



Consultation Paper
on
the draft Hague Convention on
Exclusive Choice of Court Agreements
Jurisdiction and Foreign Judgments

International Law Division

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Table of Contents

CONSULTATION PAPER on the draft Hague Convention on Exclusive Choice of Court Agreements

SUMMARY	1
BACKGROUND	3
THE 1965 HAGUE CONVENTION	3
PRELIMINARY DRAFT CONVENTION OF 1999	4
A CONVENTION BASED ON CHOICE OF COURT AGREEMENTS	5
NEGOTIATION IN DECEMBER 2003.....	5
HONG KONG'S PARTICIPATION	6
APPLICATION OF THE CONVENTION TO THE HONG KONG SAR	6
THE DRAFT CONVENTION.....	6
THE STRUCTURE OF THE DRAFT CONVENTION	7
CHAPTER I - SCOPE AND DEFINITIONS	7
<i>Article 1</i> <i>Scope</i>	7
<i>Exclusion from Scope</i>	7
<i>Intellectual Property</i>	8
<i>Businesses Conducted by Government and Immunities</i>	8
<i>Article 2</i> <i>Exclusive Choice of Court Agreements</i>	9
<i>Article 3</i> <i>Other Definitions</i>	9
<i>"Judgments"</i>	9
<i>Non-monetary Judgments</i>	9
<i>Finality and Binding Effect of Foreign Judgments</i>	9
<i>Habitual Residence</i>	10
CHAPTER II - JURISDICTION.....	10
<i>Substantive validity of the Agreement</i>	11
<i>Exceptions to Article 4</i>	11
<i>Article 5</i> <i>Obligations of a Court Not Chosen</i>	12
<i>Special Exceptions</i>	12
<i>Article 6</i> <i>Interim Measures of Protection</i>	13
CHAPTER III - RECOGNITION AND ENFORCEMENT.....	13

<i>Article 7(1) Grounds for Refusing to Recognise or Enforce</i>	14
<i>Agreement being Null and Void</i>	14
<i>Lack of Capacity</i>	14
<i>Insufficient Notice</i>	15
<i>Breach of Fundamental Principles of Procedures</i>	15
<i>Characteristics of a Judgment</i>	15
<i>Article 8 Documents to be produced</i>	16
<i>Recommended Form</i>	16
<i>Translation</i>	16
<i>Article 10 Damages</i>	16
<i>Article 12 Settlement</i>	17
CHAPTER IV – GENERAL CLAUSES	17
<i>Declarations</i>	17
<i>Asbestos Cases</i>	18
<i>Withdrawal of Declarations</i>	18
<i>Article 18 Non-Unified Legal System</i>	18
CHAPTER V - FINAL CLAUSES	18
VIEWS AND COMMENTS	19
APPENDIX – Draft Convention on Exclusive Choice of Court Agreements	
RECOMMENDED FORM	

Consultation Paper on the draft Hague Convention on Exclusive Choice of Court Agreements

Summary

1. The Hague Conference on Private International Law (the “Hague Conference”) has been, for many years, trying to conclude a worldwide convention on international Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters.

2. It was clear, after a meeting in June 2001, that there are significant differences amongst States participating in the negotiation of such a comprehensive convention. A more realistic goal is to negotiate a simple convention dealing with exclusive choice of court agreements.

3. Building on the negotiations that have been held since 1996, a Special Commission of the Hague Conference tasked with negotiating a convention on exclusive choice of court agreements was convened in December 2003 and a draft text for the convention was produced (the “draft convention”).

4. The Special Commission set out to negotiate a convention that will be complementary to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Whereas the basis for the New York Convention is an arbitration agreement, the basis for the draft convention is an exclusive choice of court agreement between parties in a business-to-business relationship. Where such an agreement is held to be valid under the convention, the resulting judgment given by the chosen court will be recognised and enforced in any Contracting State to the convention.

5. This consultation paper outlines the various provisions of the draft convention and the reasons behind them. A copy of the draft convention is attached as an Appendix to the paper. It may also be downloaded from the website of the Hague Conference at www.hcch.net.

6. If the draft convention is concluded in a diplomatic conference of the Hague Conference, a decision regarding its application to Hong Kong will be taken after the Government has considered the views of interested parties. Hong Kong is represented at

the Special Commission as part of the Chinese delegation*. The Department of Justice is now seeking comments on the draft convention.

7. Comments may be addressed to the Treaties and Law Unit, International Law Division, Department of Justice, 47th Floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong (fax no: 2877 2130; e-mail: ild@doj.gov.hk) on or before 21 February 2004. Inquiries on this subject should be directed to Mr Frank Poon (tel: 2867 4915; e-mail: frankpoon@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

* Membership of the Hague Conference is limited to sovereign States.

Background

1. The Hague Conference on Private International Law (the “Hague Conference”) has been trying to conclude an international convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters for a long time. One of the principal objectives of such a convention would be to bring about increased certainty on questions relating to jurisdiction which will help to prevent duplication of effort, costs and procedures caused by parallel litigation. A successful convention that is accepted on a global basis will also facilitate trade and investment because of the certainty and predictability that such a convention may bring to businesses.

2. Currently, questions relating to jurisdiction and recognition and enforcement of foreign judgments are not governed by any international convention, with the exception of bilateral agreements and regional agreements which are only applicable to States that are members of the same economic integration agreements¹, and agreements concluded by States with similar legal systems.

The 1965 Hague Convention

3. An earlier attempt was made by the Hague Conference which led to the conclusion of the Hague Convention of 15 November 1965 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. That Convention is considered to be a failure as it has never attracted sufficient ratifications to bring it into force. The main reason for its failure is seen by many States as its lack of direct jurisdictional rules governing the question of jurisdiction. This may lead to obligation to recognise or enforce a judgment that is given by a court that should not have exercised jurisdiction.

4. Many States consider that it is of utmost importance that a judgment from a foreign court should only be given effect if that court is the most appropriate court to exercise jurisdiction² under their own rules on private international law. They would only agree to sign up to an international agreement if it contains what they consider to be acceptable rules on jurisdiction.

¹ The most prominent of such agreements are the Brussels Convention (between EU member States) and the Lugano Convention (between member States of the European Free Trade Association). The former has been turned into a Regulation of the European Community.

² This is particularly the case for civil law jurisdictions which commonly have elaborated conflict of law rules on jurisdiction in order to avoid parallel litigation.

Preliminary Draft Convention of 1999

5. A number of negotiation meetings were held by a Special Commission of the Hague conference on this subject since 1996 which culminated in the adoption by the Special Commission of a draft convention entitled “Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial matters” in October 1999 (the “1999 Draft Convention”)³.

6. In view of the importance attached to harmonising rules of jurisdiction, the 1999 Draft Convention contains elaborate rules on jurisdiction⁴. In other words, the 1999 Draft Convention is a very ambitious attempt to harmonise different rules on jurisdiction. Recognition and enforcement under the 1999 Draft Convention would only follow if the jurisdiction of the original court is based on a required ground of jurisdiction⁵. The 1999 Draft Convention has also listed a number of situations in which a court would be obliged to refrain from exercising jurisdiction⁶.

7. A diplomatic conference was convened by the Hague Conference in June 2001 with a view to adopting the 1999 Draft Convention. During that meeting, member States of the Hague Conference expressed concerns on a number of jurisdictional rules in the 1999 Draft Convention⁷. The diplomatic conference failed to produce a finalised text. Instead, an “Interim Text”, based on the 1999 Draft Convention, was produced but with a number of square brackets.

8. It is quite apparent, after the June 2001 meeting, that it was too ambitious to negotiate a convention that covers all aspects of jurisdiction. It would also be very difficult, if not impossible, to harmonise the substantive rules of jurisdiction of the different legal systems represented in the Hague Conference by an international convention.

³ “Consultation Paper No. 2 on the Preliminary draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters” was published by the Department of Justice in October 2000 inviting public comments on the 1999 Draft Convention.

⁴ The 1999 Draft Convention has separate Articles on jurisdiction dealing with, *inter alia*, the defendant’s forum, contracts, consumers and employment contracts, branches, torts, exclusive jurisdiction, provisional measures, multiple defendants, counter-claims and third party claims.

⁵ The required grounds of jurisdiction under the 1999 Draft Convention are enumerated in footnote 3, *ante*.

⁶ See Articles 18 (Prohibited Grounds of Jurisdiction) and 21 (*Lis pendens*) of the 1999 Draft Convention.

⁷ The problem was discussed in “An Update on the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters” published by the Department of Justice on its websites.

A Convention Based on Choice of Court Agreements

9. From 2002, a small group of experts from certain member States of the Hague Conference met regularly with the aim of finding a solution to the impasse and decided that a convention on recognition and enforcement of civil and commercial judgments based on choice of court agreements between business parties to a dispute would be very useful to businesses⁸. Such a convention would complement the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If the proposed convention is concluded, business parties may elect to resolve a dispute arising from their legal relationship by either an arbitration agreement (in which case the New York Convention will apply) or a choice of court agreement (in which case the proposed convention will apply), with the certainty that the resulting award or judgment will be enforceable in member States of the respective Conventions.

Negotiation in December 2003

10. The Hague Conference endorsed the recommendation of the small expert group after consulting all member States. It convened a meeting of the Special Commission to study the expert group's proposal from 1-9 December 2003. As a result of the substantial reduction of the scope of the Convention on matters relating to jurisdiction, the meeting was able to focus on jurisdiction based on choice of court agreements between businesses (B2B). In the course of the negotiation, it was clear to many delegations that the convention would be simpler and easier to understand and apply if its scope was further narrowed down to *exclusive* choice of court agreements.

11. At the end of the Special Commission meeting, a reasonably clean draft of a convention based on exclusive choice of court agreements was produced. The draft represents the consensus of the majority of the States that have participated in the negotiation⁹ on the more substantive issues covered by the draft. It should be noted that there are still some unresolved problems that will have to be dealt with in the next meeting. Furthermore, some of the final clauses of the draft convention are yet to be drafted.

⁸ The group has prepared a draft convention based on choice of court agreements. The text was uploaded to the Department of Justice website and sent to interested parties for comments in May 2003.

⁹ The notable exception is the Russian Federation, which decided to circulate an alternative text of the draft convention at the conclusion of the meeting.

12. The remaining problems as well as the final clauses will be considered in the next meeting of the Special Commission, which is expected to be held in either March or April 2004. If the negotiation goes smoothly in the next meeting, it is expected that a diplomatic conference will be convened towards the end of 2004 with a view to concluding the convention.

Hong Kong's Participation

13. Membership in the Hague Conference is limited to States. Lawyers from the Department of Justice of the Hong Kong SAR Government have participated in this negotiation as members of the Chinese delegation. It is expected that the HKSAR Government will continue to be represented in the Special Commission until the conclusion of its work.

Application of the Convention to the Hong Kong SAR

14. Upon the conclusion of the draft convention, the Government may, subject to views expressed by interested parties, seek to have it applied to the Hong Kong SAR under Article 153 of the Basic Law¹⁰, irrespective of whether or not the Convention is applied to the Mainland. If applied to Hong Kong, new legislation to give effect to the Convention, including enforcement of judgments resulting from exclusive choice of court agreements between business parties, will have to be introduced.

The Draft Convention

15. The text of the draft convention on exclusive choice of court agreements is annexed as an Appendix to this paper. It is also available on the website of the Hague Conference on Private International Law at www.hcch.net. In many instances, the draft clauses represent compromises and should not be regarded as finalised or definitive at this stage.

¹⁰ Article 153 of the Basic Law provides as follows:-

“The Application to the Hong Kong Special Administrative Region of international agreements to which the People’s Republic of China is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People’s Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”

The Structure of the Draft Convention

16. The draft convention is divided into five chapters. The first chapter defines the scope of the convention and provides definitions for some important terms used in the convention. The second chapter deals with questions relating to jurisdiction based on exclusive choice of court agreements. The third chapter deals with the issues of recognition and enforcement of judgments falling within the scope of the Convention. The fourth chapter contains provisions dealing with general matters and the last chapter deals with final clauses.

Chapter I - Scope and Definitions

Article 1 Scope

17. The draft convention will apply to exclusive choice of court agreements concluded in civil or commercial matters. Paragraph 2 of this Article excludes choice of court agreements concluded in B2C (business-to-consumer) and C2C (consumer-to-consumer) situations. A consumer is defined as a natural person acting primarily for personal, family or household purposes¹¹. Article 1 also expressly excludes employment contracts from the scope of the draft convention.

Exclusion from Scope

18. Even between business parties, certain matters are excluded from the scope of the convention because of their particular nature. Examples of these are matters that are traditionally subject to the exclusive jurisdiction of the court of the place where the subject matter is situated e.g. immovable property, and matters that are subject to special jurisdiction rules according to international agreements or conventions. The European Commission, representing all the European Union States in these negotiations, stated during the meeting that it would propose excluding short-term tenancies from the list of exclusion at the next meeting¹².

¹¹ Please see Article 1(2)(a) of the draft convention.

¹² It should be noted that if short-term tenancies were indeed excluded from immovable property in the list of excluded matters, the draft convention would apply only in circumstances where the tenancy agreement is concluded between two businesses.

Intellectual Property

19. The exclusion from scope of certain registered intellectual property (“IP”) in sub-paragraphs (k) and (l) of paragraph 3 requires some explanation. The meeting agreed that the court in the country of registration of registered intellectual property rights should have the exclusive jurisdiction to determine the validity or otherwise of the registration as these IP rights are derived from registration.

20. However, it was also acknowledged that in some litigation, the validity of such IP rights arises only as an incidental question and it would detract from the usefulness of this convention if a judgment fulfilling the requirements of the convention could not be enforced merely because the court which have given the judgment (containing an incidental ruling on the validity of certain IP rights) is not a court of the country of registration. To address this problem, paragraph 4 was drafted, which will be applicable to all the subject matters listed in paragraph 3. Paragraph 4 provides that “proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question.” Several delegations at the meeting have indicated that they would propose language to restrict the effect of any incidental ruling on validity of IP rights¹³.

21. It should be noted that copyright has not been excluded from the scope of the Convention¹⁴. The reasons that have been given for the special treatment of copyright are (1) copyright, in the majority of cases, does not require registration, and (2) litigation on copyright invariably relates to infringement rather than validity.

Businesses Conducted by Government and Immunities

22. Paragraphs 6 and 7 are intended to deal with situations where a Government or a State is involved in the proceedings. On the one hand, the draft convention will apply to situations where a Government or a State is acting in its commercial capacity (acts *jure gestionis*) (paragraph 6); on the other hand, the draft convention will not affect the principles of sovereign immunities and the law on privileges and immunities applicable to sovereign States and international organisations.

¹³ One idea is to say that the incidental ruling has effect only as between the parties to the proceedings.

¹⁴ See Article 1(3)(1) of the draft convention.

Article 2 Exclusive Choice of Court Agreements

23. An exclusive choice of court agreement is an agreement which designates the courts of one State or one specific court to the exclusion of the jurisdiction of any other courts for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship. A choice of court agreement which designates the courts of one State or one specific court will be deemed to be an exclusive choice of court agreement unless the parties have expressly provided otherwise. Paragraph 3 of this Article requires an exclusive choice of court agreement to be entered into or evidenced in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference.¹⁵

Article 3 Other Definitions

“Judgments”

24. Paragraph 1 defines “judgment”. It is important to note that provisional and interim orders such as *mareva* injunctions and *Anton Pillar* orders will not qualify as “judgment” under the draft convention as “judgment” means a decision on the merits. However, permanent injunctions will be covered, so will other non-monetary judgments, as well as monetary judgments, as long as they are decisions on the merits.

Non-monetary Judgments

25. The draft convention will also cover non-monetary judgments. It may be possible, if the draft convention is applied to Hong Kong, that the court in Hong Kong will be asked to enforce permanent injunctions, orders for specific performance and other non-monetary foreign judgments which are hitherto not enforceable in Hong Kong under the common law and our legislation on enforcement of foreign judgments.

Finality and Binding Effect of Foreign Judgments

26. The definition for “judgment” in paragraph 1 does not contain any reference to “finality” or “binding effect”. This question is now dealt with in Article 7(3) of the draft convention. In the past meetings, there

¹⁵ Under the draft convention, an exclusive choice of court agreement cannot be implied by trade usage and customs, which are permissible under the 1999 Draft Convention.

had been long discussion on the question of the finality and binding nature of judgments. It is apparent that it would be difficult, if not impossible, to harmonise the rules in different jurisdictions represented in the Hague Conference with regard to the time at which a judgment becomes final and binding. There are also different understandings on the concept of *res judicata*.

27. The formulation now used in paragraph 3 of Article 7 provides that “a judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin”. This avoids the use of technical terms such as *res judicata*, which may mean different things in different jurisdictions, and terminology such as “final” or “binding” which have, over the years, developed their own specific legal meanings under the domestic law of a number of States participating in the negotiations.

Habitual Residence

28. The term “habitual residence” is used in the draft convention, mainly for the purpose of denoting or identifying purely domestic cases. Paragraph 2 of Article 3 provides that a legal person’s habitual residence may be determined by reference to the State (1) where it has its statutory seat, (2) under whose law it was incorporated or formed, (3) where it has its central administration, or (4) where it has its principal place of business. This means that it is theoretically possible for a legal person to be habitually resident in four different States under the current provision although in the majority of cases, all the four factors will point to the same State.

Chapter II - Jurisdiction

29. This chapter deals with the all important question of jurisdiction, which is regarded by many countries represented at the Hague Conference as decisive in deciding whether the resulting judgment should be enforced under the convention. The basic principle of the chapter is that a court of a contracting State chosen in a valid exclusive choice of court agreement will be obliged to exercise jurisdiction (Article 4(2)) unless the agreement is null and void under its law. Conversely, a court of a contracting State which has not been chosen in an Exclusive Choice of Court agreement must decline to exercise jurisdiction (Article 5), subject to a number of exceptions enumerated in Article 5.

Substantive validity of the Agreement

30. An important matter dealt with in the first paragraph of Article 4 is the law by which the substantive validity¹⁶ of a choice of court agreement concluded by parties in a particular legal relationship should be determined. According to that paragraph, the law to be applied is the law of the chosen forum.

31. This means that if a court in Hong Kong is the chosen court, the substantive validity of the exclusive choice of court agreement will be decided by reference to the law as determined by the Hong Kong court to be the governing law for the relevant choice of court agreement. In the majority of such cases, the parties are likely to have also chosen Hong Kong law as the governing law. In these situations, Hong Kong law on capacity, undue influence or duress etc. may be applied to resolve any question relating to the substantive validity of the exclusive choice of court agreement.

Exceptions to Article 4

32. The obligation imposed by Article 4 (to assume jurisdiction) and Article 5 (to decline jurisdiction) will not be applicable if all the parties to the exclusive choice of court agreement are habitually resident in respectively the State of the chosen court¹⁷ and the State of the Court seised. The reason behind this is that the convention should only apply in a case with an international character. However, it should be noted that a judgment of a purely domestic case given by a court in a place where the parties are habitually resident is also covered by the chapter on recognition and enforcement, i.e. it may be enforceable in States which are parties to the convention, as long as there is a valid exclusive choice of court agreement pointing to the original court¹⁸.

¹⁶ This refers to validity under substantive law, such as the law on duress and undue influence. This is different from the concept of “validity as to form”, or what is otherwise known as “formal validity”. That is now governed by Article 2(3) of the draft convention. See paragraph 23 of this paper.

¹⁷ See Article 4(4) and Article 5(f). There is currently a proposal to limit the application of this exception to situation where the parties to the agreement are habitually resident **only** in the State of the chosen court. The addition of the word “only” will limit the application of the exception to situations where the parties’ have only **one** place of habitual residence and where they have the **same** place of habitual residence. A further limitation of the application of this exception appears in the second set of square brackets in Article 4(4) of the draft. Under this set of square brackets, the exception will apply if the parties to the agreement are habitually resident in the State of the chosen court **and** the relationship of the parties and all elements relevant to the dispute are connected with that State.

¹⁸ See Article 7(1) of the draft convention.

Article 5 Obligations of a Court Not Chosen

33. Whilst the primary purpose of Article 5 is to impose an obligation on a non-chosen court to refrain from exercising jurisdiction, that obligation is subject to a number of exceptions, in addition to the obvious exception based on the nullity and invalidity of the exclusive choice of court agreement under the law of the State of the chosen court¹⁹. These exceptions are included because some States are concerned that the strict obligation imposed by this Article may prevent their courts from interfering with or applying their legislation or policy on such important matters as unfair competition and the law on capacity.

Special Exceptions

34. Three of the exceptions are worth a special mention. Sub-paragraph (b) is included because it was considered not practical to harmonise rule on legal capacity in different jurisdictions. As drafted, the law of the court seised, but not the law of the chosen court, will be used to determine if a party lacked the capacity to enter into the exclusive choice of court agreement.

35. The exception in sub-paragraph (c) is the most controversial. It permits the court seised to refuse to give effect to the exclusive choice of court agreement if giving effect to it would lead to a *very serious injustice* or would be manifestly contrary to fundamental principles of public policy. This was primarily introduced to deal with unfair competition and unbalanced bargaining power between commercial parties during contract negotiation. Although it is the understanding of many delegations that this exception should only be used very sparingly, there are still concerns that the exception may be abused as to impair the object and usefulness of Article 5. Another difficulty with this paragraph is the ambiguity in the terminology employed and the subject matters covered by the exception.

36. The exception in sub-paragraph (d) may not be obvious to readers but it is meant to deal with situations in which it is unreasonable to expect a party to honour an exclusive choice of court agreement. For example, it might not be safe for the parties to travel to the State where the chosen court is situated because of war or insurgency.

¹⁹ This will mean that the court seised but not chosen will have to apply the law of the chosen court to determine the validity or otherwise of the exclusive choice of court agreement.

37. It should now be obvious to readers (after an explanation of the exceptions available in Article 5) that there are possibilities for parallel litigation. Parallel litigation will happen if a party has seised the chosen court under Article 4 and the other party is also able to convince a court not chosen to exercise jurisdiction on the basis of one of the exceptions. The draft convention does not contain any rule to resolve such conflicts but it might be sufficient to point out that in such cases, a judgment given by a court not chosen in the agreement will not be enforceable under the convention²⁰ by reason that it was not given by a court of a Contracting State designated in an exclusive choice of court agreement.

Article 6 Interim Measures of Protection

38. As mentioned earlier²¹, the draft convention does not impose any obligation on a Contracting State to recognise and enforce interim measures of protection which, by their nature, are not decisions on the merits. The purpose of Article 6 is to make it clear that notwithstanding any provision in the convention, a party is not prevented from requesting interim measure from any court, including a court which is not seised with the substantive litigation; and any court requested is not prevented by anything in the convention to grant such a measure under its own law.

Chapter III - Recognition and Enforcement

39. This is a very important chapter of the draft convention. A judgment given by a court of a Contracting State to the convention exercising jurisdiction in accordance with an exclusive choice of court agreement will be recognised and enforced in all other States party to the convention. It should be noted that the exception concerning purely domestic cases has not been repeated in this chapter²². As a result, a judgment in a purely domestic case which has been given by a domestic court will be recognised and enforced in other Contracting States to the Convention.

40. Some States (mainly civil law States) have expressed concerns about the requirement to enforce purely domestic judgments of

²⁰ The first sentence in the chapeau of Article 7(1) of the draft convention provides as follows:-
“A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this chapter.”

²¹ See paragraph 24 above.

²² See for example Article 4(4) and Article 5(f) of the draft convention.

other States. This does not seem to pose any problem for Hong Kong because under our existing common law rules, a foreign judgment may be recognised and enforced without regard to whether the foreign judgment is a purely domestic one or one with an international character.

Article 7(1) Grounds for Refusing to Recognise or Enforce

41. In common with all bilateral and regional arrangements on reciprocal enforcement of judgments, the obligation to enforce foreign judgments under the draft convention is subject to a number of exceptions. These are now exhaustively²³ listed in paragraph 1 of Article 7. The court addressed *may* refuse to recognise or enforce a foreign judgment if one or more of the sub-paragraphs of Article 7(1) apply. The onus of establishing one or more of the grounds set out in Article 7(1) will rest with the party opposing the recognition or enforcement of the judgment.²⁴

Agreement being Null and Void

42. The ground for refusal under sub-paragraph (a) of Article 7(1) may need some explanation as, at first glance, it may seem contradictory. The starting point is that this ground cannot be relied upon to refuse recognition or enforcement if the court chosen has indicated in its judgment that the exclusive choice of court agreement has been determined by it to be valid.

43. It is possible that in some cases, the validity of the exclusive choice of court agreement has not been raised or argued and the chosen court may have merely proceeded on the assumption that it is valid. If this is so, the judgment creditor may raise in enforcement proceedings taken elsewhere, as part of his defence, that the agreement was null and void under the law of the State of the chosen court. In such cases, it will be for the court addressed to decide on the validity of the agreement by applying the law of the State of the chosen court.

Lack of Capacity

44. The ground for refusal in sub-paragraph (b) of Article 7(1) is that a party lacked the capacity to enter into the agreement. This is

²³ The second sentence of the chapeau to Article 7 provides that “recognition or enforcement may be refused **only** on the following grounds:-

²⁴ This interpretation is consistent with the report on the same Article in the 1999 Draft Convention - see page 85 of the Report on the 1999 Draft Convention.

consistent with the wish and desire of many States that the important question of the capacity of a party should be a matter governed by their own law. Therefore this paragraph provides that the question of capacity is determined under the law of the requested State.

Insufficient Notice

45. Sub-paragraph (c) of Article 7(1) is concerned with the question of whether the defendant has been notified in sufficient time as to enable him to arrange for his defence. Some States took the view that the defendant must be notified by a method which is in accordance with the law of the State where notification takes place. This proposal is now put in square brackets for resolution at future meetings. The second set of square brackets in this paragraph aims to simplify the situation where the defendant has voluntarily appeared to contest the merit of the case against him. In that situation, the ground cannot be invoked by the defendant at the enforcement stage.

Breach of Fundamental Principles of Procedures

46. The grounds for refusal in sub-paragraph (d) (fraud) and in sub-paragraph (e) (public policy of the requested State) are very well known under Hong Kong's own law on enforcement of foreign judgments. However, sub-paragraph (e) also refers to fundamental principles of procedure. Not much explanation was given at the meeting as to examples of such fundamental principles but an analogy may be drawn with the principles of natural justice as well as the principles of rule of law. For Hong Kong, such a reference may be superfluous as such principles are often subsumed under the heading of public policy in the context of the grounds for refusing to enforce foreign judgments.

Characteristics of a Judgment

47. As indicated earlier in paragraphs 26 and 27, the draft convention does not refer to *res judicata* or the final and binding nature of a judgment because the stage at which a judgment is deemed to have the effect of *res judicata* or become final and conclusive is different in every jurisdiction. The convention leaves that question to be answered by reference to the law of the court of origin of the judgment by saying that a judgment is recognised only if it has effect in the State of origin and is enforced only if it is enforceable in the State of origin²⁵. Article

²⁵ Paragraph 3 of Article 7

7(4) of the draft convention further provides that recognition or enforcement may be postponed or refused if the judgment is the subject of review (or appeal) in the State of origin or if the time limit for seeking ordinary review has not expired.

Article 8 Documents to be produced

48. This Article lists the documents to be produced to the requested court in an application to enforce a judgment under the convention. Sub-paragraph (c) of paragraph 1 requires the production of all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin. It is not clear whether a certificate from the court of origin is required. The completion of the Recommended Form annexed to the draft convention will certainly assist in providing proof on this as questions 7 and 8 of the Form are directly relevant to the issue.

Recommended Form

49. Paragraph 3 of Article 8 does not make it compulsory to use the Recommended Form because in some jurisdictions, it may be difficult or time-consuming to secure the completion of the Form by an official of the court. The “recommended” nature of the Form also makes it easier for it to be amended in future.

Translation

50. Paragraph 4 of Article 8 refers to the possibility that the requested court may, at its discretion, require translation of any document referred to in this Article.

Article 10 Damages

51. The subject of damages, particularly non-compensatory damages, has been discussed very thoroughly in the previous meetings of the Hague Conference on enforcement of foreign judgments. One of the main concerns is the possibility that foreign judgments may contain elements of non-compensatory damages as well as punitive damages which may be considered to be excessive. Our law provides that the court shall not entertain any proceedings at common law for the recovery of any sum payable under a judgment of multiple damages²⁶.

²⁶ Section 7(1) of the Protection of Trading Interests Ordinance, Chapter 471 of the Laws of Hong Kong

52. Article 10 follows the equivalent provision of the 1999 Draft Convention. Under this Article, Contracting Parties would not be obliged to give effect to that part of a judgment that represents non-compensatory damages, including exemplary or punitive damages (Article 10(1)). However, it is not clear how the courts would go about excluding that part of the damages that is non-compensatory in judgments that do not distinguish between compensatory and non-compensatory damages.

53. The Article also permits the judgment debtor to argue that recognition or enforcement should be limited to a lesser amount because grossly excessive damages have been awarded. It could mean that the court might be asked to determine whether under the same circumstances, similar or comparable damages could have been awarded by the Hong Kong courts²⁷.

Article 12 Settlement

54. A consent order or any settlement agreement sanctioned by the court of a Contracting State which has been chosen in an exclusive choice of court agreement will be enforceable under the convention in accordance with this Article.

Chapter IV – General Clauses

Declarations

55. Under Article 14 of the draft convention, a Contracting State may declare that its courts may refuse to *determine disputes* covered by an exclusive choice of court agreement if there is no connection between that State and the parties or the dispute except for the relevant choice of court agreement. Article 15 also provides that a Contracting State may declare that its courts may *refuse to recognise or enforce a judgment* of a court in another Contracting State if all parties are habitually resident [only] in the requested State (the former Contracting State) and the relationship of the parties and all other elements relevant to the dispute are connected with the requested State except for the relevant choice of court agreement.

²⁷ Article 10(2)(a) read together with Article 10(1) of the draft Convention

Asbestos Cases

56. Article 16 of the draft convention is a unique provision dealing with a declaration that may be made to exclude asbestos cases from the scope of the convention. This has been included at the request of the Canadian delegation which indicated that it has particular problems with asbestos litigation and would like to see that such matters are excluded from the draft convention.

Withdrawal of Declarations

57. As drafted, the declarations mentioned in paragraphs 55-56 above are to be made once and they must be made at the time of ratification, acceptance, approval or accession of that Contracting State. Although the draft text is silent but it should be possible for a Contracting State which has made any of the declarations to subsequently withdraw the declaration.

Article 18 Non-Unified Legal System

58. Article 18 is included to facilitate the operation of the convention in States which have more than one legal system. This is an important Article for Hong Kong and China as a whole as China consists of at least three separate jurisdictions. Paragraph 1 of the Article is an interpretation paragraph which seeks to give important terms used in the draft convention the necessary context in the application of the convention to a State with more than one legal system. Paragraph 2 provides that the draft convention will not apply between individual territorial units within a State and paragraph 3 reinforces the same concept by saying that enforcement of a judgment in one territorial unit of a State will not enable the same to be automatically enforceable in another territorial unit of the same State which has a different legal system.

Chapter V - Final Clauses

59. The Articles in this chapter currently only have a heading, with the exception of Article 21 which deals with the application of the draft convention to a State with more than one legal system. The contents for these Articles will be discussed and added to the draft convention in the next working meeting of the Special Commission.

Views and Comments

60. Views and comments on the provisions of the draft convention and, in particular, on the following issues are now invited:-

- whether the draft convention on exclusive choice of court agreement will be of benefit to Hong Kong
- whether the draft convention, if concluded, should be applied to Hong Kong
- the scope of the draft convention in the light of the difficulty in concluding a comprehensive convention governing jurisdiction and enforcement of foreign judgments
- whether there should be any addition to or deletion from Article 1(3) which lists the subject matters to be excluded from the draft convention
- whether short-term tenancy should be carved out from the exclusion relating to immovable property (Article 1(3)(i))
- the formulation for the exclusion of intellectual property (Article 1(3)(k) and (l) and Article 1(4)) and, in particular, whether the treatment given to copyright²⁸ is appropriate
- the tests for formal validity (Article 2(3)) and substantive validity (Article 4(1), Article 5(a) and Article 7(1)(a)) of an exclusive choice of court agreement
- the definition of “judgments” and, in particular, whether non-monetary judgments should be covered by the draft convention
- whether it is sufficient to characterise judgments covered by the draft convention as in Article 7(3) instead of referring to them as being “final” and “conclusive”²⁹

²⁸ See paragraph 21 above.

²⁹ See also the discussion in paragraphs 26, 27 and 47 above.

- the exceptional circumstances in Article 5(b) and (c) where a non-chosen court may ignore an exclusive choice of court agreement³⁰ and exercise jurisdiction
- whether it is appropriate to enforce a foreign judgment based on an exclusive choice of court agreement even though it might not have any international characteristics³¹
- the various grounds for refusing to recognise or enforce a foreign judgment under the draft convention and, in particular, the grounds in Article 7(1)(c)(on insufficient notice) and Article 7(1)(e) (on breach of fundamental principles of procedures)³²
- the information required in the Recommended Form
- the provisions for limiting enforcement of non-compensatory damages (Article 10)

61. Views and comments received will be taken into account in formulating the Hong Kong SAR's position in our preparation for the next meeting, which will be held in spring 2004. If the next meeting goes smoothly, a diplomatic conference will be organised towards the end of 2004 to conclude the negotiation of the draft convention.

62. Views and comments may be addressed to the Treaties and Law Unit, International Law Division, Department of Justice, 47th Floor, High Block, Queensway Government Offices, 66 Queensway, Hong Kong (fax no: 2877 2130; e-mail: ild@doj.gov.hk) on or before 21 February 2004. Inquiries on this subject should be directed to Mr Frank Poon (tel: 2867 4915; e-mail: frankpoon@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

Treaties and Law Unit
International Law Division
Department of Justice
January 2004

³⁰ See paragraphs 34 and 35 above.

³¹ See paragraphs 32 and 39 above.

³² See paragraphs 45 and 46 above.

**DRAFT CONVENTION ON
EXCLUSIVE CHOICE OF COURT AGREEMENTS**

The States signatory to the present Convention,

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

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

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

Chapter I - Scope and Definitions

Article 1 Scope

1. The present Convention shall apply to exclusive choice of court agreements concluded in civil or commercial matters.
2. The Convention shall not apply to exclusive choice of court agreements -
 - (a) between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between consumers; or
 - (b) relating to individual or collective contracts of employment.
3. The Convention shall not apply to proceedings that have as their object any of the following matters -
 - (a) the status and legal capacity of natural persons;

- (b) maintenance obligations;
- (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- (d) wills and succession;
- (e) insolvency, composition and analogous matters;
- (f) contracts for the carriage of goods by sea [and other admiralty or maritime matters];
- (g) anti-trust / competition matters;
- (h) nuclear liability;
- (i) rights in rem in immovable property;
- (j) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
- (k) the validity of patents, trademarks, protected industrial designs, and layout-designs of integrated circuits;
- (l) [the validity of other intellectual property rights the validity of which depends on, or arises from, their registration, except copyright]; or
- (m) the validity of entries in public registers.

4. Proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question.

5. The Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to the terms of an arbitration agreement.

6. Proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.

7. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Exclusive choice of court agreements

1. In this Convention, “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph 3 and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one specific court to the exclusion of the jurisdiction of any other courts.

2. A choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have expressly provided otherwise.

3. An exclusive choice of court agreement must be entered into or evidenced -

(a) in writing; or

(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

4. An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 3 Other definitions

1. In this Convention “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that such determination relates to a judgment which may be recognised or enforced under this Convention.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -

- (a) where it has its statutory seat;
- (b) under whose law it was incorporated or formed;
- (c) where it has its central administration; or
- (d) where it has its principal place of business.

Chapter II - Jurisdiction

Article 4 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules on jurisdiction related to subject matter or to the value of the claim, or the internal allocation of jurisdiction among the courts of a Contracting State [unless the parties designated a specific court].

4. The preceding paragraphs shall not apply if all the parties to the agreement are habitually resident [only] in the State of the chosen court [and the relationship of the parties and all elements relevant to the dispute are connected with that State].³³

Article 5 Obligations of a court not chosen

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

- (a) the agreement is null and void under the law of the State of the chosen court;
- (b) a party lacked the capacity to enter into the agreement under the law of the State of the court seised;

³³ The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

- (c) giving effect to the agreement would lead to a very serious injustice or would³⁴ be manifestly contrary to fundamental principles of public policy;
- (d) for exceptional reasons the agreement cannot reasonably be performed;
- (e) the chosen court has decided not to hear the case; or
- (f) the parties are habitually resident [only] in the State of the court seised, and the relationship of the parties and all other elements relevant to the dispute, other than the agreement, are connected with that State.³⁵

Article 6 Interim measures of protection

Nothing in this Convention shall prevent a party from requesting an interim measure of protection from any court or prevent a court from granting such a measure under the law of the State of the court.

Chapter III - Recognition and Enforcement

Article 7 Recognition and enforcement³⁶

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds³⁷ -

- (a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- (b) a party lacked the capacity to enter into the agreement under the law of the requested State;

³⁴ One delegation suggested the inclusion of the word "otherwise" at this point.

³⁵ The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

³⁶ Recognition and enforcement of judgments where a matter referred to in Article 1(3) or Article 16 has arisen as an incidental question remains to be discussed. Further reflection may also have to be given to the question of irreconcilable judgments.

³⁷ Further consideration is required as to whether the matters covered by Article 5(c) and (d) are adequately reflected in this paragraph.

- (c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence [or was not notified in accordance with the law of the State where such notification took place] [, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested];
- (d) the judgment was obtained by fraud in connection with a matter of procedure; or
- (e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, in particular if the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.³⁸

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

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

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

³⁸ The Drafting Committee was not able to accommodate the concerns of one member with respect to this paragraph, and considers there is an issue to be resolved. An alternative text was suggested:

(e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including where the specific proceedings leading to the judgment were seriously unjust with respect to procedural fairness.

Article 8 Documents to be produced

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

- (a) a complete and certified copy of the judgment;
- (b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
- (c) all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require evidence of the exclusive choice of court agreement, and any other necessary documents.

3. An application for recognition or enforcement may be accompanied by a form recommended and published by the Hague Conference on Private International Law.

4. The court addressed may require a translation of any document referred to in this Article.

Article 9 Procedure

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

Article 10 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the requested State could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the

judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

2. (a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

(b) In no event shall the court addressed recognise or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.
3. In applying the preceding paragraphs, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 11 Severability

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

Article 12 Settlements

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

Chapter IV - General Clauses

Article 13 No legalisation

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

Article 14 Limitation of jurisdiction

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the agreement, there is no connection between that State and the parties or the dispute.³⁹

Article 15 Limitation of recognition and enforcement

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if all parties are habitually resident [only] in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the exclusive choice of court agreement, are connected with the requested State.⁴⁰

Article 16 Limitation with respect to asbestos related matters

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

Article 17 Uniform interpretation

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

Article 18 Non-unified legal system⁴¹

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

- (a) any reference to the law or procedure of a State shall be construed as referring to the law or procedure in force in the relevant territorial unit;

³⁹ The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

⁴⁰ The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed. The time of enforcement should not be relevant.

⁴¹ The matters dealt with in this Article will require further study and discussion.

- (b) any reference to habitual residence in a State shall be construed as referring to habitual residence in the relevant territorial unit;
- (c) any reference to the court or courts of a State shall be construed as referring to the court or courts in the relevant territorial unit; and
- (d) any reference to the connection with a State shall be construed as referring to the connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraphs, a Contracting State with two or more territorial units in which different systems of law are applied shall not be bound to apply this Convention to situations involving solely such different territorial units.

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

Article 19 Relationship with other international instruments

This matter has not yet been discussed.

Chapter V - Final Clauses

Article 20 Signature, ratification, acceptance, approval or accession

Article 21 Non-unified legal system

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 22 Regional Economic Integration Organisations

Article 23 Entry into force

Article 24 Reservations

Article 25 Declarations

Article 26 Denunciation

Article 27 Notifications by the Depositary

RECOMMENDED FORM

(Sample form confirming the issuance and content of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Exclusive Choice of Court Agreements (the "Convention"))

(THE COURT OF ORIGIN)

(ADDRESS OF THE COURT OF ORIGIN)

(CONTACT PERSON AT THE COURT OF ORIGIN)

(TEL./FAX/EMAIL OF THE COURT OF ORIGIN).....

CASE / DOCKET NUMBER:

_____ (PLAINTIFF)

v.

_____ (DEFENDANT)

(THE COURT OF ORIGIN) hereby confirms that it rendered a judgment in the above captioned matter on (DATE) in (CITY, STATE), which is a Contracting State to the Convention. Attached to this form is a complete and certified copy of the judgment rendered by (THE COURT OF ORIGIN).

1. This Court based its jurisdiction on an exclusive choice of court agreement:

YES _____ NO _____

If so, the agreement was found in or evidenced by the following document(s):

2. This Court awarded the following payment of money (*Please indicate any relevant categories of damages included*):

3. This Court awarded interest as follows (*Please specify the rate of interest, the portion(s) of the award to which interest applies, and the date from which interest is computed*):

4. This Court included within the judgment the following court costs and expenses (including lawyers' fees) related to the proceedings (*Please specify the amounts of any such awards, including where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings*):

5. This Court awarded, in whole or in part, the following non-monetary remedy (*Please describe the nature of the remedy*):

6. This judgment was rendered by default:

YES _____ NO _____

(If this judgment was rendered by default, please attach the original or a certified copy of the document verifying notice to the defendant of the proceedings.)

7. This judgment (or a part thereof) is currently the subject of review in (STATE OF THE COURT OF ORIGIN):

YES _____ NO _____

8. This judgment (or a part thereof) is enforceable in (STATE OF THE COURT OF ORIGIN):

YES _____ NO _____

List of documents annexed:

Dated this _____ day of _____, 20__.

Signature and/or stamp by an officer of the Court