



Consultation Paper No. 2

on

the Preliminary draft Hague Convention on

Jurisdiction and Foreign Judgments

in Civil and Commercial Matters

International Law Division

Department of Justice

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**Consultation Paper No. 2 on the Preliminary
Draft Hague Convention on Jurisdiction and
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in Civil and Commercial Matters**

Summary

1. A Special Commission of the Hague Conference on Private International Law (the “Hague Conference”) has been convened, with the principal task of producing a Convention on international Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters. The Department of Justice issued a consultation paper and invited comments on a preliminary draft of the Convention in January 1999.

2. Two more negotiating sessions were held by the Special Commission since January 1999. A draft text of the Convention, which has been given the title of “Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters” (the “Draft Convention”), was adopted by the Special Commission on 30 October 1999. Readers may also wish to refer to the report prepared by the Reporters of the Special Commission* for a detailed discussion of the provisions of the Draft Convention. The report is also available on the Department of Justice website at <http://www.info.gov.hk/justice/>.

3. This consultation paper outlines the various provisions of the Draft Convention and invites all interested parties in Hong Kong to express their views and comments by the end of November 2000. A soft copy of this paper may also be found on the website of the Department of Justice. The text of the Draft Convention is annexed to this consultation paper; it may also be downloaded from the website of the Hague Conference at www.hcch.net.

4. The Draft Convention will be submitted for consideration by a diplomatic conference of the Hague Conference, expected to be held in June 2001. However, the Special Commission has not yet completed its work, as evidenced by the number of square brackets and alternative texts appearing in the Draft Convention. It is expected that the Special Commission will hold informal meetings before the diplomatic

* The report on the Draft Convention was prepared by Mr Peter Nygh of Australia and Mr Fausto Pocar of Italy.

conference with the purpose of reaching consensus on as many outstanding issues as possible.

5. If the Draft Convention is adopted by the Hague Conference, a decision regarding its application to Hong Kong will be taken only after the Government has considered the views of interested parties, including the two legal professional bodies, and made an assessment of the provisions of the finalised Convention. Hong Kong is represented at the Special Commission as part of the Chinese delegation*. The Department of Justice is now seeking comments on the Draft Convention.

6. Comments may be addressed to the Treaties and Law Unit, International Law Division, Department of Justice, 7th Floor, Main Wing, Central Government Offices, Lower Albert Road, Central, Hong Kong (fax no: 2877 2130; e-mail: ild@doj.gcn.gov.hk) on or before 30 November 2000. Inquiries on this subject should be directed to Mr Frank Poon (tel: 2810 2754; e-mail: frankpoon@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

* Membership of the Hague Conference is limited to sovereign States. A representative from the Department of Justice of the HKSAR Government has been participating in the work of the Special Commission from October 1998 as a member of the Chinese delegation.

Background

1. A Special Commission has been convened by the Hague Conference on Private International Law (the "Hague Conference") to study the question of jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters and the feasibility of introducing an international convention on the subjects. One of the principal objectives of such a Convention would be to bring about increased certainty on important jurisdictional issues relating to international litigation and to prevent duplication of effort, costs and procedures.

Hong Kong's Participation

2. Membership of the Hague Conference is limited to States. The Government of the Hong Kong Special Administrative Region ("HKSAR"), with the permission of the Central People's Government under Article 152 of the Basic Law, sent a representative to join the PRC delegation at the meetings of the Special Commission. It is envisaged that the HKSAR will continue to be represented in the work of the Special Commission until the conclusion of its work.

Previous Consultation

3. In January 1999, the Department of Justice published a consultation paper and invited comments on the draft provisions of the proposed Convention which were formulated after three meetings of the Special Commission held between June 1997 and November 1998. Since January 1999, two further meetings of the Special Commission were held. A draft text of the Convention entitled "*Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*" (the "Draft Convention") was adopted in October 1999. The Draft Convention has substantially revised the preliminary draft circulated with the first consultation paper in January 1999.

Application of the Convention to the Hong Kong SAR

4. Currently, the question of jurisdiction in international litigation involving foreign parties, or property located abroad, or a tort or contract with a foreign element, is determined by the courts in Hong Kong applying private international law rules developed under the common law. Several regional international conventions have been concluded on

the subject of jurisdiction and enforcement of judgments (for example the Brussels Convention and the Lugano Convention) but they are not applicable to Hong Kong. Upon the conclusion of the Draft Convention, the Government may seek to have it applied to the Hong Kong SAR under Article 153 of the Basic Law, irrespective of whether or not the Convention is applied to the Mainland. In common with the other Hague Conventions, it is expected that the Convention, in its final form, will allow a State to apply the Convention to its entire territory or part only of its territory. Legislation on jurisdiction and enforcement of judgments would have to be amended or introduced in the event that the Convention is applied to Hong Kong.

The Draft Convention

5. The text of the Draft Convention is annexed as an appendix to this paper. It is also available on the website of the Hague Conference on Private International Law at www.hcch.net. In many instances, the draft clauses represent compromises made by States participating in the work of the Special Commission. These States represent different legal systems around the globe. However, the draft clauses should by no means be regarded as finalised or definitive, as evidenced from the square brackets appearing throughout the text. The square-bracketed texts represent proposals, alternatives and options which have been discussed in the Special Commission. There is also blank space for some Articles, which is due to the lack of consensus at the meetings of the Special Commission. According to the procedure of the Hague Conference, the Draft Convention will be put before a diplomatic conference.

New Development

6. Since the adoption of the Draft Convention in October 1999, the US Government has expressed grave concerns about some of its contents and indicated that it would not be possible for the US to accept the Draft Convention as it stands. A few other countries have also written to the Hague Conference urging a more consensual approach and that the diplomatic conference should be postponed with a view to finding solutions to address the US concerns. During the meeting of the Special Commission on General Affairs In May 2000 of the Hague Conference, it was recommended that the diplomatic conference be split into two parts, the first part of which will be held on June 2001. Before the diplomatic

conference, informal meetings will be held amongst Hague member States in order to resolve the difficulties raised by States concerned.

The Structure of the Draft Convention

7. The Draft Convention is divided into four chapters. The first chapter defines the scope of the Convention. The second chapter deals with the rules of jurisdiction and the third chapter deals with the issues of recognition and enforcement of judgments. Finally, the last chapter contains provisions dealing with general matters.

Chapter I - Scope of the Draft Convention

8. The Draft Convention covers all civil and commercial matters with the exception of the matters referred to in Article 1(1) – (2). The notable exceptions are matters relating to administrative law, maintenance obligations, matrimonial matters, succession matters, insolvency and all admiralty or maritime matters. With a few exceptions, the Draft Convention would *not* apply to cases where all the parties are habitually resident in one State (Article 2).

Chapter II - Jurisdiction

9. Chapter II of the Draft Convention is devoted to the rules of jurisdiction governing international litigation. The Draft Convention can be described as a mixed Convention¹. That is to say, for a judgment to be enforceable under the Draft Convention, it must come from the court of a member State exercising jurisdiction on a “white” or “required” ground of jurisdiction specified in the Convention (Articles 3-16). There would be no obligation under the Draft Convention to recognise or enforce judgments based on a “grey” or “permitted” ground of jurisdiction (Article 17). Finally, it would be contrary to the Draft Convention to give effect to judgments based on a “black” or “prohibited” ground of jurisdiction (Article 19).

10. For cases involving one or more parties not habitually resident in Hong Kong, the application of the Draft Convention to the Hong Kong SAR would basically change the traditional rules of jurisdiction. At present, the jurisdictional rule in Hong Kong is very

¹ For the meaning of “mixed Convention”, “double Convention” and “single Convention”, please refer to the consultation paper issued by the Department of Justice on the same subject in January 1999 a copy of which may be downloaded from the Department of Justice website at <http://www.info.gov.hk/justice/>

simple. Subject to very few exceptions², jurisdiction is based on the successful service of a writ. A writ can be served on a defendant within the jurisdiction as of right. In most cases where the defendant is located outside the jurisdiction, all that is required is to secure the leave of the court for service of the writ to the defendant outside the jurisdiction. If Hong Kong is to accept and implement the Draft Convention, new legislation on jurisdiction would have to be introduced and the existing legislation on enforcement of judgments, as well as some court rules, would also have to be amended in order to comply with the Draft Convention.

The Required Grounds of Jurisdiction (the “white” list)

Article 3 - The Defendant’s Forum

11. Article 3 defines the defendant’s forum as the State where the defendant is “habitually resident”. Paragraph 2 of the Article elaborates the concept of habitual residence. That concept is also referred to in other parts of the Draft Convention. Questions remain as to whether or not the term “habitual resident” or “habitual residence” should be defined and whether a presumption should be introduced to provide that a person would be regarded as habitually resident in a country when that person had resided there for a minimum period of, say, 3 months.

Article 6 – Contracts

12. The US delegation is concerned that, as drafted, the exercise of jurisdiction by a court in a contractual dispute might not be linked to the activities of the defendant in the forum in which the legal action is commenced. The reporters appointed by the Special Commission have also pointed out in their report³ that this Article does not address cases of non-performance⁴.

Articles 7 and 8 – Consumers’ and Employment Contracts

13. A number of delegations have questioned the need to make special jurisdictional provisions for employment contracts in order to

² The exceptions relate to disputes on title to foreign lands, disputes concerning foreign intellectual property rights and enforcement of foreign penal law, revenue law or public law. The courts will not assume jurisdiction on matters relating to the above exceptions.

³ The report on the Draft Convention was prepared by the Co-reporters, Mr Peter Nygh and Mr Fausto Pocaur of Italy. The report is also available on the Department of Justice website at <http://www.info.gov.hk/justice/>.

⁴ See page 32 of the report on the draft Convention and note 3 *ante*.

protect employees. Support is stronger for the inclusion of jurisdictional rules to protect consumers. The major difficulty, however, is to devise rules that are equally applicable to consumer contracts concluded over the Internet because of the difficulty of tracing the origin of the suppliers as well as the consumers. A special meeting on e-commerce will be held in early 2001 to explore the jurisdictional issues relating to e-commerce.

Article 9 – Branches [and regular commercial activity]

14. A party may bring an action in the State where the relevant branch, agency or other establishment is situated. It is not necessary for the activity out of which the dispute arose to occur in that State. For this reason, the US delegation has warned that without the bracketed wording or a reference to “activity based jurisdiction”, the US would not be able to accept the Draft Convention because this would not satisfy the US’ concept of due process. This raises a particular constitutional problem for the US. The question for many delegations is what would amount to “regular commercial activity”?

Article 10 – Torts

15. The problem arises from paragraph 1(b) with the foreseeability test. The US delegation is of the view that the test is still too tenuous and should be linked to some activities of the defendants which are directed to the State in which the injury arose.

Article 12 – Exclusive Jurisdiction

16. All the matters referred to in this Article are intended to be subject to the exclusive jurisdiction of a single Contracting State. Some delegations have questioned the extensive nature of the list and suggested that some, if not all, of the grounds could be made non-exclusive, although they could still remain as “required” or “white” bases of jurisdiction.

Article 13 – Provisional and Interim Measures

17. The inclusion of interim measures within the scope of the Draft Convention would help to prevent a judgment from being prejudiced or frustrated by the actions taken by parties to the litigation both within and outside the jurisdiction. A court having jurisdiction under a ground of jurisdiction specified in Articles 3-12 would have jurisdiction

to order any provisional or protective measures which would be enforceable in other Contracting States. Paragraph 2 of Article 13 would also permit the courts of a State in which the property is located to have jurisdiction to order interim protective measures, even though it might not have jurisdiction to determine the merit of the claim.

18. A point of contention is the scope and variety of interim measures that would be covered by this Article because of the lack of a definition. The term “provisional and interim measures” may bear different meanings in the jurisdictions to which the Draft Convention would apply. It is unclear, for example, whether the measures would cover a pre-trial discovery order e.g. an Anton Pillar order. It might be necessary therefore to provide that the measures should be restricted to those that provide a preliminary means of securing assets out of which an ultimate judgment may be satisfied or measures that seek to maintain the status quo of the assets in question pending determination of the merits.

Articles 14 to 16 – Multiple Defendants, Counter-claims and Third Party Claims

19. Some delegations are of the view that these provisions are too detailed for a global Convention and that they might intrude into rules of court which should more appropriately be left to national law in each jurisdiction.

Article 17 - Jurisdiction Based on National Law (the “grey” list)

20. Grounds of jurisdiction based on national law and which are not covered by Articles 3-16 of the Draft Convention would constitute the so-called “grey” or “permitted” grounds of jurisdiction. It is envisaged that parties to the Convention would be allowed to make their own rules with regard to jurisdiction subject to the provisions in the Convention relating to exclusive jurisdiction, choice of court agreed by parties, protective jurisdiction and prohibited jurisdiction etc. However, Article 24 provides that the Chapter on recognition and Enforcement would not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17. On the other hand, the Draft Convention would not prevent a party to the Convention from recognising and enforcing a foreign judgment based on a “grey” or “permitted” ground of jurisdiction.

Article 18 - Prohibited Grounds of Jurisdiction (the “black” list)

21. Prohibited grounds of jurisdiction are sometimes referred to as “exorbitant” or “black” grounds of jurisdiction and these are now listed in Article 18. Paragraph 1 contains a generic description of such prohibited grounds of jurisdiction while paragraph 2 of the Article is a non-exhaustive list of the prohibited grounds. Some delegations are concerned that an open, or non-exhaustive, list might leave room for abuse. This may happen when enforcement is unreasonably refused in the court addressed on the basis that the court of origin had exercised jurisdiction on a prohibited ground. A closed, or exhaustive, list may also suffer from the possibility of abuse in that new exorbitant grounds of jurisdiction, ostensibly outside the closed list, might be invented to vest jurisdiction in the court of origin when there was no real link between the court and the dispute. Contracting Parties to the Draft Convention would be under an obligation NOT to recognise or enforce judgments based on a prohibited ground of jurisdiction (see Article 26).

22. Paragraph 3 creates an exception to the normal rule based on human rights considerations. The general idea in this paragraph is that a court in a Contracting State may exercise jurisdiction in human rights litigation based on national law despite the lack of a real link between the court and the cause of action. Alternative formulations are included in the Draft Convention because of the great divergence of opinions. This is perhaps the most politically sensitive subject dealt with by the Draft Convention.

Article 19 – Authority of the court seised

23. Article 19 (authority of the court seised) describes the circumstances under which a court is obliged to verify whether it is prohibited from exercising jurisdiction in accordance with Article 18 of the Draft Convention. Paragraph (a) preserves the right to verify jurisdiction in some legal systems. Paragraph (b) is for the benefit of plaintiffs who wish to be sure that the court is not exercising jurisdiction in contravention of Article 18 which would have rendered the resulting judgment unenforceable under the Draft Convention. The usefulness of the provision is not entirely clear because the court addressed might still examine whether or not the court of origin had exercised jurisdiction on a ground listed in Article 18. Furthermore, it would seem to be illogical to make provision for verification of jurisdiction under Article 18 (prohibited grounds) but not for other jurisdictional grounds, e.g. exclusive

jurisdiction under Article 12 and protective jurisdiction under Articles 7 and 8.

Article 20 - Notification of Proceedings to the Defendants

24. Article 20 relates to the obligation of the plaintiff to prove that the claims have been notified to the defendant in sufficient time and in such a way as to enable him to defend himself properly. The Article would apply to the proceedings taken at the court of origin. On the other hand, Article 28(1)(d) provides that the court addressed may refuse to recognise or enforce a foreign judgment if the document which instituted the proceedings was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence. The defendant would appear to enjoy two layers of protection, prompting criticisms that Article 20 should be excised from the Convention, leaving the detailed rules for notification of claims to be made by individual States which became parties to the Draft Convention.

Articles 21 and 22 - Lis Pendens and Forum Non Conveniens

25. At meetings of the Special Commission, consideration has been given to the question of whether or not the Draft Convention should contain provisions relating to *lis pendens* and *forum non conveniens*. Rules on *lis pendens* seek to resolve the issue of which court should exercise jurisdiction when litigation involving the same parties and issues has already been initiated in a foreign court. *Forum non conveniens* rules in the Draft Convention would provide a uniform basis for a court to exercise its discretion to stay a case (i.e. suspend consideration of it) on the ground that the court was not a suitable forum to deal with the case.

26. The concept of *lis pendens* as understood by civil law jurisdictions is unfamiliar to many common law lawyers but it is a familiar concept to member States of the Brussels and Lugano Convention and other civil law jurisdictions. Articles 21 and 22 of the Draft Convention represent a compromise that was reached after long and strenuous debates. If the conditions stipulated in paragraph 1 of Article 21 are established, the second court seised would in the normal course of events be under an obligation to suspend the proceedings. It would have to decline jurisdiction as soon as a judgment on the merit had been rendered by the second court seised (Article 21(2)).

27. Although *lis pendens* (Article 21) has been accepted as the normal rule, Article 22 creates an exception to the rule. It would allow a court to decline to exercise jurisdiction when it is *clearly inappropriate* for that court to exercise jurisdiction, and when a court of another jurisdiction is *clearly more appropriate* to hear the case. The Hong Kong courts would, over a period of time, develop a body of jurisprudence on the meaning of “clearly inappropriate” and “clearly appropriate” in the sense used in the Draft Convention if the Draft Convention was applied to Hong Kong.

Chapter III – Recognition and Enforcement

Article 23 – Definition of “Judgment”

28. Article 23, as it stands, does not confine the definition of “judgment” to money judgments. The question is whether the definition (with the exception of provisional and protective measures – Article 23(b) and Article 13) should be limited to money judgments only. Some delegations are of the view that the court addressed should not be asked to enforce non-monetary judgments e.g. orders to transfer property. This subject will be discussed again before the diplomatic conference.

Article 24 – Judgments excluded from Chapter III

29. Judgments based on a ground of jurisdiction provided for by national law are not governed by this part of the Draft Convention. Contracting Parties to the Draft Convention would be free to decide whether such judgments should be recognised and enforced under their respective domestic law.

Article 25 – Judgments to be recognised or enforced

30. A Contracting Party to the Convention would be under an obligation to recognise and enforce a judgment from another Contracting Party based on a ground of jurisdiction specified in Articles 3-13, or a ground of jurisdiction which was *consistent with any such grounds*. Such a judgment would be recognised if it had the effect of *res judicata* (final and conclusive) in the State of origin and it would be enforceable if it was enforceable in the State of origin. It should be noted that in each jurisdiction, the stage at which a judgment is deemed to have the effect of *res judicata* may be different. The Draft Convention leaves that question to be answered by reference to the law of the court of origin of

the judgment. The judgment creditor seeking recognition and enforcement would have the evidential burden of proving that the judgment had the effect of *res judicata* in the State of origin and that it was also enforceable there (see Article 29(1)(c)).

Article 26 – Judgments not to be recognised or enforced

31. This Article provides that judgments based on a prohibited ground of jurisdiction and/or grounds of jurisdiction that are inconsistent with the jurisdictional grounds contained in Articles 4, 5, 7, 8 or 12 shall not be recognised or enforced by Contracting Parties to the Convention because of their exorbitant nature.

Article 27 – Verification of Jurisdiction

32. If the convention is applied to Hong Kong, the provisions in this Article will have to be implemented by domestic legislation (e.g. amendments to the rules of court) because they require the court addressed to verify that the court of origin exercised jurisdiction on one or more required grounds of jurisdiction under the Draft Convention. The Article also provides that the court addressed would be bound by findings of fact made by the court of origin. This Article would impose an additional requirement on the Hong Kong courts as they are not at present required to verify the jurisdiction of the court of origin in proceedings relating to enforcement of foreign judgments either under the common law or the statutory registration regime.

Article 28 – Grounds for refusal of recognition or enforcement

33. The court addressed *may* refuse to recognise or enforce a foreign judgment falling within Chapter III of the Draft Convention if one or more of the sub-paragraphs of Article 28 applies. It should be noted that the grounds of refusal enumerated in Article 28 are exhaustive in nature. Although not expressly stated, the reporters to the Special Commission have taken the view, rightly so, that the onus of establishing one or more of the grounds set out in the Article rests with the party opposing the recognition or enforcement of the judgment.⁵

34. Sub-paragraph (a) gives precedence to the court first seised under the *lis pendens* rule. Sub-paragraph (b) deals with judgments

⁵ See page 85 of the Report on the Draft Convention and note 3 *ante*.

inconsistent with other judgments previously issued by the court addressed or a judgment from a third jurisdiction which is enforceable in the State addressed.

35. Sub-paragraphs (c) and (d) both relate to breach of natural justice or the fundamental notion of justice. The State addressed may refuse to recognise or enforce judgments resulting from proceedings that are incompatible with its own fundamental principles of procedure under sub-paragraph (c). Under sub-paragraph (d), enforcement of judgments in which the document instituting the proceedings was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence may also be refused. The choice of the word “notified” was deliberate so as to distinguish it from “served” and the notion of service. The reporters’ comments on the use of this particular word are instructive:-

“The words “notified to” indicated that the defendant must have been placed in a position to inform him or herself of the claim; it does not require that the defendant actually becomes aware of the contents the document provided. But, if the defendant is not given the opportunity of reading the documentation, even if this is due to his or her own refusal to accept the document, notification will not have taken place.”⁶

36. Sub-paragraphs (e) and (f) are the familiar grounds of refusal based on fraud and public policy. The relevant fraud refers to the fraud in the course of proceedings at the court of origin. The court addressed may also refuse to recognise or enforce a judgment on the basis that the judgment itself or the effect of its recognition or enforceable is “manifestly” incompatible with the public policy of the State addressed.

Article 29 – Documents to be produced

37. This Article lists the documents to be produced to the court addressed in an application to enforce a judgment under Chapter III of the Draft Convention. Sub-paragraph (c) requires the production of all documents to establish that the judgment is *res judicata* in the State of origin and that it is enforceable in that State. A natural question is whether or not this means that a certificate to those effects from the court of origin is required.

⁶ See p.88 of the Report on the Draft Convention and note 3 *ante*.

Articles 30 to 32

38. These Articles deal with procedure, security for costs and legal aid. Article 32 envisages that legal aid should be available, in recognition or enforcement proceedings, to natural persons habitually resident in a Contracting State subject to the same conditions as apply to persons habitually resident in the State addressed.

Article 33 - (Excessive or non-compensatory) Damages

39. One of the major concerns about the Draft Convention is the possibility that foreign monetary awards, which may be considered to be excessive by Hong Kong's standards, may be brought to Hong Kong for enforcement. Judgments of this nature usually include punitive damages, or non-compensatory damages. Indeed, 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 damages⁷.

40. Article 33 of the Draft Convention establishes a sensible benchmark for the recognition and enforcement of foreign money judgments. Under the current proposal, Contracting Parties to the Draft Convention would not be obliged to give effect to that part of a judgment that represents non-compensatory damages, including exemplary or punitive damages (Article 33(1)). However, it is not clear how the courts would go about excluding that part of the damages that is non-compensatory in judgments that do not distinguish between compensatory and non-compensatory damages.

41. The Article also permits the judgment debtor to argue that recognition should be limited to a lesser amount because grossly excessive damages have been awarded. It could mean that the court might be asked to determine whether under the same circumstances, similar or comparable damages could have been awarded by the Hong Kong courts⁸.

Article 35 - Authentic Instruments

42. Authentic instruments are drawn up by notaries settling small claims between parties in dispute. Their use is known to a number of civil law jurisdictions but is virtually unknown in jurisdictions with a

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

⁸ Article 33(2)(a) read with Article 33(1) of the draft Convention

common law tradition. A Contracting Party to the Draft Convention might elect to recognise and enforce foreign authentic instruments by making a declaration to that effect. It is envisaged that no such declaration would be made on behalf of Hong Kong even if the Convention was applied to Hong Kong.

Article 36 - Settlement

43. This would cover consent orders and any settlement agreement sanctioned by the courts.

Chapter IV – General Provisions

Article 37 - Relationship with other Conventions

44. The draft for this Article has not been settled. Alternative proposals can now be found at the Annex to the Draft Convention. Contracting Parties to the Brussels and Lugano Conventions are especially concerned about this Article as it would affect the ways in which the Draft Convention and the two regional Conventions interact in a dispute involving a party from within Brussels/Lugano States and a party from outside Brussels/Lugano States; especially where the latter is resident in a State which is a party to the Draft Convention.

Articles 38 to 40 – Uniform Interpretation

45. Unlike the Brussels Convention, a number of Contracting Parties to the Draft Convention would not be subject to the jurisdiction of the European Court of Justice which acts as a single juridical organ overseeing the interpretation of the Brussels Convention and ensuring uniformity in the interpretation of that Convention. Article 39 envisages that decisions by the courts of Contracting Parties relating to the application of the Draft Convention would be circulated. This would be supplemented by the convening of Special Commissions to review the operation of the Draft Convention on a regular basis.

46. The creation of a “committee of experts” to make recommendations to Contracting Parties or their courts is a rather controversial suggestion which might have implications, legal and political, beyond the original intention of this proposals. Hence both Articles have been put in square brackets, pending further deliberations

at informal meetings to be convened before the diplomatic conference or at the diplomatic conference itself.

Article 41 – Federal Clauses

47. These clauses have not been discussed in detail. However, it is expected that there would be provisions allowing the Draft Convention to be applied to individual territorial units within a State having different legal systems. The “federal” clauses might also provide that the rules of the Draft Convention would not apply between individual territorial units within a State.

Other Matters

Intellectual Property

48. Given that intellectual property (IP) rights are territorial in nature, it has been decided that the determination of the validity or nullity of registrable IP rights should fall under the exclusive jurisdiction of the State of registration. It was, however, also proposed that provisions be included in the Draft Convention which would allow a court outside the jurisdiction where the IP rights are registered to exercise *non-exclusive* jurisdiction to make determinations concerning infringement of such IP rights. The effects of such determination would be limited to the parties to the disputes. These ideas are now reflected in paragraphs 4, 5 and 6 of Article 12.

49. Whilst there is a clear consensus on paragraph 4, paragraphs 5 and 6 have been put in square brackets for further consideration. The Hague Conference on Private International Law, in conjunction with the World Intellectual Property Organization (WIPO), will host a seminar on IP rights and Private International Law in Geneva in January 2001. It is expected that the subject will be further discussed in that forum and in the informal meetings before the diplomatic conference.

Jurisdiction and E-Commerce

50. The Special Commission is conscious of the need to ensure that the relevant provisions, e.g. contracts, torts, consumers’ transaction, in the Draft Convention are compatible with the developing practice of electronic commerce. A meeting on the subject, which was also attended

by experts in the field, was held in February 2000. A further meeting will be held in February 2001 with a view to making further recommendations with regard to the relevant Articles of the Draft Convention.

Views and Comments

51. Views and comments on the provisions of the Draft Convention and the issues outlined above are now invited. They will be taken into account in formulating the Hong Kong SAR's position on the various issues in preparation for the informal meetings preceding the diplomatic conference and the diplomatic conference itself. The diplomatic conference is expected to be held in two parts, the first part is to be held in June 2001.

52. Comments may be addressed to the Treaties and Law Unit, International Law Division, Department of Justice, 7th Floor, Main Wing, Central Government Offices, Lower Albert Road, Central, Hong Kong (fax no: 2877 2130; e-mail: ild@doj.gcn.gov.hk) on or before 30 November 2000. Inquiries on this subject should be directed to Mr Frank Poon (tel: 2810 2754; e-mail: frankpoon@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

International Law Division
Department of Justice
October 2000

**PRELIMINARY DRAFT CONVENTION
ON JURISDICTION AND FOREIGN JUDGMENTS
IN CIVIL AND COMMERCIAL MATTERS**

adopted by the Special Commission
on 30 October 1999

CHAPTER I - SCOPE OF THE CONVENTION

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. The Convention does not apply to -
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition or analogous proceedings;
 - f) social security;
 - g) arbitration and proceedings related thereto;
 - h) admiralty or maritime matters.
3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.
4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope

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

CHAPTER II - JURISDICTION

Article 3 Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.
2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -
 - a) where it has its statutory seat,
 - b) under whose law it was incorporated or formed,
 - c) where it has its central administration, or
 - d) where it has its principal place of business.

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.
2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed -
 - a) in writing;
 - b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
 - c) in accordance with a usage which is regularly observed by the parties;
 - d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.
3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

Article 5 Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.
2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

Article 6 Contracts

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

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

Article 7 Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
 - a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
 - b) the consumer has taken the steps necessary for the conclusion of the contract in that State.
2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.
3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -

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

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment -

- a) an employee may bring an action against the employer,
 - i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or
 - ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;
- b) a claim against an employee may be brought by the employer only,
 - i) in the courts of the State where the employee is habitually resident, or
 - ii) in the courts of the State in which the employee habitually carries out his work.

2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court -

- a) if such agreement is entered into after the dispute has arisen, or
- b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9 Branches [and regular commercial activity]

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State -
 - a) in which the act or omission that caused injury occurred, or
 - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.
3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.
4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11 Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in

the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. In the absence of such designation, proceedings may be brought before the courts of a State -
 - a) in which is situated the principal place of administration of the trust;
 - b) whose law is applicable to the trust;
 - c) with which the trust has the closest connection for the purpose of the proceedings.

Article 12 Exclusive jurisdiction

1. In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.
2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.
3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.
4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the

terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

- [5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]
- [6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

Article 13 Provisional and protective measures

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.
2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.
3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that -
 - a) their enforcement is limited to the territory of that State, and
 - b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 14 Multiple defendants

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other defendants not habitually resident in that State if -

- a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
 - b) as to each defendant not habitually resident in that State, there is a substantial connection between that State and the dispute involving that defendant.
2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and conforming with Article 4.

Article 15 Counter-claims

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

Article 16 Third party claims

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving that third party.
2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and conforming with Article 4.

Article 17 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

Article 18 Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.
2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following-
 - a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;
 - b) the nationality of the plaintiff;
 - c) the nationality of the defendant;
 - d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
 - e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
 - f) the service of a writ upon the defendant in that State;
 - g) the unilateral designation of the forum by the plaintiff;
 - h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;

- i) the temporary residence or presence of the defendant in that State;
 - j) the signing in that State of the contract from which the dispute arises.
3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes -

[Variant One:

[a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]

[b) a serious crime against a natural person under international law; or]

[c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].

[Sub-paragraphs [b) and] c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

Variant Two:

a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19 Authority of the court seised

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

- a) national law so requires; or

b) the plaintiff so requests; or

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

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

or

[d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

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

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable

of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.
4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
5. For the purpose of this Article, a court shall be deemed to be seised-
 - a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
 - b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised -
 - a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
 - b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

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

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.
2. The court shall take into account, in particular -
 - a) any inconvenience to the parties in view of their habitual residence;
 - b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
 - c) applicable limitation or prescription periods;
 - d) the possibility of obtaining recognition and enforcement of any decision on the merits.
3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.
4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,
 - a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
 - b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 23 Definition of "judgment"

For the purposes of this Chapter, "judgment" means -

- a) any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention;
- b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1.

Article 24 Judgments excluded from Chapter III

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17.

Article 25 Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.

2. In order to be recognised, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.
3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.
4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26 Judgments not to be recognised or enforced

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

Article 27 Verification of jurisdiction

1. The court addressed shall verify the jurisdiction of the court of origin.
2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 28 Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if -
 - a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;

- b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;
 - c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
 - d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;
 - e) the judgment was obtained by fraud in connection with a matter of procedure;
 - f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.
2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Article 29 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -
- a) a complete and certified copy of the judgment;
 - b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) all documents required to establish that the judgment is res judicata in the State of origin or, as the case may be, is enforceable in that State;

- d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
2. No legalisation or similar formality may be required.
3. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 31 Costs of proceedings

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

Article 32 Legal aid

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

Article 33 Damages

1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.
2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.

b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.
3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34 Severability

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

Article 35 Authentic instruments

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.
2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.

[3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

Article 36 Settlements

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

CHAPTER IV - GENERAL PROVISIONS

Article 37 Relationship with other conventions

[See annex]

Article 38 Uniform interpretation

1. In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.
2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.

[Article 39

1. Each Contracting State shall, at the request of the Secretary General of the Hague Conference on Private International Law, send to the Permanent Bureau at regular intervals copies of any significant decisions taken in applying the Convention and, as appropriate, other relevant information.

2. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the operation of the Convention.
3. The Commission may make recommendations on the application or interpretation of the Convention and may propose modifications or revisions of the Convention or the addition of protocols.]

[Article 40

1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court.
- [2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]]

Article 41 Federal clause

ANNEX [back to article 38]

Article 37 Relationship with other conventions

Proposal 1

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

Proposal 2

1. a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".
2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.
3. Except where the provisions of the European instruments on -
 - a) exclusive jurisdiction;
 - b) prorogation of jurisdiction;
 - c) lis pendens and related actions;
 - d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply -
 - a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
 - b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
 - c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

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

Proposal 3

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

[back to article 38]