory Report. The disadvantage of this solution is well known: the Explanatory Report is not as readily consulted as the text of a Convention, and courts will not necessarily all have it available. The advantage would be that this avoids overburdening the text of the Convention.

186 As regards ascertaining that the defendant has been properly notified, some experts on the Special Commission in June 1996 suggested that this could be done by a straightforward *renvoi* to the 1965 Hague Convention.²⁰⁴ This solution, a satisfactory one on the face of it for the sake of harmonising the application of the various Hague Conventions, may prove more difficult to carry out in practice, as some Contracting States to the new Convention will not be Parties to the 1965 Convention. The relevant clause in the new Convention could therefore include a *renvoi* to the 1965 Convention or to any equivalent provision known both to the State of origin and to the State in which notification took place, the latter not necessarily being the State addressed.

E) Substantive public policy

187 The possibility cannot be avoided of the court addressed raising its substantive public policy as an objection to the recognition or enforcement of a foreign judgment which conflicts with its fundamental principles and rules. However, following all the conventions on the subject, including those on the recognition of arbitral awards, it should be clearly stated that it is the effect of the foreign judgment which has to be contrary to the substantive public policy, not the judgment itself. In other words, the problem is the inclusion of obligations and rights derived from the foreign judgment in the legal system of the State addressed. The implementation in practice of this objection should therefore probably be limited to especially flagrant cases. In this regard, the traditional formula of the Hague Conventions seems appropriate for the future Convention.

F) Irreconcilable decisions

188 Most legal systems allow that the court addressed may refuse to give effect to a foreign judgment if it

some cases, but they did not give any examples; doc. cit. *supra*, note 38, p. 23, No 36.

²⁰³ The Special Commission of June 1996 discussed this question at length; its debates are summarised in No 38, p. 25 of the document cited *supra*, note 38. Although there is unanimous agreement that a judgment rendered by a partial jurisdiction subject to political control should not be given effect, it is difficult to organise verification of such an occurrence. The essential danger lies in the temptation not to study the actual proceedings, but to opt for a general appraisal of all the courts of a given country, in the light of the ups and downs of the foreign relations between the State of origin and the State addressed. Of course, the control may be carried out more rigorously and accurately when the judgment comes from one country rather than another, and this cannot be avoided. But the Convention should be drafted in such a way, so that the court is obliged to proceed on a case-by-case basis, and not through generalisations.

²⁰⁴ Doc. cit. *supra*, note 38, p. 23, No 35.

is irreconcilable with a previous judgment. This provision is usually subject to several conditions: 1) A definition of what is meant by "irreconcilable decisions". These will be two decisions providing contradictory rights and obligations for the parties to the case. The court addressed must therefore make an appraisal *in concreto*. 2) If the decision with which the foreign judgment concerned cannot be reconciled also comes from abroad, both must have successfully passed the tests for the verification of foreign judgments, either under the ordinary law of the State addressed, if the judgment comes from a non-Contracting State, or under the Convention itself if the judgment comes from a court in a State Party.

G) *Fraud*

189 It will probably be desirable to stipulate that fraud perpetrated abroad must form an obstacle to the effects of the judgment in the State addressed.²⁰⁵ However, it is important to agree on the notion of fraud as used here.

a) *Evasion of applicable law*

190 Whatever views the experts reach regarding verification of the law applied by the court of origin, we do not think evasion of the applicable law should be verified as such in the conventional provision on fraud. Either the experts will have provided for verification of the law applied by the court of origin, and evasion of the law will therefore be verified by virtue of this provision; or the experts will have abandoned the requirement for verification of the law applied by the court of origin, and it will then be impossible to revert to it through evasion of the law except, perhaps, by strictly limiting its application and the specific cases in which it is implemented.

b) *Fraud in the proceedings or in obtaining the judgment*

191 Here the question is how to sanction a fraud perpetrated abroad, without which the judgment could not have been obtained. For example, this is the case when the plaintiff argues before the original court that he/she does not know the address of the defendant or that the defendant has no known domicile, thus preventing the defendant from being notified and being represented in the foreign proceedings. The judgment which ensues is generally a default judgment, or sometimes, a judgment "deemed to follow adversarial proceedings". It is possible for such a fraud to be verified through procedural public policy, but it is so serious for it not to have its own form of control. There may also be another kind of fraud in the judgment, the submission of false evidence to the foreign court. Here, of course, the only sanctions available will be those in which the false character of the evidence submitted abroad emerges *a posteriori*, *i.e.*, when the foreign judgment is presented to the court addressed. In this case, the court addressed must be able to refuse to give effect to this judgment. The onus of proving the false character of the evidence used abroad obviously lies on the party making this claim.

H) *Judgments awarding excessive damages*

192 The difficulties associated with any enforcement of judgments awarding punitive damages or damages regarded as "excessive" preoccupied the two Special Commissions of June 1994 and June 1996. The question was discussed in detail during the debates in the Special Commission of 1996. The United States delegation, which is much concerned with judgments of this type since many of them come from its courts, in view of the procedural and judicial features peculiar to its system, which do not require further comment, showed that the most recent case law, especially that of the Supreme Court, should in future reduce considerably the risks of such judgments being delivered.

193 However, a significant number of experts preferred not to take this optimistic view, and suggested that the future Convention should include one or more specific clauses on this subject.²⁰⁶

194 With a view to exploring possible solutions, a distinction must be drawn among the three categories of cases which were explained, to general satisfaction, by the experts of the Special Commission in June

²⁰⁵ Cf. doc. cit. *supra*, note 33, p. 23, No 36.

²⁰⁶ Conclusions of the Special Commission of June 1996, doc. cit. *supra*, note 38, p. 19, No 27.

1996.²⁰⁷

1) Judgments awarding punitive damages are typically not compensation awards. It would be possible simply to exclude these judgments from the scope of the Convention since, in essence, they are more akin to judgments ordering fines, despite the difference that a fine is paid to the State whereas punitive damages are payable to the winning party in the case. Often, this total exclusion of judgments awarding punitive damages will be difficult to operate, as these judgments may include other awards which may not involve the same difficulties as the part of the judgment which awards the punitive damages. It would then be enough for the Convention to permit the court addressed, in this case and by way of exception, to grant enforcement of the foreign judgment only in part. This would be a solution close to the one admitted for conflicts with public policy; this solution, where the various heads of the judgment can be separated, enables enforcement to be avoided of one or more which are contrary to substantive public policy, while allowing the other heads of the judgment to be enforced on the territory of the State addressed.

2) The second category includes judgments awarding multiple damages (for example in anti-trust cases in the United States). These multiple damages are calculated on the basis of a multiplier coefficient in relation to the initial award of damages in compensation made to the other party to the suit. It should be noted that, like the punitive damages in the first category, multiple damages are not compensatory in nature, but are intended to prevent future conduct by the losing party. The solution of partial enforcement proposed for the first category can be applied even more readily in the case of multiple damages since, in general, the amount of the basic damages to which the multiplier coefficient is applied is known. It will then be sufficient for the court addressed to consent to enforcement only for the basic portion of the damages.

3) As for all other judgments awarding damages regarded as "excessive", the solution proposed above is not directly applicable, since these damages are by nature compensatory, but are regarded as excessive only by the court addressed or by courts other than the one which awarded them. If the Convention were to provide a special rule for these decisions, it would first have to be spelt out what is meant by "excessive damages". We think it is important not to leave the court addressed entirely free to define the concept, for itself and according to its own

criteria. One possible definition would be to say that for the purposes of the court addressed, excessive damages are those which have nothing in common with the risks generally assessed by local insurance companies to calculate insurance premia when the judgment is on a subject falling within a domain covered by insurance, or if the enforcement of the damages would involve collective proceedings for the party who has to enforce them, such as insolvency or a similar proceedings.²⁰⁸ For these judgments, the Special Commission of June 1996 also emphasised the value of contemplating inclusion of a clause similar to the one proposed in Article 8A of the draft bilateral treaty between the United Kingdom and the United States.²⁰⁹

SECTION 4 – PROCEDURE

195 In the context of a worldwide Convention, whether double or mixed, it seems difficult to specify a simplified procedure²¹⁰ for the enforcement of decisions. However, some principles could be laid down. If the effect to be given to the foreign judgment is not forced execution but some other effect (factual, title, proof, recognition), jurisdiction for this purpose must be given to the court adjudicating on the case during which the question of the effect of the foreign judgment arises. On the other hand, if the effect sought is forced execution, a specially appointed court must be given jurisdiction to order either *exequatur* in the

²⁰⁷ Doc. cit. *supra* note 38, p. 19, No 23.

²⁰⁸ Obviously, it is debatable whether it is indeed excessive to induce bankruptcy of a person by reason of a judgment or whether this is the normal event in the course of business.

²⁰⁹ Annex V to this Report contains the pertinent extract of that text.

²¹⁰ The Conclusions of the Special Commission of June 1994 refer to an "expedited" procedure; *cf.* doc. cit. *supra*, note 33, p. 25 No 38.

countries which have this procedure, or action on the judgment, or registration in the others. It would be desirable for the Convention to designate by name the court having jurisdiction in each Contracting State. This could be done in the form of a declaration at the time of signing or ratifying the Convention. This declaration could also contain the kinds of remedies available in the State, and the courts competent to adjudicate on them.²¹¹

196 It has been suggested that the Convention should state the maximum period within which the enforcement procedure should take place. We are admittedly alive to this argument, which would prevent overlong enforcement procedures often voiding the interest of this procedure. The "didactic" nature of such a provision should not be ignored either. However, if it is too severe the Convention may miss its goal, by discouraging States from ratifying it.

197 It is quite possible for this procedure to be unilateral initially. The court would then have an obligation to verify *ex officio* the existence of the judgment, the jurisdiction of the foreign court and the absence of any conflict with procedural public policy. Of course, this *ex officio* verification might be confined to checking for "manifestly contrary" elements.

198 Provision should also be made for actions for a declaration that the judgment is not entitled to recognition, *i.e.*, actions brought by the party who has lost the case abroad, or a third party. Such an action enables them not to leave in suspense a legal situation which may be prejudicial to them, and to seek to block the effects of the judgment. This action, which procedurally is the reverse of an *exequatur*, follows the same criteria for verification as the latter. This is a very useful action which should not be excluded from the Convention. However, where countries have no such procedure, it would be difficult to ask them to introduce it solely in order to implement the Convention. The clause in the Convention could simply provide that an action for ineffectiveness is possible as long as it is available in the law of the State addressed. It must then be decided what will be the fate of a decision on such an action in the other Convention countries. There are two possible approaches: 1) it could be considered that the decision is to be valid only in the country where it was made; 2) it could be decided to recognise it in the other countries Parties to the Convention. The advantages and drawbacks of both alternatives are well known. In the former case, the foreign judgment can continue to have effect in all Convention countries, except in those where it has been declared inoperative. In the second case, the results will be more uniform but the chief drawback is that the party who has acted more swiftly and has obtained a decision on ineffectiveness in one country (which might have no connection with the case or with the parties) would then prevent the judgment from having any effect in all the other countries. We think that only the former solution is conducive to harmony in private international relations.

199 It would be very useful for the Convention to specify remedies against *exequatur* decisions or decisions rendered on the judgment, or registration measures. The Convention could include a list of courts in which such applications can be heard. This list would be updated as States Parties made their declarations. As for the *exequatur* procedure itself, the remedy procedures could also be subject to a time limit known to all. However, it has to be recognised that all this would considerably burden the text of the Convention. Consideration might therefore be given to producing, when the Convention is completed, a practical detailed handbook on the *exequatur* procedures in the various Contracting States. The value of such a handbook would only be obvious if it is widely circulated through international bar associations and perhaps through professional and consumer organisations.

CHAPTER IV – INTERPRETATION OF THE CONVENTION AND REVIEW OF OPERATION

SECTION 1 – UNIFORM INTERPRETATION

²¹¹ Doc. cit. *supra*, note 33, p. 25, No 39.

200 A uniform interpretation of the Convention may be thought desirable.²¹² To that effect, a large array of options exists ranging from the simple systematic collection of decisions of the States Parties and their distribution, to the preparation of opinions or general advisory interpretations or the organisation of an international court assigned the task of giving binding interpretations. Of course, States Parties will not have available to them a court such as the European Court of Justice for the Brussels Convention of 27 September 1968.²¹³ However, it might be possible to set up *ad hoc* interpretative panels, to deal with issues encountered in practice as they arise. This would work as follows:

- 1) Each State ratifying the Convention would appoint two experts, thoroughly versed in both the theoretical and the practical aspects of international jurisdiction and the enforcement of judgments, as well as, more generally, in civil and commercial proceedings, to join a list of experts held by the Permanent Bureau of the Hague Conference, if an interpretative panel is necessary to meet.
- 2) When a court in a State Party to the Convention encountered a problem of interpretation, it would address the question to the Permanent Bureau.
- 3) Within a relatively short period, to be decided, the Permanent Bureau and/or the parties would be responsible for setting up an interpretative panel of three experts.
- 4) The constitution of the panel would follow predetermined rules (for instance, it should be decided in advance whether an expert appointed by the country of the court which has put the question for interpretation could join the panel, or should be debarred).
- 5) The members of the panel would receive the question for interpretation and could, if they wished, meet at The Hague on the premises of the Permanent Bureau.
- 6) The parties to the dispute would be heard in a predetermined form (for example, only in writing to avoid excessive delays).
- 7) The members of the panel would not receive any specific remuneration for this work, but all their expenses would be covered by a portion of the budget of the Permanent Bureau, specially allocated for this purpose.

201 If this idea were adopted, it would be necessary to decide what is to become of the interpretative decisions of these panels, not only in relation to the court which put the question for interpretation, but also in relation to all the other courts in the States Parties which may, in future, face the same question in identical circumstances. Of course, the effective use of the funds provided for this purpose would argue for compulsory application of these interpretations, not only by the court which put the question for interpretation, but also by all the courts in the States Parties. The advantages and drawbacks of this outcome would need to be discussed in more detail.

SECTION 2 – REVIEW OF OPERATION

202 The implementation of the future Convention could be monitored during Special Commissions meeting on a regular basis, such as the Permanent Bureau has successfully organised for other Hague Conventions.

203 The particular feature of the future Convention is that it does not specify any Central Authorities, and the experts usually sent by States to take part in the special monitoring commissions will not necessarily have concrete knowledge of how the Convention is being implemented in their jurisdiction. It is therefore suggested that the special monitoring commissions for the future Convention should consist of serving

²¹² Cf. Conclusions of the Special Commission of June 1996, doc. cit. *supra*, note 38, p. 17, No 20.

²¹³ As partial justification for the idea that the future Convention could be based on the Brussels and Lugano Conventions, the Permanent Bureau emphasised the valuable assistance of the case law of the Court of Justice of the European Communities, including for the Lugano Convention, thanks to its Protocol No 2 which invites Contracting States to take due account of this case law; cf. *Proceedings of the Seventeenth Session*, Tome I, p. 237, No 16.

judges. These Special Commissions could perhaps be prepared at the national level by judges' seminars, during which current national practice could be reviewed; this review would then be presented during the special monitoring commission by an expert from these judges' seminars.

ANNEX III

Questionnaire on the denial of justice or forum of necessity*1 Explanation*

Factual circumstances of private international relations may give rise to certain cases wherein a judge is confronted with the affirmation of one party, according to which a foreign court, although possibly having jurisdiction, "cannot" hear the case, or, on the contrary, no court exists which could hear the case. In such circumstances, can a judge decide it has jurisdiction in order to avoid a potential denial of justice?

2 Questions

2.1 According to the national law of your country, does there exist a rule through which a denial of justice can be avoided?

2.2 If such a forum does exist, under what specific circumstances is it put into motion? Is it sufficient to set out a case for the probability of a denial of justice? Must the proof presented be more specific? Must the party, supporting the jurisdiction under the denial of justice theory, prove that it is impossible to file with the foreign court which potentially has jurisdiction (the foreign court is too far, justice deliberations too slow, prohibited costs are entailed, etc.)?

2.3 In addition to a material impossibility to hear the case, is it possible to apply the forum of necessity theory in the case of a "subjective" impossibility to have a foreign judge decide on the case? If this is so, what are the facts to be brought forward to prove that this "subjective impossibility" be acknowledged?

2.4 When a judge is determining its jurisdiction in a case of a forum of necessity, does it take into consideration the place where the decision will be eventually enforced?

2.5 If your reply to 2.4 above is affirmative, does the judge deny its jurisdiction if it is proven that the decision rendered in such a case would not be enforced in another country?

In addition to your answers to the above questions, would you kindly send to the Permanent Bureau a copy of the case law pertinent hereto, as well as copies of legal texts possibly applicable in such cases.

ANNEX IV

Questionnaire on the matter of fictitious corporations**1 Explanation**

Within the context of the possible acceptance of an international jurisdictional rule providing that a parent company may be called before the court in the place wherein its establishment, branch or other centre of activity is located, provided that the dispute has arisen from the activities of such establishments, branch or centre of activity, it is necessary to know under what conditions a subsidiary, having a distinct legal personality, could possibly be assimilated to an establishment, branch or centre of activity.

Such assimilation exists notably if the subsidiary is "fictitious". But there may be other cases within which national law pierces the veil of a corporate entity. Moreover, it is imminently possible that the notion of "fictitious corporation" is not applied in the same manner in different areas of law (bankruptcy, civil liability, maritime shipping, etc.).

2 Questions

2.1 Under what concrete cases have the courts of your country been brought to acknowledge the fictitious nature of a corporate entity?

2.2 Does your national law contain legal provisions pertinent to the question of fictitious corporations? If so, please cite these provisions precisely.

2.3 Have the legal provisions mentioned in 2.2 above been applied in case law? If so, please explain the rationale of such decisions.

2.4 When the question of fictitious corporations is posed regarding a foreign corporation, what law is applicable to the notion of fictitious corporations according to the conflict of laws rule of your country?

2.5 Has the rule described in 2.4 above been displaced to the benefit of the *lex fori* in certain matters (such as in bankruptcy cases)?

In addition to your answers to the above questions, would you kindly send to the Permanent Bureau a copy of the case law pertinent hereto, as well as copies of legal texts possibly applicable in such cases.

E x t r a c t**of Article 8 A of the draft bilateral Convention
between the United Kingdom and the United States of America**

"Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognise and enforce the judgment in a lesser amount."

* * *

E x t r a i t**de l'article 8 A du projet de traité bilatéral
entre le Royaume-Uni et les Etats-Unis d'Amérique**

(traduction)

«Lorsque le défendeur établit que le montant de la condamnation accordé par le tribunal d'origine est largement plus important que celui (y compris les coûts) qui aurait été accordé par le tribunal requis sur la base des éléments de fait et de droit prouvé dans la procédure d'origine, le tribunal requis, dans la mesure autorisée par son propre droit, peut reconnaître ou exécuter le jugement pour un montant inférieur»