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An Update on the proposed Hague
Convention on Exclusive Choice of Court
Agreements

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An Update on the proposed *Hague Convention on Exclusive Choice of Court Agreements*

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In response to the difficulties of getting judgments recognised and enforced outside the state from which they originate, work on a new and ambitious convention was initiated in 1992, at the Hague Conference on Private International Law. The proposed convention, which was an initiative of the US Government,¹ is titled the *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, but is commonly referred to as the 'judgments project'. Now, more than ten years later, it seems clear that there will be no *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*. Due to a range of factors, including difficulties raised by the Internet, the wide scope and great ambitions of the 'judgment project' have proven impossible, and in late 2003, the 'judgments project' was replaced, also in name,² by a much more narrow convention proposal titled *Convention on Exclusive Choice of Court Agreements*.

With some restrictions, the *Convention on Exclusive Choice of Court Agreements* is to regulate choice of forum clauses in civil and commercial contracts, and the recognition and enforcement of judgments rendered pursuant to such clauses. The work on this convention proposal is in its final stages and a Diplomatic Conference, at which the convention text is expected to be finalised, is scheduled for early 2005.³ With contracts concluded via the Internet constituting a large portion of cross-border contracts, the proposed Convention is likely to have serious effects on electronic commerce.

This article discusses the background to, and main features of, the *Convention on Exclusive Choice of Court Agreements*. Further, it highlights the lack of protection afforded to weaker parties in the current convention text of April 2004.⁴ Suggestions for improvement are provided in this respect, and some thoughts are expressed about the direction of the future work of the Hague Conference on Private International Law.

Background

Before the current text of the *Convention on Exclusive Choice of Court Agreements* is analysed and discussed, it is useful to briefly examine the main features of the

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¹ Martin Davis, *Time to Change the Federal Forum Non Conveniens Analysis*, 77(2) Tulane Law Review 309 (2002), at 381.

² It could rightfully be said that the 'judgments project' was abandoned, in spirit, already in 2002.

³ Tentative dates for that meeting are January 31 - February 16, 2005 but those dates are not confirmed.

(<http://www.cptech.org/ecom/jurisdiction/hague.html>).

⁴ The full Convention text is available at: <http://www.cptech.org/ecom/jurisdiction/hague-100e.doc>.

previously proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* and the organisation through which the work on the conventions is facilitated.

The Hague Conference on Private International Law

The Hague Conference on Private International Law has been working to harmonise and improve the application of the rules of private international law for over 100 years. It has been a permanent intergovernmental organisation since the 1950's, and has since then adopted 35 Conventions dealing with a multitude of issues, such as civil procedure, family law, protection of minors, international child abduction, contracts law and products liability. There are presently 64 member states, including, for example, Australia, most European states, the US, the PRC, Japan, and an increasing number of African and South American states taking part in the negotiations of the proposed *Convention on Exclusive Choice of Court Agreements*.⁵

The Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

Despite the fact that it seems overwhelmingly likely that there will be no *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, important lessons can be learned from the in large part excellent work done on the convention. Drawing upon the Draft text of June 2001, this part of the article examines the main features of the 'judgments project', which could be said to represent the foundation for the *Convention on Exclusive Choice of Court Agreements*.

The 'judgment project' was what can be called an open double convention. It set out to determine under which circumstances a member-state can exercise jurisdiction over an international dispute involving one or several parties from another member state, and establish under which circumstances a member-state should recognise and enforce a judgment rendered in another member-state in such disputes. This can be contrasted to a single convention, which only sets out to regulate recognition and enforcement and leaves the issues of jurisdiction to national laws.

There are other examples of double conventions, the most well-known being the *Brussels Regulation*⁶ of the European Union. The difference between the 'judgments project' and the European instrument is that the *Brussels Regulation* is a closed double convention, which means that only the grounds for jurisdiction that are provided for in that convention itself are available, while under the 'judgments project', grounds for jurisdiction available under national law were to be valid unless black-listed (see below). The 'judgment project' being an open convention would obviously have provided for more flexibility than, for example, the *Brussels Regulation*, and such flexibility was motivated by the great differences that exist between the different states taking part in the negotiations.

⁵ For a complete list see: <http://www.hcch.net/e/members/members.html>.

⁶ Brussels Regulation 44/2001.

The ‘judgments project’ was to be divided into four Chapters. Chapter I provided limitations to the territorial and substantive scope of the proposal. Chapter II determined which grounds for jurisdiction are valid and Chapter III regulates recognition and enforcement. Finally, Chapter IV consisted of general provisions dealing with matters such as the interpretation of the Convention and the relation between the Convention and other conventions.⁷ A similar structure was adopted for the *Convention on Exclusive Choice of Court Agreements*.

As the name indicates, the *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* set out to regulate civil and commercial matters only. Thus, criminal matters like, for example, the French/US *Yahoo!* dispute⁸ would have fallen outside the scope of the proposed convention. In addition Article 1 listed a range of matters that were not to be covered by the ‘judgment project’. Most notably anti-trust disputes, tax and arbitration was to be excluded. It was also suggested that provisional and protective measures should be excluded. Further, it seems likely that the ‘judgment project’ would have been applicable only when the relevant parties are habitual residents in different states or the dispute at least had some international elements.

Looking closer at Chapter II, there were three groups of grounds for jurisdictional claims; “white-listed” grounds, “grey-listed” grounds and “black-listed” grounds. White-listed grounds are those that are specifically provided for in Chapter II of the Convention. Judgments based on white-listed jurisdictional grounds should be recognised and enforced by other member states under Chapter III, and included certain jurisdictional grounds such as the defendant’s habitual residence⁹ and choice of court provisions¹⁰. Further, Chapter II outlined white-listed jurisdictional grounds in relation to, for example, non-business-to-business (non-B2C) contracts¹¹, business-to-consumer (B2C) contracts¹² and torts¹³. The black-listed grounds are prohibited grounds for jurisdictional claims, and judgments rendered on these grounds should not be recognised and enforced by other member states under Chapter III. Finally, grey-listed grounds for jurisdiction are grounds that are allowed if they exist under national law. Whether or not a judgment rendered under a grey-listed ground should be recognised and enforced in another member state is for that state to decide independently of the Convention’s Chapter III. In addition, certain limitations were placed on under which circumstances grey-listed grounds of jurisdiction were to be allowed.

When the work on the *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (hereinafter, the ‘judgments project’) was first initiated, in 1992, little regard was had to the special needs created by the Internet. In

⁷ Concern was, for example, being raised as to how the ‘judgments project’ was to relate to the Brussels Regulation.

⁸ *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.* High Court of Paris, 20th of November 2000, and *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001).

⁹ Article 3.

¹⁰ Article 4.

¹¹ Article 6.

¹² Article 7.

¹³ Article 10.

recent years it became apparent that the Internet raises several complex issues that made the finalising of the ‘judgments project’ more difficult. At the same time, it should be noted that the widespread use of the Internet amplifies the importance and necessity of international instruments like the previously proposed Convention, and indeed, the importance of an instrument such as the *Convention on Exclusive Choice of Court Agreements*.

In 1999 a draft proposal was presented and a detailed expert report was written outlining how the Convention text was to be interpreted. But during the following couple of years the debate intensified and several other drafts has been presented since, the most comprehensive being from June 2001. Consultations have taken place both within countries, and on a regional level (e.g. the European Union). The diplomatic conference held in June 2001 illustrated just how far from agreement the ‘judgments project’ was. In April 2002 a Commission I meeting, that is the top representatives from a range of states, was held and it was concluded that the ‘judgments project’ is of such importance that continued work was motivated. The Commission I decided that an expert group would be formed and that, that group would be meeting for the first time in October 2002. Following the meeting held in October 2002, the expert group met regularly and produced a draft, which constituted the foundation for the *Convention on Exclusive Choice of Court Agreements* now under negotiations.

At points, criticism has been raised that there has been a lack of transparency in the proceedings and negotiations surrounding the Convention proposal. In part this critique has been addressed as the Hague Conference has been issuing a range of valuable working documents giving an insight to the ongoing discussions¹⁴, and indeed opening up for a degree of public consultation the last couple of years.

The Hague Convention on Exclusive Choice of Court Agreements

As the name indicates, the latest proposal, the *Convention on Exclusive Choice of Court Agreements*, aims at regulating choice of forum clauses. However, being a double convention, it also regulates recognition and enforcement. In other words, this proposed Convention will ensure the recognition and enforcement of judgments rendered in a court having jurisdiction based on the parties nominating that forum. In doing so, the Convention is limited to areas that could be described as civil and

¹⁴ See for example, Preliminary Document No. 16, Avril D. Haines, *Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference* (ftp://ftp.hcch.net/doc/gen_pd16e.doc), Preliminary Document No. 17, Avril D. Haines, *The impact of the Internet on the Judgments Project: thoughts for the future* (ftp://ftp.hcch.net/doc/gen_pd17e.doc), Preliminary Document No. 18, Avril D. Haines, *Choice of court agreements in international litigation: their use and legal problems to which they give rise in the context of the interim text* (ftp://ftp.hcch.net/doc/gen_pd18e.doc) and Preliminary Document No. 19, Andrea Schultz, *Reflection Paper to Assist in The Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (ftp://ftp.hcch.net/doc/jdgm_pd19e.doc).

commercial.¹⁵ Furthermore, the Convention is not to apply to business-to-business (B2C) contracts, consumer-to-consumer (C2C) contracts, or employment contracts.¹⁶

Article 5, which is the most central Article in the proposed Conventions, consists of 3 paragraphs and provides that:

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; or
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State [unless the parties designated a specific court].

Article 7 essentially states that other courts should suspend or dismiss any proceedings interfering with the exclusive jurisdiction of the nominated court, and only under very limited circumstances may a court claim jurisdiction in contravention of the exclusive choice of court agreement. The most relevant ground under which such an exception could be made is where: “giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy”¹⁷. It is, however, not immediately clear how the rather peculiar phrase “very serious injustice” should be interpreted. The explanatory Draft Report drawn up by Masato Dogauchi and Trevor C. Hartley states that this exception is intended to apply “only in the most exceptional circumstances”¹⁸. They further state that:

The phrase “very serious injustice” would cover the case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the circumstances in which the agreement was concluded – for example, if it was the result of fraud.¹⁹

Finally, Chapter III of the proposed Convention outlines the recognition and enforcement process to be used. Essentially, contracting-states are obligated to recognise and enforce judgments rendered in accordance with the jurisdictional provisions of the Convention, except in certain strictly limited situations such as

¹⁵ *Convention on Exclusive Choice of Court Agreements*, Article 2(2) lists a range of areas to which the Convention will not be applicable, such as for example, family law matters, insolvency, and anti-trust. Furthermore, Article 2(4) excludes arbitration related matters.

¹⁶ *Convention on Exclusive Choice of Court Agreements*, Article 2(1).

¹⁷ *Convention on Exclusive Choice of Court Agreements*, Article 7(c).

¹⁸ Masato Dogauchi and Trevor C. Hartley, *Preliminary Draft Convention On Exclusive Choice of Court Agreements* (Prel. Doc. No 26 of August 2004), at 27.

¹⁹ Masato Dogauchi and Trevor C. Hartley, *Preliminary Draft Convention On Exclusive Choice of Court Agreements* (Prel. Doc. No 26 of August 2004), at 27.

“where 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”²⁰.

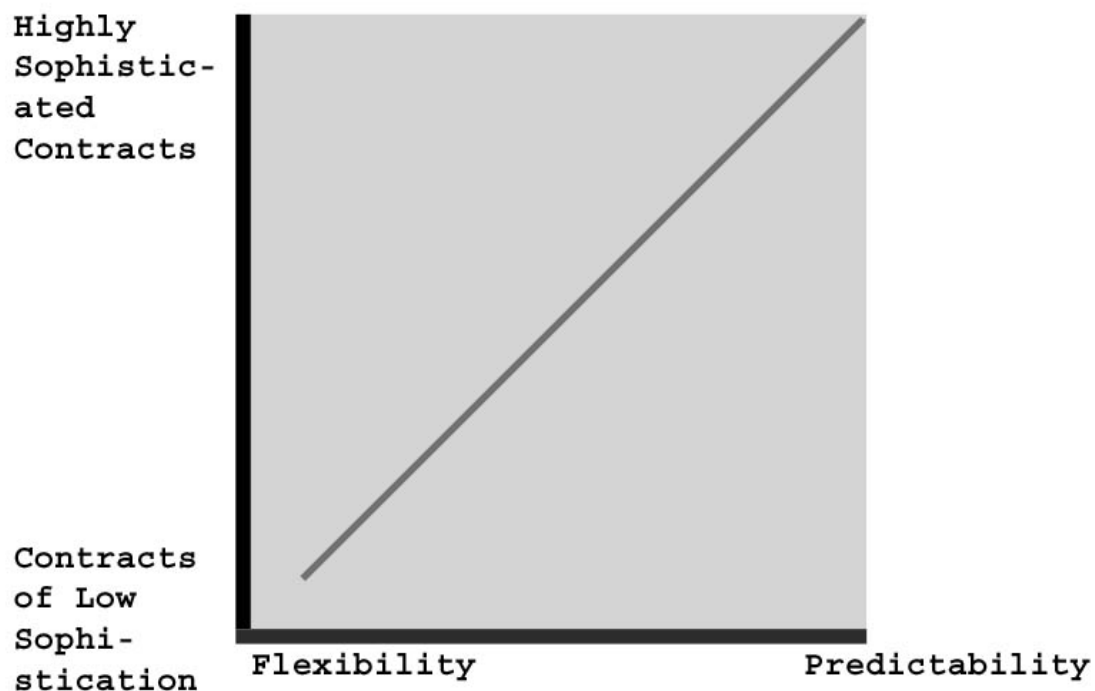
While it is submitted that the proposed Convention may become an important and welcomed instrument in international trade, and that the work carried out by the Hague Conference on Private International Law is to be encouraged, the current Convention proposal contains, at least, one great problem – it lacks appropriate protection of weak parties where such protection is needed. In constructing the Convention, focus has been placed on *predictability*. In other words, the drafters have set out to make sure that the Convention text allows for an as mechanical application as possible. The reason for this approach seems to be twofold. First, provisions leaving discretion to the courts to make some sort of value judgments are associated with the risk of diverging interpretations (particularly when courts from potentially over sixty states are involved), and secondly, the Convention seeks to meet the legitimate expectations of the parties by providing for a high level of party autonomy. In pursuing predictability, however, the drafters have underestimated the need for *flexibility* (i.e. justice in the individual case).²¹ It is not always possible to rely on predictability to achieve a fair outcome, and it is certainly not always possible to rely on predictability to achieve an outcome in line with the parties’ legitimate expectations. If the parties actively and in an informed manner reach an agreement as to, for example, which law shall be applied in, or which court shall determine, a potential dispute, we can speak of *genuine party expectations* being created from the point such agreement is reached. By allowing for party autonomy (i.e. allowing the parties to make such choices and ensuring that the parties’ choice is respected), private international law rules can achieve an outcome in line with the parties’ legitimate expectations. Indeed, authors have gone as far as to suggest a “human rights basis for party autonomy”.²² However, there are several situations in which one cannot speak of any genuine party expectations. For example, a consumer entering into a cross-border contract might not at all have considered in which forum a potential dispute would be heard or which laws would be applied if a dispute should arise. Indeed, many, not to say most, consumers would not have sufficient legal knowledge to properly evaluate the relevance of these questions. Further, the victim in a tort action would, ordinarily, have even less of an expectation; after all, the victim could not ordinarily know that he or she would become a victim. Yet, one could perhaps speak of a party expectation also in relation to these types of parties. Perhaps it could be said that each and every one of us has some basic expectation as to how we will be treated in the eyes of the law, in case something happens. We could here speak of *constructive party expectations*, as opposed to the genuine party expectation of a party that has properly considered the issues to which the expectations relate.

²⁰ *Convention on Exclusive Choice of Court Agreements*, Article 9(1)(e).

²¹ The Dogauchi/ Hartley report contains a two-page Appendix discussing “The problem of flexibility”. See: Masato Dogauchi and Trevor C. Hartley, *Preliminary Draft Convention On Exclusive Choice of Court Agreements* (Prel. Doc. No 26 of August 2004), at 54-55.

²² Peter Nygh, *The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 *Recueil des cours* (1995), at 303.

It is submitted that while sophisticated²³ contracts, such as a multimillion dollar contract between Ericsson and Sony, requires a high level of predictability and a much lower level of flexibility, an unsophisticated contract, such as a low-value B2C contract, requires a high level of flexibility and a lower level of predictability. The reason for this is primarily that high-value contracts between large corporations are invariably under the supervision of legally trained people. This means that, in most cases, there is an inherent high level of legal awareness behind any such contract.²⁴ The parties may have negotiated and agreed upon a certain law to apply and a certain forum to decide any potential dispute. With such a degree of planning, certainly amounting to what could be called genuine party expectations, the most important sub-quality of conflict of laws rules is of course predictability – the parties expect their expectations to be met. This can be contrasted to low-value contracts between less sophisticated parties, such as amongst smaller businesses or between smaller companies and consumers or amongst consumers. In such contractual situations, the above-mentioned level of legal planning and awareness, and consequently genuine party expectations, are lacking – there are only constructive party expectations. In such circumstances the importance of predictability is obviously at a minimum while the importance of flexibility is at its peak. As far as contractual situations are concerned, the relationship between the need for predictability and the need for flexibility can, thus, be illustrated by the following simple graph²⁵:



²³ The level of sophistication of a contractual relation must be judged based on several different factors including: the parties' level of sophistication, the monetary value of the transaction and the extent of legal knowledge applied in forming the contract.

²⁴ Since it allows the parties to make conscious decisions, this legal awareness is of greatest importance also in a situation where the parties are not evenly matched, and perhaps one party is seeking to impose certain conditions on the other party.

²⁵ This graph may also be useful on a more general level as it illustrates that, if we see predictability as black and flexibility as white, most private international law rules would be some shade of grey.

Particular considerations are present in relation to contracts between one sophisticated party and one unsophisticated party. In such contractual relations there are never, or very rarely, any real negotiations and all the legal planning is done by the sophisticated party. An emphasis on predictability, in such a case, would merely lead to the fulfilment of one party's expectations. Or in other words, the stronger party's genuine party expectations would be met, while the weaker party's constructive party expectations would be unlikely to be met. Determining the respective importance of predictability and flexibility in such a situation, necessarily involves a value judgment as to the respective rights of the stronger party and the weaker party. If we take the position that the law must aim at creating a society that is as fair and just as humanly possible, one simply cannot ignore the inherently unequal bargaining powers present, for example, in a typical B2C contract or a contract between a small not-for-profit organisation and a huge corporation. Furthermore, it would seem that there are several factors indicating that businesses are in a better position to adapt their conduct to the risks involved in cross-border trade than, for example, consumers and small not-for-profit organisations are. For example, they can adopt a business model that minimises their risks. This can be done in a multitude of manners but, for example, they could take measures to limit the geographical extent of their legal exposure. In addition, as is already often the case, businesses can demand payment before delivery of goods or services are made. Finally, business organisations can help work out appropriate business behaviour. Against this background, it is submitted that, in any contractual case involving at least one unsophisticated party, flexibility is more important than predictability, both in relation to jurisdiction and the choice of law.

While no foolproof rule of thumb can be used to determine which contractual situations involve genuine party expectations (and thereby require more predictability than flexibility), and which contractual situations involve constructive party expectations by at least one party (and thereby warrant a higher degree of flexibility than predictability) it is submitted that fairly reliable guidance can be found in the contracting process. Unless both parties have given their consent to the forum or choice of law clause, at least one party lacks genuine party expectations. In this context it should be noted that the term "consent" is given different meanings in different contexts. It is here submitted that there are three elements necessary to create a proper consent. The consent has to be:

- 1) identifiable;
- 2) informed; and
- 3) free.

Consent is identifiable when it is expressed or implied. While consent ordinarily becomes identifiable through some positive act, under certain circumstances, consent can be implied from passivity. Thus this requirement would not be hard to overcome in most cases. However, it would perhaps be difficult to prove an identifiable consent in a situation where choice of law or choice of forum clauses are simply listed in, for example, website terms and conditions.

There are several different degrees of informed consent. In assessing what constitutes a sensible degree of "informedness" in the context discussed here, it must be remembered that requiring too much information may in fact have rather unhealthy

consequences as the amount of information a business would have to provide could be burdensome both for the one party to provide, and for the other party to receive. It would seem that quality is of greater importance than quantity in this context. Yet the level of “informedness” must be reasonable, and the simple fact that one party, for example, has clicked on an “I agree, and am informed” button in a contract concluded via the Internet, is not sufficient. In fact, bearing the complexity of private international law in mind, it would seem that this, the second, requirement would ordinarily not be met in non-negotiated strong party-weak party transactions, at least under the majority of business models in use today.

Consent has to be given freely for it to be valid. Although there can be little controversy regarding the sensibility of this requirement, the degree of freedom to choose has been the source of numerous disputes. However, ordinarily the requirement that consent is given freely would not constitute a problem in the type of contractual situations discussed here.

In light of this, it is obviously crucial that conflict of laws rules are structured in a manner that, both in relation to the applicable law and the question of jurisdiction, provide predictability in situations where predictability is needed and flexibility in situations where flexibility is needed. Ordinarily, this would warrant the application of separate rules in the absolute majority of B2C contracts, but it also illustrates a need for a sensitive arrangement in relation to all other contracts involving at least one unsophisticated party.

While the Convention proposal excludes B2C and C2C contracts from its scope, not all contracts that do not fit into those two categories are of such a level of sophistication that it is justified to only cater for predictability. In fact, with the current limitations, the proposed Convention will cover a large number of relatively unsophisticated contracts. For example, the Convention proposal would cover a situation where a small community library enters into a contract with a huge publishing company. It is not difficult to think of other vulnerable parties, such as not-for-profit organisations, that would fall within the scope of the proposed Convention. This fact, although undeniable, has for some reason largely been overlooked in the discussion. One reason for this is presumably found in that the Convention frequently, but wrongfully, is referred to as a business-to-business (B2B) Convention. It could, of course, be said that the term B2B is used for convenience, but this simplification distorts the picture of what is actually under negotiation. First, the Convention will not only deal with business-to-business contracts (e.g. it also covers not-for-profit organisations), and secondly, the two Bs leads the mind to think of two equal parties, which of course is not always the case. A contract between a one-man bakery and Microsoft is a B2B contract, but the parties are far from equal in their strength. In other words, the proposal only caters for *predictability*, but covers also contracts that need *flexibility*.

The validity of the choice of court agreement is to be determined by the court nominated in the agreement, under the current proposal. This is troubling for several reasons. There can be no doubt that the talented company lawyers that construct the choice of forum clauses will be able to identify forums that not only provide them with favourable liability limitations but also with party autonomy of the kind that would uphold also unfair choice of forum clauses. In other words, a stronger party

nominating a forum would not choose a forum that would hold their choice to be invalid. This can certainly lead to injustices. If a party wishes to challenge the validity of the choice of court agreement, he/she has two options. An action can be taken in another court than the one nominated, and reliance placed on Article 7(c) (see above). However, it is submitted that Article 7(c) appears to be too limited, particularly in light of the Dogauchi/ Hartley report, and could preferably be replaced by an Article along the following lines:

If the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than the State of the chosen court is to suspend or dismiss the proceedings unless the forum in which the action is brought finds that a balance of the parties interests, the convenience of the parties, the parties' individual power and the circumstances of the formation of the contract indicates that declining jurisdiction would render the plaintiff, effectively, without reasonable access to justice.

This suggested Article is loosely based upon Article 36²⁶ of the Swedish contracts law²⁷, and aims at providing a plaintiff with the possibility of initiating proceedings in an alternative forum to the one specified in the contract, under certain limited circumstances. While the majority of the proposed Article is rather self-explanatory, a few words may be said about the reference to "reasonable access to justice". The inclusion of the word "reasonable" was deemed necessary to avoid a party having the right to sue in an alternative forum simply to, for example, avoid being barred by the limitation period of the forum identified under the contract.

Under the current draft of the proposed Convention, the best option for a party wishing to challenge the validity of the choice of forum agreement is, however, probably found in the public policy clause (Article 9(1)(e)) in relation to recognition and enforcement. The typical contractual party deserving extra protection would ordinarily only have assets in one state and if enforcement cannot be effected there, due to this provision, the weaker party is rather well protected. However, there are at least two serious downsides to this approach. First, it would seem that in many, not to say most, weak party-strong party relations it is the weaker party that is trying to get a judgment against the stronger party. In such situations, the structure of the suggested Convention provides little comfort, and the alternative of relying on Article 7(c), discussed above, is the only option. Secondly, the chosen structure is extraordinarily wasteful when it comes to the costs associated with international litigation. By the

²⁶ "Contractual terms may be modified or disregarded if the term is unreasonable with regard to the content of the contract, the circumstances of the contract formation, subsequent changes to the conditions and other circumstances. Where the term is of such importance for the contract that it [i.e. the contract] cannot reasonably be upheld if unchanged [after being modified in relation to the unreasonable contractual term], the contract may be modified also in other regards or be disregarded in full.

In the application of [the above] particular regard shall be had to the need for protection for those who in the capacity of consumer, or otherwise, assume an inferior position in the contractual relation." (Author's translation of: "Avtalsvillkor får jämkas eller lämnas utan avseende, om villkoret är oskäligt med hänsyn till avtalets innehåll, omständigheterna vid avtalets tillkomst, senare inträffade förhållanden och omständigheterna i övrigt. Har villkoret sådan betydelse för avtalet att det icke skäligen kan krävas att detta i övrigt skall gälla med oförändrat innehåll, får avtalet jämkas även i annat hänseende eller i sin helhet lämnas utan avseende.

Vid prövning enligt första stycket skall särskild hänsyn tagas Till behovet av skydd för den som i egenskap av konsument eller eljest intager en underlägsen ställning i avtalsförhållandet.")

²⁷ Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

time, in the process, a party can rely on non-enforcement, it is possible that both the parties to the dispute, as well as the society at large, have spent considerable amounts of money on the litigation.

In light of the above, it is submitted that it would be desirable to include a balancing provision already at the stage of the initial trial (i.e. not to uphold unfair forum selection clauses). As I have suggested elsewhere,²⁸ the proposed Convention would do well to include a provision along the lines of Article 4 Paragraph 3 of the 1965 *Hague Convention on the Choice of Court*: “The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means.” This would admittedly lower the predictability of the Convention, but predictability must always be balanced with flexibility (i.e. justice in the individual case). A will to strive towards such a balance exists already in many states (e.g. the US and the PRC), it exists in Europe and it certainly should exist in the proposed Convention.

Should the fear of introducing flexibility into the proposed *Hague Convention on Exclusive Choice of Court Agreements* be of such magnitude that it is politically impossible to introduce an Article along the lines of Article 4 Paragraph 3 of the 1965 *Hague Convention on the Choice of Court*, the least that can be done is to expand the *ordre public* exception in relation to recognition and enforcement (i.e. Article 9(1)(c)), and to rework Article 7(c) as outlined above.

If both of these options prove impossible, the scope of the proposed Convention must be adequately adjusted. This could suitably be done through a change in the definition of “consumer contract”, and inspiration could be drawn from the definition of consumer contracts as found in the *Trade Practices Act 1974 (Cth)* of Australia. A little simplified, in that Act, a person is viewed as a consumer if the price of the goods or services did not exceed a prescribed amount,²⁹ or if the goods or services were of a kind ordinarily acquired for personal, domestic or household use or consumption. With such a definition of consumer contracts, the proposed Convention would have a more limited scope, but would still be applicable in relation to the type of sophisticated contracts it is suited for in its current shape.

Concluding Remarks and Thoughts on the Future of the ‘Judgments Project’

It should be borne in mind that the ‘judgments project’ is the largest project, so far, facilitated by the Hague Conference on Private International Law, and adding the complications raised by the Internet, it is perhaps not surprising that the project has followed the course it has.

Either way, this article submits that, while the *Convention on Exclusive Choice of Court Agreements* clearly has the potential to become an important and valuable international instrument, further work is needed in relation to the problem areas identified above. Furthermore, irrespective of the *Convention on Exclusive Choice of Court Agreements* it is of the outmost importance that the Hague Conference on

²⁸ See e.g. Submission by Dan Svantesson to (EU) European Commission, Directorate-General Justice and Home Affairs, *Hague Convention on Exclusive Choice of Court Agreements*, February 2004.

²⁹ The prescribed amount is currently 40 000 Australian dollars, or approximately 23 300 Euro.

Private International Law continues the work on a more comprehensive ‘judgments project’ covering the sort of areas previously proposed to be covered by the ‘judgments project’. In doing so, it would be useful to learn from the experiences from the work on the ‘judgments project’, and one of the main lessons to be learnt is that it may be better to construct a range of area-specific conventions (e.g. one convention addressing cross-border defamation and another addressing cross-border copyright disputes), rather than one convention covering a very wide and diverse range of areas.