Consultation Paper

on

the Hague Convention on

Choice of Court Agreements

concluded on 30 June 2005

International Law Division

Department of Justice

Hong Kong

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APPENDIX – Convention on Exclusive Choice of Court Agreements

RECOMMENDED FORM
Consultation Paper on the Hague Convention on
Choice of Court Agreements
concluded on 30 June 2005

Summary


2. It was clear, after a Special Commission meeting in June 2001, that there were significant differences among States participating in the negotiation of such a comprehensive convention. It was also clear that a more realistic goal would be to conclude a convention whose scope would be limited to jurisdiction based on choice of court agreements and recognition and enforcement of judgments arising from such agreements.

3. Building on the negotiations held since 1996, the Special Commission last convened in June 2005. After two weeks of intensive negotiations, the text of the Convention on Choice of Court Agreements (the “Convention”) was finalised and it was adopted at the twentieth session of the Hague Conference on 30 June 2005.

4. The Convention is intended to serve as a parallel instrument to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. While the basis for the New York Convention is an arbitration agreement, the basis for the 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 rules established by 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 provisions of the Convention. A copy of the Convention is attached as Appendix to the paper. The text of the Convention may also be downloaded from the website of the Hague Conference at http://www.hcch.net/index_en.php?act=conventions.text&cid=98. This
consultation paper may also be found on the website of the Department of Justice at [www.doj.gov.hk](http://www.doj.gov.hk).


7. Before a decision is taken to seek the application of the Convention to Hong Kong, the Government would like to consider the views of interested parties, including members of the two legal professions and the business community who will be most affected by the Convention if it is applied to Hong Kong.

8. Hong Kong is represented at the Special Commission as part of the Chinese delegation*. States which participated in the negotiation of the Convention included China, the European Community (representing all EU States), the United States of America, Russia, Ukraine, Canada, Mexico, Japan, Korea, Australia and New Zealand. The Hong Kong Special Administrative Region Government is now seeking comments on the Convention. In particular, views are invited with regard to the question of whether the Convention should be applied to Hong Kong.

9. 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 September 2007. Inquiries on this subject should be directed to Mr Peter Wong (tel: 2867 4745; e-mail: peterwong@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

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

1. In 1992, the United States of America proposed to the Hague Conference on Private International Law (the “Hague Conference”) that consideration should be given to concluding a worldwide convention on jurisdiction and recognition and enforcement of civil and commercial judgments. The principal objective of such a convention is to bring about increased certainty on questions relating to jurisdiction and enforcement of judgments 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 worldwide convention although there exist a number of bilateral agreements and regional conventions that are only applicable between two States or to States that are members of a customs union or free trade area, and agreements concluded by States with similar legal systems.

The 1971 Hague Convention

3. An earlier attempt at harmonisation of international rules in this area was made by the Hague Conference which led to the conclusion of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. That Convention has not attracted wide support.

4. Many States consider that it is of utmost importance that a judgment from a foreign court should be given effect only if that court is the most appropriate court to exercise jurisdiction under their own rules of private international law or conflict of laws.

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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 elaborate conflict of law rules on jurisdiction in order to avoid parallel litigation.
Preliminary Draft Convention of 1999


6. In view of the importance attached to harmonising rules of jurisdiction, the 1999 Draft Convention contains elaborate rules on jurisdiction, representing a very ambitious attempt to harmonise international rules on jurisdiction.

7. In June 2001 member States of the Hague Conference expressed concerns on a number of the jurisdictional rules in the 1999 Draft Convention and they failed to finalise the 1999 Draft Convention. It was quite apparent, after the June 2001 meeting, that it would 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.

A Convention Based on Choice of Court Agreements

8. From 2002, the Special Commission considered that its time could be more usefully spent on a convention based on choice of court agreements between business parties. Such a convention would complement the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If such a convention could be concluded, business parties may elect to resolve a dispute arising from their legal relationship either by 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 Contracting States of the respective conventions.

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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 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 website.
Negotiations Since 2003

9. As a result of the substantial reduction of the scope of the convention on matters relating to jurisdiction, the Special Commission was able to focus on jurisdiction based on choice of court agreements between businesses. In the course of the negotiations, it was also 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. This would also avoid the problems in connection with parallel proceedings.

10. Negotiations on a convention based on exclusive choice of court agreements at the Special Commission finally came to fruition in June 2005. On 30 June 2005, the Convention on Choice of Court Agreements (the “Convention”) was adopted by the twentieth session of the Hague Conference and it is now open for signature by all States. The Convention establishes rules for exclusive choice of court agreements and recognition and enforcement of judgments based on such agreements. The Convention also contains an Article which introduces an “opt-in” system under which a Contracting State may declare that its courts will recognise and enforce a judgment given by a court of another Contracting State designated in a non-exclusive choice of court agreement. In May 2007, the Explanatory Report on the Convention drawn up by Professors Trevor C Hartley and Masato Dogauchi, Rapporteurs to the Special Commission, was published by the Hague Conference. The Report is available at this website: http://www.hcch.net/index_en.php?act=publications.details&pid=3959. It sets out the background to the drafting and adoption of the Convention and provides an overview as well as a full commentary on the Convention. The assistance derived in the preparation of this consultation paper from the Explanatory Report is gratefully acknowledged.

Hong Kong’s Participation

11. Membership in the Hague Conference is limited to States. Lawyers from the Department of Justice and colleagues from relevant departments of the Hong Kong SAR Government participated in the work of the Special Commission since 1998 as members of the Chinese delegation and since then, the legal professions, the business community as well as members of the public have been kept informed of

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6 See Article 22 of the Convention.
the development of the negotiations through consultation papers and updates issued by the Department of Justice.

Application of the Convention to the Hong Kong SAR

12. The Government of the Hong Kong Special Administrative Region would like to seek the views of interested parties and stakeholders before it decides whether to seek to have the Convention applied to Hong Kong under Article 153 of the Basic Law. If it is decided to apply the Convention to Hong Kong, new legislation will be required to give effect to the Convention. Such legislation will be enacted before formal notification is given to the Dutch Government by the Central Peoples’ Government, the former serving as the depositary to the Convention.

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7 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.”
Commentary on the Convention

Terms and Abbreviations

Unless otherwise indicated, the following terms appearing in the commentary shall have the meaning specified below:-


“Special Commission” – the Special Commission on jurisdiction and enforcement of judgments established by the Hague Conference;

“requested State” – the Contracting State to the Convention where a judgment from another Contracting State is sought to be recognised and enforced;

“State of origin” and “court of origin” – respectively the Contracting State which gives a judgment covered by the Convention and the court of such a state;


The Convention

13. The text of the Convention is annexed as Appendix to this paper. It is also available on the website of the Hague Conference at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98. The basic premise of the Convention can be briefly summarised as follows:-

(a) the court chosen by the parties in a valid exclusive choice of court agreement shall exercise jurisdiction (Article 5);

(b) a court NOT chosen by the parties shall decline to exercise jurisdiction (Article 6); and
The Structure of the Convention

14. The 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, including the definition for “exclusive choice of court agreement”. 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 on general matters and the last Chapter contains final clauses.

Chapter I - Scope and Definitions

Article 1 Scope

15. The Convention will apply to international cases only. A case is international unless, apart from the location of the chosen court, the parties are resident in the same Contracting State AND all other elements relevant to the disputes are connected only with that State. It should be noted that the Convention is silent as to the time at which the foreign elements, including residency, need to be tested. A case will be international as long as the dispute involves a foreign element (with the exception of the location of the chosen court), whether at the conclusion of the choice of court agreement or when the dispute arose.

16. The interpretation adopted in the previous paragraph is consistent with the very liberal standard prescribed in paragraph 3 of this Article, which provides that a case is international where recognition or enforcement of a foreign judgment is sought. The practical effect of paragraph 3 is to enable domestic judgments based on an exclusive choice of court agreement to be enforced in any Contracting State in accordance with Chapter III of the Convention although a domestic court is not required to have regard to the Convention at the jurisdiction stage. However, a State may, under Article 20 of the Convention, declare that its courts may refuse to recognise or enforce a judgment from another Contracting State where the parties are resident in the requested State and all other relevant elements are connected only with that State.
**Article 2  Exclusion from scope**

17. Paragraph 1 excludes choice of court agreements concluded in business-to-consumer and consumer-to-consumer situations. A consumer is defined as a natural person acting primarily for personal, family or household purposes. Employment contracts are also excluded from the scope of the Convention by paragraph 1(b) of Article 2.

18. Certain matters have been expressly excluded from the scope of the Convention because of their special nature. These include matters that are traditionally subject to the exclusive jurisdiction of the court of the place where the object is situated e.g. immovable property, and matters that are subject to special jurisdiction rules found in widely accepted international agreements or conventions. These exceptions are listed in paragraph 2 of Article 2.

**Carriage of Passengers and Goods**

19. Liability in respect of carriage by air and by sea is now mostly governed by international conventions. The exception in paragraph 2(f) of Article 2 also covers land transport.

**Maritime Matters**

20. These were subject to intense last minute negotiations. As a result, the list of excluded matters was narrowed down to marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage (see Article 2(2)(g)). A number of maritime matters are now covered – e.g. marine insurance, non-emergency towage and salvage, shipbuilding and repairs, ship mortgages and liens.

**Intellectual Property**

21. Intellectual property was also subject to intense negotiation during the meetings. The Convention makes a clear distinction between copyright and related rights, to which the Convention is applicable, and other intellectual property rights to which the Convention is NOT applicable except in relation to certain contracts on such rights. One example of such contracts is a licensing agreement for the use of an intellectual property right.

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8 Please see Article 2(1)(a) of the Convention.
22. Paragraph 2(o) of Article 2 excludes from the scope of the convention infringement of intellectual property rights other than copyright and related rights. However, this exclusion does not apply to infringement proceedings that are brought for breach of a contract between the parties relating to such rights or could have been brought for breach of that contract. This can be illustrated by an example in which the licensee for the use of a trade mark has used the trade mark in a manner that has exceeded the scope of the licence. The licensor in this instance may sue the licensee by virtue of the exclusive choice of court agreement in the licensing agreement. This will be covered by the Convention. If the licensor decided to sue in tort in relation to the same breach of the licensing agreement, the case will also be covered by the Convention because he could have sued in contract.

Others

23. The other more notable exceptions are claims for personal injury brought by or on behalf of natural persons (Article 2(2)(j)) and tort claims for damage to tangible property that do not arise from a contractual relationship (Article 2(2)(k)). In both cases, the likelihood of an exclusive choice of court agreement in existence between the parties is extremely remote.

Insurance

24. Article 17 makes it clear that insurance contracts are fully covered by the Convention even if a contract of insurance relates to a matter to which the Convention does not apply (Article 17(1)). For example, a contract to insure goods carried by sea is not excluded even though carriage of goods by sea is excluded. Article 17(2) further provides that recognition and enforcement of a judgment in respect of liability insurance may not be limited or refused solely on the ground that the liability related to a matter to which the Convention does not apply, or it is an award for punitive or exemplary damages under Article 11 of the Convention⁹.

Decisions on Preliminary Questions

25. However, it was also acknowledged that in some cases, the matters excluded by Article 2 of the Convention (e.g. validity of certain intellectual property rights, ownership of rights in rem in immovable

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⁹ See also paragraphs 76 to 77 of this paper.
property etc.) may only arise as a preliminary 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 that has given the judgment has decided on such matters as preliminary, or incidental, questions. Article 2(3) addresses this problem and provides that the proceedings will not be excluded from the scope of the Convention. Neither will such proceedings be excluded merely because a matter excluded by Article 2(2) arises by way of defence and if that matter is not an object of the proceedings.

26. The effect of a preliminary ruling, however, has no binding effect on third parties or *in rem* effect. Article 10 provides that such rulings shall not be recognised or enforced under the Convention. Furthermore, recognition or enforcement *may* be denied if the judgment was based on a ruling on a matter excluded under Article 2(2) or pursuant to a declaration made under Article 210.

*Preliminary Rulings in Intellectual Property Claims (other than Copyright and Related Rights)*

27. Preliminary rulings on, for example, the validity of a patent are given special consideration because of the special nature of intellectual property rights11. Article 10(3) provides that recognition or enforcement of a judgment based on such a ruling may be refused only where the ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State where the intellectual property right arose or there are pending proceedings concerning the validity of the intellectual property right in that State.

*Businesses Conducted by Government and Immunities*

28. Paragraphs 5 and 6 of Article 2 are intended to deal with situations where a Government or a State is involved in the proceedings. On the one hand, the Convention will apply to situations where a Government or a State is acting in its commercial capacity (acts *jure gestionis*) (paragraph 5); on the other hand, the Convention will not affect the principles of sovereign immunities and the law on privileges and immunities applicable to sovereign States and international organisations.

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10 See Article 10(2) and (4).
11 Such rights are territorial in nature and they are derived from national laws which may bear some differences although important aspects of such rights are governed by international conventions.
Exclusion by Declaration

29. While Article 2(2) sets out a list of matters excluded from the scope of the Convention, it was not considered sufficient for a number of States participating in the negotiations. To cater for the particular needs of each Contracting State to the Convention, Article 21 of the Convention allows a Contracting State, on an exceptional basis, to declare that the Convention will not apply to certain specific matters. The effects of declarations made under Article 21 are discussed in more details in paragraphs 82 to 84 below.

Article 3 Exclusive choice of court agreements

30. An exclusive choice of court agreement is an agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State 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 Contracting State or one or more specific courts of one Contracting State will be deemed to be an exclusive choice of court agreement unless the parties have expressly provided otherwise.\(^\text{12}\)

Formal Validity of an Exclusive Choice of Court Agreement

31. Paragraph (c) of Article 3 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.

Article 4 Other Definitions

“Judgment”

32. Paragraph 1 defines “judgment” to mean any decision on the merits given by a court. Accordingly, provisional and interim orders such as mareva injunctions and Anton Pillar orders will not qualify as “judgments” because they are not decisions on merits. This is now made clear by the last sentence of paragraph 1 which provides that “(a)n interim measure of protection is not a judgment”\(^\text{13}\). However, permanent

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\(^{12}\) See Article 3(a) of the Convention.

\(^{13}\) This is further reinforced by Article 7 of the Convention.
injunctions will be covered, so will other non-monetary judgments, as well as monetary judgments, as long as they are decisions on the merits\textsuperscript{14}.

**Finality and Binding Effect of Foreign Judgments**

33. The definition for “judgment” in Article 4 does not refer to “finality” or “binding effect”. Instead, Article 8(3) of the Convention helps to resolve this question by referring to the status of the judgment in the jurisdiction where it was given. It provides as follows:-

“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.”

34. The absence of any reference to “finality” or “res judicata” is understandable in view of the different ways in which the concept of finality is expressed in jurisdictions represented at the negotiations. It would be difficult, if not impossible, to harmonise the rules governing the time at which a judgment becomes final and binding.

**Chapter II - Jurisdiction**

35. This Chapter deals with the important question of jurisdiction, which is regarded by many States represented at the Hague Conference as decisive in determining whether the resulting judgment should be enforced under the Convention. The basic principle of the Chapter is that the court of a contracting State chosen in a valid exclusive choice of court agreement will be obliged to exercise jurisdiction (Article 5(1) and (2)) unless the agreement is null and void under its law (including its choice of law rules). Conversely, the court of a Contracting State which has not been chosen must decline to exercise jurisdiction (Article 6), subject to certain exceptions.

**Article 5  Substantive validity of the agreement**

36. Paragraph 1 of Article 5 set out, among other things, the law under which the substantive validity\textsuperscript{15} of the exclusive choice of court

\textsuperscript{14} There is no obligation to enforce remedies that are not available in Hong Kong, even if it forms a part of the foreign judgment on merits that is enforceable under the Convention. In such a case, a Hong Kong court may apply the enforceable measures available under Hong Kong law to give as much effect as possible to the foreign judgment. See Article 14, paragraph 72 below, and paragraph 201 of the Report.
agreement is to be tested. According to that paragraph, the law to be applied is the law of the chosen forum. This will be the basis on which the substantive validity of an exclusive choice of court agreement will be tested. A non-chosen court in a Contracting State of the Convention will be bound to apply the law of the chosen forum to determine the substantive validity of the agreement, whether at the jurisdiction stage or at the recognition and enforcement stage.

37. 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 Hong Kong law including its conflict of laws rules. In the majority of such cases, the parties are likely to have also chosen Hong Kong law as the governing law. In such cases, 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.

Non-application of the Principles of Forum Non Conveniens and Lis Pendens

38. Although the relevant legal principles have not been named in Article 5(2), the intention and effect of that Article is to reinforce the obligation to assume jurisdiction when a court is chosen by an exclusive choice of court agreement. Unless an exclusive choice of court agreement is null and void under the law of the chosen court or fails the formal requirement for such agreements under Article 3(c), the chosen court may NOT avoid assuming jurisdiction by invoking the principle of forum non conveniens even though it may consider that it is more appropriate for a court in another jurisdiction to exercise jurisdiction16. In the case of a civil law jurisdiction, its court is similarly obliged to exercise jurisdiction because it will be prevented from invoking the principle of lis pendens17.

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15 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 3(c) of the Convention. See paragraph 31 of this paper.

16 This is a change from the common law principles established in the case Spiliada Maritime Corporation v Cansulex Ltd [1986] 3 All ER 843. If the Convention is to be applied to Hong Kong, the obligation to exercise jurisdiction where the Hong Kong court is chosen will have to be written into the implementing legislation to displace the principle of forum non conveniens in situations where the Convention applies.

17 Lis pendens is a civil law principle which, in summary, provides that the court first seised should exercise jurisdiction over a case and any court subsequently seised should decline to exercise jurisdiction over the same case.
**Internal Transfer of Cases**

39. Paragraph 3 of Article 5 addresses internal rules in a Contracting State governing transfer of cases within the courts in the jurisdiction chosen by an exclusive choice of court agreement. Cases transferred under internal rules satisfying the conditions in Article 5(3) will not be affected by the compulsory rules to exercise jurisdiction under paragraphs 1 and 2 of Article 5.

**Subject Matter Jurisdiction**

40. The situation contemplated by paragraph 3(a) of Article 5 is that of the transfer of a case to another court within the same jurisdiction due to the special nature of the subject matter of the proceedings (such as tax) or because of the value of the claims. So even if the parties concluded an exclusive choice of court agreement designating such a court, it would not be obliged under the Convention to hear the case. In Hong Kong, this may happen where the District Court of Hong Kong is chosen by the parties but the value of the claim falls outside the jurisdictional limits of the District Court. In that situation, the case may be transferred to the Court of First Instance of the High Court even if the exclusive choice of court agreement points to the District Court but this will not affect the operation of the Convention. The Convention rules will apply to the case and the resulting judgment provided that the case itself falls within the scope of the Convention and satisfies all its requirements.

**Internal Allocation of Jurisdiction**

41. A case may also be subject to the rules of internal allocation of jurisdiction in a Contracting State. In the US, state courts and federal courts may exercise jurisdiction that may be exclusive of the other depending on, for example, the nature of the case and the status of the parties. Where the parties have chosen a specific court but the case is transferred to another court within the same Contracting State because of its internal rules on allocation of jurisdiction, the Convention may still apply. Where the relevant rules are such that the transfer is discretionary, a court should take into consideration the choice of the parties in deciding whether or not to transfer the case to another court.

42. In order to have due regard to parties’ autonomy, Article 8(5) (on recognition and enforcement) provides that where the power to

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18 See the two examples discussed in paragraphs 157 and 158 of the Report.
transfer a case is discretionary and a party has objected to such transfer in a timely manner, recognition and enforcement of the resulting judgment against the objecting party may be refused by another Contracting State. In other words, the fact that a party has objected to the transfer may be used as a defence by that party in the subsequent proceedings to enforce the judgments in another jurisdiction\textsuperscript{19}.

**Article 6   Obligations of a court not chosen**

43. The primary purpose of Article 6 is to prevent a non-chosen court from assuming jurisdiction. That obligation to refrain from exercising jurisdiction 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 court\textsuperscript{20}. These exceptions are included in the Convention because some States are concerned that the strict obligation imposed by this Article may prevent their courts from interfering in a case where there is manifest injustice or from applying their legislation on such fundamental legal rules such as those relating to the legal capacity of the parties.

**Special Exceptions**

44. Three of the exceptions under which a non-chosen court may exercise jurisdiction are worth a special mention. Paragraph (b) is included because it was considered not practical to harmonise the rules on legal capacity of the different jurisdictions represented at the negotiations. As it stands, the court seised will apply the law designated by its own choice of law rules to determine if a party lacked the capacity to enter into the exclusive choice of court agreement. However, since lack of capacity would also render the agreement null and void under Article 6(a), the issue of capacity will, in practice, be determined both by the law of the chosen court and by the law of the court seised.

45. The exception in 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 manifest injustice or would be manifestly contrary to the public policy of the court seised. 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 lead to abuse which might impair the object and

\textsuperscript{19} See also paragraph 54 of this paper.
\textsuperscript{20} 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.
usefulness of Article 6. However it has been emphasised in the Report that a “high standard” or “high threshold” is intended by these terms (see paragraphs 151-152 of the Report).

46. The exception in sub-paragraph (d) may not be obvious 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.

47. Despite the intention on the part of the drafters of the Convention to avoid parallel litigation, it should by now be obvious that the possibilities of parallel litigation cannot be totally eliminated. Parallel litigation will happen if a party has seised the chosen court under Article 5 and the other party is also able to convince a court not chosen to exercise jurisdiction on the basis of one of the exceptions in Article 6. The 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 exclusive choice of court agreement will not be enforceable under the Convention21 by reason that it was not given by a court of a Contracting State designated in an exclusive choice of court agreement. The court of a Contracting State, however, may nonetheless decide to recognise and enforce such a judgment under its own domestic law.

**Article 7 Interim measures of protection**

48. As mentioned earlier22, the Convention does not impose any obligation on a Contracting State to recognise and enforce interim measures of protection granted by a court in another Contracting State which, by their nature, are not decisions on the merits. The purpose of Article 7 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.

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21 The first sentence in the chapeau of Article 8(1) of the 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.”

22 See paragraph 32 of this paper.
Chapter III – Recognition and Enforcement

49. This is a very important Chapter of the Convention. It should be noted that the exception in the Chapter on “Jurisdiction” concerning purely domestic cases has not been repeated in this Chapter. Article 1(3) also provides that a case is international where recognition or enforcement of a judgment is sought for the purposes of Chapter III. As a result, a judgment in a purely domestic case based on an exclusive choice of court agreement given by a court of a Contracting State will also be recognised and enforced in other Contracting States to the Convention.

50. Some States (mainly civil law States) have expressed concerns about the requirement to enforce purely domestic judgments of other States. However, 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 20 of the Convention addresses the relevant concerns to a certain extent and permits a Contracting State to make a declaration to the effect that its courts may refuse to recognise or enforce judgments in a case where all the parties and all other elements other than the location of the chosen court were connected only with the requested State.

Article 8 Recognition and enforcement

51. Paragraph 1 of this Article contains one of the most fundamental principles of the Convention. It imposes an obligation on Contracting States to recognise and enforce a judgment given by a court of another Contracting State designated in an exclusive choice of court agreement. Recognition or enforcement may be refused only on the grounds specified in this Chapter of the Convention.

52. Paragraph 2 of Article 8 is a provision commonly found in agreements of this kind. It provides that the court where recognition and enforcement is sought should not review the merits of the original judgment except to the extent necessary to apply the provisions of this

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23 See paragraphs 15 and 16 of this paper.

24 On non-monetary remedy, see footnote 201 of the Report which states as follows: "However, it was understood by the Diplomatic Session that a Contracting State is not obliged to enforce a judgment for a non-monetary remedy if this is not possible under its legal system. Nevertheless, it should give the foreign judgment the maximum effect that is possible under its internal law".
Chapter of the Convention. If review of the merits of a foreign judgment is permitted without limitation, the enforcement proceedings would amount to a re-trial or appeal of the original judgment, which would defeat the very purposes of the Convention. There is a similar rule about finding of facts in the same paragraph.

53. The 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 may be different in each jurisdiction. The Convention leaves that question to be answered by reference to the law of the court of origin of the judgment. It simply states 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 origin\(^ {25} \). Paragraph 4 of Article 8 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.

54. To cater for cases that might have been transferred due to internal rules about allocation of jurisdiction, paragraph 5 of Article 8 provides that judgments in respect of cases transferred in accordance with Article 5 will be recognised and enforced under Chapter III. However, recognition or enforcement may be refused if the internal rules governing allocation of jurisdiction give a discretion to the court as regards whether a transfer should be made and a party had objected to the transfer in a timely manner in the State of origin.

**Article 9  Refusal of recognition or enforcement**

55. In common with all bilateral and regional arrangements on reciprocal enforcement of judgments, the obligation to enforce a judgment under the Convention is subject to a number of exceptions in order to safeguard the interests of the judgment debtors and the Contracting State where a judgment is sought to be recognised and enforced. These are now exhaustively listed in Article 9. The court of the requested State *may* refuse to recognise or enforce a foreign judgment if one or more of the grounds listed in Article 9 apply.

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\(^{25}\) Paragraph 3 of Article 8.
Agreement being Null and Void

56. Under paragraph (a) of Article 9, a judgment may be refused recognition and enforcement if the choice of court agreement is null and void under the law of the State of the chosen court, including its internal choice of law (conflict of laws) rules, unless the chosen court has determined that the agreement is valid. The last part of this ground for refusal may need some explanation as it appears to have created an exception. 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.

57. It is possible that in some cases, the validity of the exclusive choice of court agreement has not been disputed or argued and the chosen court may have merely proceeded on the assumption that it is valid. If this is so, the judgment debtor may subsequently 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 that event, it will be for the court of the requested State to decide on the validity of the agreement by applying the law of the State of the chosen court.

Lack of Capacity

58. The ground for refusal in paragraph (b) of Article 9 is that a party lacked the capacity to enter into the exclusive choice of court agreement. This is 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 at the stage of recognition and enforcement. Since the validity of the exclusive choice of court agreement is determined by the law of the chosen court, the court of the requested State may also refuse to recognise or enforce a foreign judgment on the basis that one of the parties lacked the legal capacity to conclude the choice of court agreement under the law of the chosen court (see Article 9(a) and paragraphs 56 and 57 of this paper).

Insufficient Notice

59. Paragraph (c)(i) of Article 9 is concerned with the question of whether the defendant has been notified in sufficient time as to enable
him to arrange for his defence. Whether or not the defendant was notified in sufficient time is a question to be decided by the court of the requested State but not the law of the State of the original court. This ground of refusal cannot be invoked by the defendant if he had voluntarily submitted to the jurisdiction of the original court by appearing and contesting the merits of the claim against him26.

60. Paragraph (c)(ii) is included in the Convention to address the concerns of some States which take the view that the defendant must have been notified of the proceedings in accordance with the law of the place where service is performed. The compromise solution in paragraph (c)(ii) may only be invoked as a ground for refusing to recognise and enforce a judgment where the service was performed in the requested State and it was performed in a manner that is incompatible with the fundamental principles of the requested State concerning service of documents.

Breach of Fundamental Principles including Procedural Fairness

61. The grounds for refusal in paragraphs (d) (fraud in connection with a matter of procedure) and (e) (public policy of the requested State) are very well known under Hong Kong’s own law on enforcement of foreign judgments. It should also be noted that fraud as to substance is often subsumed under the head of public policy under the common law27. However, paragraph (e) also refers to fundamental principles of procedural fairness in specific proceedings. The particular language was crafted to avoid a defence that is based on attacking the legal system of any Contracting State in general. Such a defence must relate to failings of procedural fairness in a specific case and the failings must be of a fundamental nature.

Inconsistent Judgments

62. A foreign judgment that is inconsistent with a judgment of the requested State in respect of a dispute between the same parties will not be enforced by the requested State under paragraph (f) of Article 9. As regards inconsistency with a judgment of another State (between the same parties and on the same cause of action) that is capable of recognition and enforcement in the requested State, the judgment under the Convention prevails only if it is earlier than the other foreign

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26 However, a defendant who appeared before the original court only to contest jurisdiction would not be deemed to have submitted to the jurisdiction of the original court.

27 See also footnote 228 of the Report.
judgment or if the earlier foreign judgment does not fulfil the conditions necessary for its enforcement in the requested State (paragraph (g) of Article 9).

**Article 10  Preliminary questions**

63. Article 10 is devoted to the effect of decisions on preliminary questions. It has been discussed in paragraphs 25-27 above. Generally such decisions are not recognised or enforced under the Convention. The special rules in paragraph 3 of Article 10 apply in relation to rulings on the validity of intellectual property rights (see paragraph 27 above). It should also be noted that a judgment that is based on a matter excluded by a declaration made by the requested State under Article 21 of the Convention may also be refused recognition and enforcement.

**Article 11  Damages**

64. The subject of damages, particularly non-compensatory damages, has been discussed very thoroughly during the negotiations. 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 damages.

65. This concern is now addressed by Article 11, which provides that Contracting States are not obliged to give effect to that part of a judgment that represents non-compensatory damages, including exemplary or punitive damages (paragraph 1). It would be up to a court in the requested State to decide which part of the damages is non-compensatory in a foreign judgment that does not expressly distinguish between compensatory and non-compensatory damages. In so doing, it should also take into account whether and to what extent the damages awarded serve to cover costs and expenses relating to the proceedings, which are not regarded as non-compensatory in nature (see paragraph 2 of Article 11).

**Article 12  Judicial settlements (transactions judiciaries)**

66. Judicial settlements (transactions judiciaries) are different from consent judgments given by courts in many common law

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28 Section 7(1) of the Protection of Trading Interests Ordinance, Chapter 471 of the Laws of Hong Kong.
jurisdictions. While the latter are recognised and enforced under the Convention as court judgments under Article 8 of the Convention, the former primarily originate from civil law jurisdictions and are only enforceable pursuant to Article 12. A consent judgment is given by a court which made the order with the consent of both parties to the proceedings. On the other hand, a judicial settlement is a contract between the parties to the dispute putting an end to it. The contract usually represents a compromise under which the parties have made some concessions. The contract is then submitted to a judge who records it in an official document which usually has the effect of a final judgment in that jurisdiction.

67. In this sense, judicial settlements (transactions judiciaries) are not previously recognised and enforced in Hong Kong. Article 12 requires a Contracting State to enforce (but not recognise) a judicial settlement approved by a court of another Contracting State that has been designated in an exclusive choice of court agreement, or which has been concluded before that court in the course of proceedings. This is subject to a very important caveat: the judicial settlement must be capable of being enforced in the same manner as a judgment in the State of origin.

Article 13 Documents to be produced

68. This Article lists the documents that are required to be produced to the court of the requested State in an application to enforce a judgment under the Convention. Sub-paragraph (a) of paragraph 1 requires the production of the full judgment including the court’s reasoning. Sub-paragraph (b) requires the production of the exclusive choice of court agreement or a certified copy or the evidence of its existence. Sub-paragraph (c) requires evidence that the defendant was served; but it only applies if the judgment concerned is a default judgment. Sub-paragraph (d) requires the production of all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin. The completion of the Recommended Form (see paragraph 3 of Article 13) will certainly assist in providing proof on this as questions 11 and 12 of the Recommended Form are directly relevant to the issue, but the use of this Form is not obligatory under the Convention.

29 See paragraph 211 of the Report.
30 See paragraph 70 below and paragraph 213 of the Report.
69. The list of documents mentioned in paragraph 1 of Article 13 is not exhaustive. A court may ask for more documentary proof if the terms of the judgment do not permit it to verify whether the conditions for enforcement stipulated in Chapter III of the Convention have been complied with.

Recommended Form

70. An application to enforce a judgment may be accompanied by a Form recommended by the Contracting Parties and published by the Hague Conference. Such a Form must be issued by a court (including an officer of the court) of the State of origin of the judgment. Paragraph 3 of Article 13 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 means that it is not part of the Convention. This also makes it easier for it to be amended in future.

Translation

71. Paragraph 4 of Article 13 refers to the possibility that the law of the requested State may require translation of any document referred to in this Article into an official language of that State.

Article 14 Procedure

72. Article 14 provides expressly that matters of procedure are to be governed by the domestic law of the requested State. It should be noted that this is only applicable to matters of procedural law. Domestic law of a Contracting State should not be inconsistent with any matter of substance laid down in the Convention e.g. the grounds for refusing to recognise and enforce a judgment under the Convention. However, the Convention does not require a court in the requested State to grant a relief which is not available under its law even though such relief might be ordered by the foreign judgment. The Report has made it clear that Contracting States do NOT have to create new kinds of remedies for the purpose of enforcing foreign judgments under the Convention31.

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31 See paragraph 89 of the Report.
Article 15  Severability

73. This Article is an attempt to maximise the utility of the Convention. It provides that a judgment creditor may apply for recognition and enforcement of a severable part of a judgment if that part of the judgment is capable of being recognised or enforced under the Convention. The key question is whether a judgment is severable and this is to be determined by the court of the requested State applying its own law.

Chapter IV – General Clauses

Article 16  Transitional provisions

74. The application of the Convention may be relevant in two scenarios; firstly when a party in a dispute seeks to invoke the jurisdiction of the court chosen in an exclusive choice of court agreement and, secondly, when a party in a dispute seeks to invoke the jurisdiction of a court not chosen in the choice of court agreement. In the first scenario, the Convention would only apply if the exclusive choice of court agreement was concluded after the Convention has entered into force for the State of the chosen court (paragraph 1 of Article 16). In the second scenario, the court which has not been chosen but which has been asked to exercise its jurisdiction would have to apply the rules of the Convention (i.e. to decline to exercise jurisdiction pursuant to Article 6 unless one or more of the exceptions in Article 6 applies) if the Convention has already come into force for the State of that court. It does not matter whether the exclusive choice of court agreement was entered into before or after the Convention has come into force for the State of the non-chosen court.

75. Article 16 does not apply to declarations under Article 22 relating to mutual recognition of judgments resulting from non-exclusive choice of court agreement (see paragraphs 85 to 87 of this paper and footnote 256 of the Report). It is expected that Contracting Parties making declarations under Article 22 will provide for the transitional arrangement in the text of the declarations.

Article 17  Contracts of insurance and reinsurance

76. Contracts of insurance may have as their object matters that are excluded by the Convention (e.g. Article 2) or matters that are
covered by declarations made under Article 21 of the Convention. Article 17(1) is meant to clarify that contracts of insurance *per se* are not excluded from the scope of the Convention despite the fact that the subject matters of the insurance may have been excluded from the scope of the Convention. This is subject to the caveats that this Article does not preclude:-

(1) an employee from suing the insurer of his insolvent employer for employee compensation in his home jurisdiction notwithstanding the existence of an exclusive choice of court agreement designating a court elsewhere where the law in a State so provides,

(2) a Contracting Party from making a declaration under Article 21 which has the effect of generally disapplying contracts of insurance from its application of the Convention (although this is discouraged by the language employed in Article 21).

77. Article 17(2) deals with contracts of insurance for indemnity. The idea follows Article 17(1). It provides that recognition and enforcement of a judgment in respect of liability under a contract of insurance to indemnify the insured in respect of (1) a matter to which the Convention does not apply or (2) an award of damages to which Article 11 may apply (e.g. punitive damages) may NOT be limited or refused.

**Article 18  No legalisation**

78. The aim of Article 18 is to facilitate the operation of the Convention by providing that no legalisation requirement or similar requirements (including *Apostille*) should be applied to documents forwarded or delivered under the Convention.

**Declarations**

79. The operation of certain Articles in the Convention may be affected by a Contracting Party making declarations under Articles 19, 20, 21 and 22. The declarations with the most far-reaching implications are those made under Article 21.

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32 In Hong Kong, the Employees Compensation Ordinance (Cap 282) confers exclusive jurisdiction on the District Court in respect of claims for employees’ compensation. This has been confirmed by a recent decision of the District Court in the case of *Paquito Lima Buton v Rainbow Joy Shipping Ltd* [2006] HKEC 1051. Section 44, in particular, empowers an injured employee to seek redress in respect of liability owed to him by his employer directly from the employer’s insurer subject to certain conditions. See also paragraph 51, footnote 75 and paragraphs 221-227 of the Report.
Article 19 Declarations limiting jurisdiction

80. Article 19 permits a Contracting State to limit the application of the Convention so that its courts may not have to entertain disputes which have nothing to do with that State even if its courts have been designated in an exclusive choice of court agreement between the parties. By making a declaration under this Article, a Contracting State’s courts may refuse to determine disputes to which an exclusive choice of court agreement applies if there is no connection between the parties and that State other than the exclusive choice of court agreement.

Article 20 Declarations limiting recognition and enforcement

81. It should be recalled that the Chapter on “Recognition and Enforcement of Judgments” envisages that domestic judgments based on an exclusive choice of court agreement may also be recognised and enforced under the Convention33. Some States are concerned about the possibility of having to enforce foreign judgments that they consider should have been decided by their own courts because the cases were domestic apart from the designation of a foreign court under an exclusive choice of court agreement. Article 20 permits such a State to make a declaration to the effect that its court may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

82. This Article proved to be the most difficult and controversial one during the negotiations. Its inclusion in the Convention is vital to many States which sought to protect interests that are very specific and sensitive to them, such as intellectual property rights and hazardous minerals. It represents a compromise among States that have participated in the negotiations. Its inclusion in the Convention has prevented the undue expansion of the list of excluded matters in Article 2 of the Convention.

83. The Article permits a Contracting State to make a declaration at any time to exclude certain subject matters from the scope of the

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33 See paragraph 49 above.
Convention for its own purposes. It should be noted that Article 21 does not impose any restriction on the subject matters that may be excluded by a declaration. In other words, even matters that are expressed to be covered by the Convention e.g. copyright (see Article 2(2)(o)), judicial settlements (Article 12), insurance/reinsurance contracts (Article 17) may be the subjects of a declaration under Article 21. Because of the need to guard against potential abuse, the Article itself expressly implores Contracting States that wish to make use of this Article to ensure that any declaration made is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

84. The effect of a Contracting State making a declaration on a specific matter is that the Convention shall not apply with regard to that matter in that Contracting State. But a declaration made under this Article is a double-edged sword. Other Contracting States shall not apply the Convention with regard to that matter where the exclusive choice of court agreement designates a court of the State that has made such a declaration. This means that they will be at liberty to disregard the exclusive choice of court agreement and exercise jurisdiction without the need to refer to Article 6 of the Convention.

**Article 22 Reciprocal declarations on non-exclusive choice of court agreements**

85. Article 22 enables Contracting States that have made a declaration under this Article to recognise and enforce each other’s judgments that are based on a non-exclusive choice of court agreement that is valid under Article 3(c) of the Convention subject to certain conditions. This Article is a last minute innovation put forward during the last meetings of the Special Commission and is a simple and useful means for Contracting States to maximise the opportunities for reciprocal recognition and enforcement of judgments on the basis of choice of court agreements under the Convention. It will be particularly useful to certain business transactions where exclusive choice of court agreements are not common because of the specific nature of the businesses e.g. banking and loan agreements.

86. Before a judgment resulting from a non-exclusive choice of court agreement given by the court of one Contracting State which has made the declaration could be enforced in another Contracting State which has made a similar declaration, the following conditions in paragraph 2 of Article 22 have to be satisfied:-
(a) the court of origin was designated in a non-exclusive choice of court agreement;

(b) there is no prior judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor is a proceeding pending between the same parties in any other such court on the same cause of action; and

(c) the court of origin was the court first seised.

87. It should also be noted that the making of a declaration under Article 22 does not have the effect of nullifying any declaration of excluded matters made under Article 21 or affecting the list of matters excluded by Article 2 as between the Contracting States which have made a declaration under Article 22. On the other hand, the relevant provisions of the Conventions on jurisdiction, e.g. Articles 5 and 6, will not be applicable to non-exclusive choice of court agreements.

Article 23 Uniform interpretation

88. The Convention is intended to be ratified by States which have different legal systems and traditions. It is important for Contracting States to bear in mind the international character of the Convention when they or their courts find it necessary to consider the meaning of any provisions of the Convention. The aim of Article 23 is to promote uniform interpretation of the Convention among Contracting States.

Article 24 Review of the operation of the Convention

89. Regular review of the Convention will promote the use of the Convention and the uniform interpretation of the Convention. The Secretary-General of the Hague Conference will play an important coordination role in convening meetings for the purpose of reviewing the operation of the Convention. It is understood that declarations made by Contracting States pursuant to the relevant provisions of the Convention will be discussed in these review meetings.

Article 25 Non-Unified legal systems

90. Article 25 will facilitate the application and practical operation of the Convention in States which have more than one legal system. This is an important Article for Hong Kong as there are at least three
jurisdictions within China each with their own legal systems. Paragraph 1 provides for certain principles of interpretation in respect of certain terms used in the Convention. It seeks to give such terms the necessary context in its application to a State with more than one legal system. Paragraph 2 provides that the Convention will not apply between individual territorial units within a State. Paragraph 3 reinforces the same concept by saying that enforcement of a judgment in one territorial unit of a State will not mean that the same judgment would be automatically enforceable in another territorial unit of the same State which has a different legal system. Paragraph 4 provides that the Article does not apply to a regional economic integration organisation.

**Article 26  Relationship with other international instruments**

91. This is a lengthy and difficult Article which was designed to address the relationship between the Convention and regional agreements/arrangements which may have provisions dealing with subject matters covered by the Convention. The most obvious examples are the Brussels Regulations (formerly the Brussels Convention) and the Lugano Convention. The former applies among EU States while the latter is applicable among EFTA States.

92. There may be conflicts when the State of a court seised with a case is party to two or more instruments governing the same subject matter. Article 26 provides that the Convention will give way to other treaties in certain circumstances. Generally speaking, the Convention will give way to another conflicting treaty if none of the parties are resident in a Contracting State that is NOT a Party to the conflicting treaty.

93. The above-mentioned rule and other rules governing different scenarios are described as “give-way” rules in the Report and the understanding of such rules is enhanced by the use of a number of examples in the Report. In view of the complex nature of these rules, readers who are interested in Article 26 are strongly advised to refer to paragraphs 265 to 310 of the Report which are devoted to this particular subject.
Chapter V - Final Clauses

Article 27  Signature, ratification, acceptance, approval or accession

94. In common with the other Hague Conventions, only States can become party to the Convention. Hong Kong cannot sign and ratify the Convention on its own but the Convention may be applied to Hong Kong by the Central People’s Government in accordance with this Article and Articles 25 and 28 (Non-unified legal systems). A State may accept the Convention in a number of ways as provided for by this Article. The relevant instrument of acceptance must be deposited with the Ministry of Foreign Affairs of the Netherlands, the depositary of the Convention.

Article 28  Declarations with respect to non-unified legal systems

95. Under this Article, the SARs and the Mainland may apply the Convention at different times. The Convention may also be applied to Hong Kong without being applied to the Mainland or Macau. In any event, Hong Kong may only seek to have the Convention applied to the SAR when its law has been amended to comply with the provisions of the Convention.

Article 29  Regional economic integration organisations

96. Regional economic integration organisations (“REIOs”) take different forms and may have different degrees of competence. Articles 29 and 30 are specifically included to cater for the different situations of REIOs.

97. Article 29 provides that an REIO constituted solely by sovereign States and has competence over some or all of the matters governed by the Convention may become a Party to the Convention. It shall have the rights of a Contracting State over matters that it enjoys competence. However the acceptance of the Convention by an REIO will not count for the purposes of the entry into force provisions of the Convention (Article 31) unless it made a declaration that its member States will not be Parties to this Convention in accordance with Article 30.
Article 30  Accession by a regional economic integration organisation without its member States

98. Where a declaration is made by an REIO that it exercises competence over all of the matters governed by the Convention and that its member States will not be Parties to this Convention, the references in the Convention to “Contracting State” or “State” shall apply equally, where appropriate, to the member States of the REIO.

Article 31  Entry into force

99. This Article specifies when the Convention will come into force internationally. This will be on the first day of the month following the expiration of three months after the deposit of the SECOND instrument of ratification, acceptance, approval or accession. The same formula applies to any given State or REIO in its acceptance of the Convention and for a territorial unit to which the Convention has been extended under Article 28.

Reservation

100. There is no express provision for States or REIO to make reservations to the Convention. In view of such silence, the normal international law principles governing the making of reservations are applicable and these rules are now embodied in Articles 19-23 of the Vienna Convention on the Law of Treaties. To discourage the use of reservations, a non-binding Statement was adopted at the Diplomatic Session discouraging the making of reservations and emphasising the need to exercise restraint in the making of reservations.\(^{34}\)

101. Having regard to the possibility of making declarations under Articles 19-22, it is unlikely that sweeping reservations will be made by Contracting Parties when they deposit the instruments of acceptance.

Article 32  Declarations

102. Article 32 provides that a declaration made under Articles 19-22 and 26 may be made, modified and withdrawn at any time and shall not apply to exclusive choice of court agreements concluded before the declaration takes effect.

\(^{34}\) See paragraph 319 of the Report.
Article 33  Denunciation

103. The Convention may be denounced which will generally take effect twelve months after the depositary has been notified.

Article 34  Notifications by the depositary

104. This Article provides for the normal functions and duties of the depositary to the Convention.

END OF COMMENTARY
Solicitation of Views and Comments

Views and comments on the Convention are now invited. In particular, members of the public, including members of the two legal professions, are invited to indicate:-

(a) whether the Convention should be applied to Hong Kong. If not, what are the reasons;

(b) whether there would be any fundamental objections and/or practical difficulties in the recognition and enforcement of non-monetary judgments from another Contracting State[^35]; and

(c) whether there are any fundamental objections to the enforcement of foreign judicial settlements (*transactions judiciaries*)[^36].

If the Convention is to be applied to Hong Kong -

(d) whether declarations limiting jurisdiction, and recognition and enforcement under Articles 19 and 20 respectively of the Convention should be made;

(e) whether a declaration should be made under Article 21 to exclude specific matters in addition to those listed in Article 2(2) of the Convention. If yes, what are those subject matters and the reasons for excluding them from the Convention’s application to Hong Kong; and

(f) whether a declaration under Article 22 to recognise and enforce judgments given by another court in respect of non-exclusive choice of court agreement should be made.

Views and comments in response to this consultation paper 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 September 2007. Inquiries on this subject should be directed to Mr Peter Wong (tel: 2867 4745; e-mail:

[^35]: There is no obligation under the Convention to enforce a remedy that is not available under the internal law of the requested State. See Article 14, paragraphs 32 and 72 above and paragraph 89 of the Report.

[^36]: See Article 12 and the comments in paragraphs 66 to 67 of this paper.
peterwong@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

Unless otherwise requested by a person submitting comments, views and comments received in response to this consultation paper may be reproduced or summarised and published. Those submitting comments who may wish to remain anonymous should clearly say so in their submissions.

Treaties and Law Unit  
International Law Division  
Department of Justice  
5 July 2007
CONVENTION ON CHOICE OF COURT AGREEMENTS

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions –

Chapter I – Scope and Definitions

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.
**Article 2  Exclusions from scope**

1. This Convention shall not apply to exclusive choice of court agreements –

   a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

   b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to 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) the carriage of passengers and goods;

   g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

   h) anti-trust (competition) matters;

   i) liability for nuclear damage;

   j) claims for personal injury brought by or on behalf of natural persons;

   k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;

   l) rights in rem in immovable property, and tenancies of immovable property;
m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

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

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

**Article 3   Exclusive choice of court agreements**

For the purposes of this Convention –

a) “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) 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 Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented –

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) 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 4 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be 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 5 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 –

   a) on jurisdiction related to subject matter or to the value of the claim;

   b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies 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 conclude the agreement under the law of the State of the court seised;

   c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

   d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

   e) the chosen court has decided not to hear the case.
Article 7  Interim measures of protection

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

Chapter III – Recognition and Enforcement

Article 8  Recognition and enforcement

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 grounds specified in this Convention.

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 given 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.

5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9  Refusal of recognition or enforcement

Recognition or enforcement may be refused if –
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 conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim –
   i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, 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; or
   ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

**Article 10  Preliminary questions**

1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.
2. Recognition or enforcement of a judgment may be refused if, and to
the extent that, the judgment was based on a ruling on a matter excluded
under Article 2, paragraph 2.

3. However, in the case of a ruling on the validity of an intellectual
property right other than copyright or a related right, recognition or
enforcement of a judgment may be refused or postponed under the
preceding paragraph only where –

   a) that ruling is inconsistent with a judgment or a decision of a
      competent authority on that matter given in the State under the
      law of which the intellectual property right arose; or

   b) proceedings concerning the validity of the intellectual property
      right are pending in that State.

4. Recognition or enforcement of a judgment may be refused if, and to
the extent that, the judgment was based on a ruling on a matter
excluded pursuant to a declaration made by the requested State under
Article 21.

Article 11 Damages

1. Recognition or enforcement of a judgment may be refused if, and to
the extent that, the judgment awards damages, including exemplary or
punitive damages, that do not compensate a party for actual loss or harm
suffered.

2. The court addressed shall take into account whether and to what
extent the damages awarded by the court of origin serve to cover costs
and expenses relating to the proceedings.

Article 12 Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) 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.
Article 13  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) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;

   c) if the judgment was given 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;

   d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

   e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14  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 15 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.

Chapter IV – General Clauses

Article 16 Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17 Contracts of insurance and reinsurance

1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.

2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –

   a) a matter to which this Convention does not apply; or

   b) an award of damages to which Article 11 might apply.

Article 18 No legalisation

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

Article 19 Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the
location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20 Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –
   
   a) in the Contracting State that made the declaration;

   b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –
a) the court of origin was designated in a non-exclusive choice of court agreement;

b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and

c) the court of origin was the court first seised.

Article 23 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 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

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

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

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

Chapter V – Final Clauses

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

**Article 28 Declarations with respect to non-unified legal systems**

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. A 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 shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

**Article 29 Regional Economic Integration Organisations**

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation
Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

4. Any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

**Article 30  Accession by a Regional Economic Integration Organisation without its Member States**

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

**Article 31  Entry into force**

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

2. Thereafter this Convention shall enter into force –

   a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

   b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.


*Article 32  Declarations*

1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

*Article 33  Denunciation*

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

*Article 34  Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –
a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;

b) the date on which this Convention enters into force in accordance with Article 31;

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;

d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.

The following Recommendation relating to the Convention on Choice of Court Agreements –

The Twentieth Session

Recommends to the States Parties to the Convention on Choice of Court Agreements to use the following form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention –
RECOMMENDED FORM
UNDER THE CONVENTION ON
CHOICE OF COURT AGREEMENTS
(“THE CONVENTION”)

(Sample form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention)

1. (THE COURT OF ORIGIN) ...........................................................................................................

ADDRESS ........................................................................................................................................

TEL. ................................................................................................................................................

FAX ................................................................................................................................................

E-MAIL ...........................................................................................................................................

2. CASE / DOCKET NUMBER ...........................................................................................................

3. ...........................................................................(PLAINTIFF)

v.

.............................................................................(DEFENDANT)

4. (THE COURT OF ORIGIN) gave a judgment in the above-captioned matter on (DATE) in (CITY, STATE).

5. This court was designated in an exclusive choice of court agreement within the meaning of Article 3 of the Convention:

   YES □       NO □

   UNABLE TO CONFIRM □
6. If yes, the exclusive choice of court agreement was concluded or documented in the following manner:

7. This court awarded the following payment of money *(please indicate, where applicable, any relevant categories of damages included)*:

8. This court awarded interest as follows *(please specify the rate(s) of interest, the portion(s) of the award to which interest applies, the date from which interest is computed, and any further information regarding interest that would assist the court addressed)*:

9. This court included within the judgment the following costs and expenses relating 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)*:

10. This court awarded the following non-monetary relief *(please describe the nature of such relief)*:

11. This judgment is enforceable in the State of origin:

   YES ☐  NO ☐  UNABLE TO CONFIRM ☐
12. This judgment (or a part thereof) is currently the subject of review in the State of origin:

YES ☐  NO ☐

UNABLE TO CONFIRM ☐

If “yes” please specify the nature and status of such review:

13. Any other relevant information:

14. Attached to this form are the documents marked in the following list (if available):

☐ a complete and certified copy of the judgment;

☐ the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;

☐ if the judgment was given 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;

☐ any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(list if applicable):

☐ in the case referred to in Article 12 of the Convention, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin;

☐ other documents: ...................................................................................................................
APPENDIX

16. Signature and / or stamp by the court or officer of the court:

CONTACT PERSON:

TEL.: 

FAX: 

E-MAIL: