

ARTICLE:

**Intellectual Property, Electronic Commerce
and the
Preliminary Draft Hague Convention
on Jurisdiction and Foreign Judgments
in Civil and Commercial Matters**

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On October 30, 1999, a Special Commission of the Hague Conference on Private International Law adopted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("Preliminary Draft Convention," or "PDC").¹ Originally scheduled for a diplomatic conference in the fall of 2000, the negotiating process has now been delayed as a result of serious questions raised about the language of the PDC. There is much work yet to be done on the general structure and content of the convention, including careful consideration to the manner in which the convention will affect litigation involving intellectual property rights and electronic commerce. These are two areas for which the implications of the convention promise to be both significant and uncertain given the rapid and continual development of high technology and the legal issues raised by those developments.

The Hague Convention may become the first general treaty governing the recognition of foreign judgments with the United States as a party. The fact that it will cover questions of jurisdiction as well will make it even more important. After a discussion of the history of the jurisdiction and judgments convention, this paper presents a review of the Preliminary Draft Convention text, describing its structure and scope. It then provides a focus on provisions of particular concern in the areas of intellectual property rights and electronic commerce.

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¹ The text of the Preliminary Draft Convention is available at <http://www.hcch.net/e/conventions/draft36e.html>.

I. THE HISTORY OF THE PROJECT

A. The Existing Treaty Framework

In 1969, the Hague Conference on Private International Law² concluded both a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,³ and a Convention on the Recognition of Divorces and Legal Separations.⁴ The first of these conventions came into force on February 1, 1971, but only Cyprus, The Netherlands, and Portugal became parties,⁵ and none of them ever deposited the bilateral agreements necessary to make the treaty operational. The divorce recognition convention came into force on June 1, 1970, with only fourteen countries (mostly European) having ever ratified or acceded.⁶ The United States never ratified either convention, and currently is not a party to any treaty on the recognition of judgments.

² The Statute of the Hague Conference is found at 15 U.S.T. 2228, T.I.A.S. No. 5710. For a summary of the work of the Hague Conference, see Kurt Lipstein, *One Hundred Years of Hague conferences on Private International Law* 42 INT'L COMP. L. Q. 553 (1993); *Information Concerning the Hague Conventions on Private International Law*, 36 NETH. INT'L L.REV. 185 (1989). Information on the Hague Conference and its conventions can be found on its website at <<http://www.hcch.net/>>.

United States participation in the Hague Conference on Private International Law was authorized by Congress in 1963. H.R.J. Res. 778 (Dec. 30, 1963), 77 Stat. 775, (codified as amended at 22 U.S.C. § 269g (1988)). For a discussion of U.S. participation in the Hague Conference, UNIDROIT and UNCITRAL generally, see Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L. & COMP. L. 671 (1986). Peter Pfund, of the Office of the Legal Advisor at the Department of State, Office of Private International Law, has provided periodic reports of the work of that office. See, e.g., Peter Pfund, *International Unification of Private Law: A Report on U.S. Participation--1987-88*, 22 INT'L LAW. 1157 (1988); Peter Pfund, *Annual Report, International Unification of Private Law: A Report on United States Participation*, 20 INT'L LAW. 623 (1986). For historical information, see Cheatham & Maier, *Private International Law and its Sources*, 22 VAND. L. REV. 27 (1968); Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 L. & CONTEMP. PROBS. 291 (1965); Nadelmann, *Ignored State Interest: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954).

³ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol, done Feb. 1, 1971, reprinted in 15 AM. J. COMP. L. 362 (1967).

⁴ Opened for signature fall 1969, printed in 8 INT'L LEGAL MATERIALS 31 (1969).

⁵ *Information Concerning the Hague Conventions*, supra note 2, at 203-04.

⁶ *Id.* at 202-03.

Within the European Community, the Brussels Convention is designed to provide uniformity in both jurisdiction and judgment practice.⁷ Article 63 of the Convention requires that any state becoming a member of the European Community also accept the Brussels Convention.⁸ However, no provision of the Brussels Convention authorizes accession by a non-EC state. Thus, neither the United States nor any other non-European state is likely to become a party to the Brussels Convention. This limitation prevents employment of this convention as the foundation for a global system of judgments recognition. In addition, the allocation of competence for issues of judicial cooperation to the Community institutions in the Treaty of Amsterdam means that the Brussels Convention will cease to exist as a treaty and be replaced by Community legislation.⁹

The Lugano Convention is “open to accession by... other States which have been invited to accede upon a request made by one of the Contracting States to the depositary state.”¹⁰ However, such a state will be invited to accede only if the existing parties to the convention unanimously agree to its participation.¹¹ It is unlikely that unanimous consent could be achieved in regard to accession by many important trading parties, and to date no non-European state has requested accession.¹²

B. The U.S. Initiative at the Hague Conference

In May of 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State, wrote the Secretary General of the Hague Conference on Private International Law proposing that the Conference take up the negotiation of a multilateral convention on the recognition and enforcement

⁷ European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, Sept. 27, 1968, 41 O.J. Eur. Comm. (C 27/1) (Jan. 26, 1998) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) (“Brussels Convention”). On May 1, 1999, the Amsterdam Treaty became effective for the European Union Member States, and competence for coordination of rules on jurisdiction and recognition of judgments now lies with the Community institutions.

⁸ Brussels Convention, *supra* note 7, art. 63.

⁹ *See, e.g.*, Council of the European Union, Draft Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Doc. No. 5733/00, JUSTICIV 10 (8 Feb. 2000).

¹⁰ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), art. 62(1)(b), Official Journal of the European Communities 1988 L 319/9, reproduced in 28 I.L.M. 620 (1989).

¹¹ *Id.*

¹² Recent accession by most of the EFTA states to the EC will bring them within the Brussels Convention, and thus limit the significance of Lugano.

of judgments.¹³ This would have allowed the Hague Conference to place such a convention on its negotiating agenda for the Eighteenth Session beginning in 1993. This did not occur. The matter was considered by a Working Group at The Hague in October of 1992, which “unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments.”¹⁴ The Seventeenth Session of the Hague Conference, in May of 1993, decided to study the matter further through a Special Commission Session.¹⁵

The United States, prior to the meeting of the Special Commission established pursuant to this decision, submitted a report proposing a “mixed” convention.¹⁶ Single (sometimes referred to as “simple”) conventions, like the earlier Hague Conventions,¹⁷ deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment—thus, jurisdiction of the court issuing a judgment is considered “indirectly” by the second court in deciding whether to recognize the judgment of the issuing court. Double conventions, like Brussels and Lugano, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought—thus addressing the matter from the outset and preempting the need for indirect consideration of the issuing court’s jurisdiction by the court asked to recognize the resulting judgment. The mixed convention is a variation on the double convention, providing rules for both jurisdiction and recognition of judgments, but not purporting to be exhaustive in its lists of allowed and prohibited bases of jurisdiction. Thus, it does not “cover the entire field,” and leaves some bases of jurisdiction available, but not subject to the convention’s rules for recognition and enforcement of a resulting judgment.

Under the mixed convention approach, there would be a list of required bases of jurisdiction and a list of prohibited bases of jurisdiction. Judgments founded on required bases of jurisdiction would be entitled to recognition under the convention. Since courts should not take jurisdiction on bases on the prohibited list, only limited exceptions to recognition would apply. Any jurisdictional basis not included on one of the two lists would be permitted,

¹³Letter of May 5, 1992 from Edwin D. Williamson, Legal Advisor, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law, *distributed with* Hague Conference document L.c. ON No. 15 (92).

¹⁴*Conclusions of the Working Group Meeting on Enforcement of Judgments*, Hague Conference on Private International Law, Doc. L.c. ON No. 2 (93).

¹⁵HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, SEVENTEENTH SESSION FINAL ACT 17 (1993).

¹⁶Arthur T. von Mehren, *Recognition Convention Study: Final Report*.

¹⁷*Supra* notes 2 & 3.

but a resulting judgment would not be entitled to recognition under the convention. Instead, such judgments would be subject to review in the recognizing court in the manner applicable absent a treaty. The 1992 Hague Working Group recommended the negotiation of a mixed convention.¹⁸

C. The Negotiations

In June of 1994, a Special Commission of the Hague Conference met and determined that it would be “advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters” and recommended that “this question... be included in the Agenda for the future work of the Conference at its Eighteenth Session.”¹⁹ The Special Commission on General Affairs and Policy of the Conference, in June of 1995, recommended to the Eighteenth Session of the Hague Conference that the proposal for a judgments convention be adopted as one of the works of that session.²⁰ As part of the Final Act of its Eighteenth Session, held in October of 1996, the Hague Conference decided to include the question of such a convention on the Agenda of its Nineteenth Session.²¹

The formal negotiations began with a two week meeting of the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters in June of 1997.²² The next session of the Special Commission was held in March of 1998,²³ but it was not until a meeting in November 1998 that the first document containing draft language

¹⁸*Conclusions of the Working Group Meeting on Enforcement of Judgments, supra* note 14.

¹⁹Hague Conference on Private International Law, *Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 1 (1994).

²⁰*Conclusions of the Special Commission of June 1995 on general affairs and policy of the Conference*, Hague Conference on Private International Law, Prel. Doc. No. 9, at 31 (Dec. 1995).

²¹*Final Act of the Eighteenth Session of the Hague Conference on Private International Law*, 19 October 1996, at 21.

²²*Preliminary Results of the Work of the Special commission concerning the Proposed Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Information Document (Sept. 1997).

²³See Catherine Kessedjian, *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel. Doc. No. 9 (July 1998)

for some convention provisions was issued by the Drafting Committee.²⁴ That document included the first draft of provisions dealing with issues of convention scope, required bases of jurisdiction, provisional and protective matters, prohibited grounds of jurisdiction, *lis pendens*, declining jurisdiction (*forum non conveniens*), rules of recognition, legal aid and damages. It was considered further during two weeks in June and one week in October of 1999, at which the Preliminary Draft Convention text was produced.²⁵ A Diplomatic Conference originally was contemplated for fall 2000. After a letter from Jeffrey Kovar, Assistant Legal Advisor for Private International Law at the U.S. State Department, indicated substantial problems with the PDC text, however, it was decided to delay the Diplomatic Conference, and to adjust the procedural rules under which the draft text would be considered. It is now contemplated that the treaty will be completed in diplomatic conference consisting of a first part in mid-2001 (at which a consensus, rather than majoritarian, process will apply), and a second part late in 2001 or early in 2002.

II. THE OCTOBER 1999 PRELIMINARY DRAFT CONVENTION

The negotiation of a global convention on jurisdiction and the recognition of judgments is not a simple matter. Despite the existence of the Brussels and Lugano Conventions as successful regional models, negotiators at the Hague Conference have realized that (1) even the Brussels Convention states are not happy with all aspects of operation of that treaty within the European Union, (2) the parties involved in a global convention present legal systems much less homogenous than those found in the smaller EU community of states, and (3) the need to take into account rapidly changing methods of transacting business around the world and the difficulties of territory-based concepts of jurisdiction as applied particularly to electronic commerce, require both an original approach and careful consideration of often conflicting positions. The PDC text suffers from a number of problems and leaves many issues less than fully resolved. Notably, the “exclusive” rules of jurisdiction for intellectual property cases, found in Article 12, and the uncertainty of how the convention will apply to electronic commerce (with particular concerns raised by the consumer protection provisions of Article 7), require special attention.

²⁴Hague Conference on Private International Law, Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Working Document No 144 (20 Nov. 1998) (hereinafter “Committee Draft”).

²⁵The text of the Preliminary Draft Convention is available at <http://www.hcch.net/e/conventions/draft36e.html>.

A. Convention structure

As noted above, the Hague Convention is what has been called a “mixed” convention, providing for three classes of jurisdiction, and corresponding results for recognition purposes. Thus, in Chapter II, the convention has articles describing “required” bases of jurisdiction that must be available in a contracting state. It also lists in Article 18 the “prohibited” bases of jurisdiction that cannot be used in a contracting state against a defendant habitually resident in another contracting state. Finally, the Convention acknowledges, in Article 17, that the required and prohibited bases lists in the Convention do not encompass every possible basis of jurisdiction, thus allowing for additional “permitted” bases of jurisdiction outside the rules of the Convention. In Chapter III, the Convention likewise provides rules dealing with the treatment of judgments from other contracting states based on each of the three types of jurisdictional bases. As a general rule, a judgment based on a required basis will be recognized and enforced. A judgment based on a prohibited basis will not be recognized or enforced. A judgment based on a permitted basis remains outside the convention, and national law of the recognizing state other than the convention rules will continue to govern issues of recognition and enforcement.

One of the problems with the PDC text is that it follows the structure of the Brussels and Lugano Conventions, both of which are double (not mixed) conventions. Thus, the PDC text creates a risk that courts from Brussels and Lugano states will improperly read the jurisprudence of those conventions into the Hague Convention text, and that courts from other states will simply not be able to understand the opaque structure of the convention, which fails clearly to present the three categories of jurisdiction and the related rules of recognition and enforcement. Thus, future negotiations must address the structure of the convention in a manner that provides a text that will avoid inappropriate comparisons with Brussels and Lugano and allow even the uninitiated reader to understand the basic rules of the convention. In the meantime, the following chart is provided to allow a more coherent understanding of structure of the PDC text.

The Structure of the Preliminary Draft Convention on Jurisdiction and Judgments

Type of Jurisdictional Bases	Direct Jurisdiction	Recognition & Enforcement
<p style="text-align: center;">Required</p> <p>(these bases of jurisdiction become rules of national law as a result of the Convention, and must be available to parties from other contracting states)</p>	<p><i>Art. 3: general rule</i>—defendant may be sued in state of <i>habitual residence</i></p> <p><i>Art. 4:</i> consent by agreement</p> <p><i>Art. 5:</i> consent by appearance</p> <p><i>Art. 6:</i> contract</p> <p><i>Art. 7:</i> consumer contracts</p> <p><i>Art. 8:</i> employment contracts</p> <p><i>Art. 9:</i> branches [and regular commercial activity]</p> <p><i>Art. 10:</i> torts</p> <p><i>Art. 11:</i> trusts</p> <p><i>Art. 12:</i> exclusive jurisdiction</p> <p><i>Art. 13:</i> provisional and protective measures</p>	<p><i>Art. 25: general rule</i>—judgment based on a required basis of jurisdiction “shall be recognized [and] enforced”</p> <p><i>Art. 26: mandatory exceptions</i> where alternative jurisdictional basis is exclusive (Arts. 4, 5, 7, 8 or 12)</p> <p><i>Art. 33:</i> recognition may include a <i>limitation on damages</i> in recognizing court, taking into account “circumstances . . . existing in the State of origin.”</p>
<p style="text-align: center;">Prohibited</p> <p>(Article 18(1) prevents the use of these bases of jurisdiction when the defendant is from another contracting state)</p>	<p><i>Art. 18(1): prohibited zone</i>—when there is no “substantial connection between that State and the dispute”</p> <p><i>Art. 18(2): prohibited list</i> of jurisdictional bases (includes jurisdiction based solely on local commercial activity and transient (“tag”) jurisdiction)</p>	<p><i>Art. 26:</i> any judgment based on a prohibited basis of jurisdiction “shall not be recognized or enforced”</p>
<p style="text-align: center;">Permitted</p> <p>(contracting states may retain these bases of jurisdiction, but their application and any questions of recognition and enforcement are not governed by the Convention)</p>	<p><i>Art. 17:</i> states may exercise jurisdiction “under national law” in the absence of exclusive jurisdiction, a choice of forum clause, or other bases of preferred jurisdiction</p> <p><i>Art. 18(3):</i> may allow otherwise prohibited bases for international human rights cases</p>	<p><i>Art. 24:</i> Convention rules on recognition and enforcement “shall not apply to judgments based on” a permitted basis of jurisdiction (<i>i.e.</i>, national law governs)</p>

B. Convention scope

While Article 1(1) of the PDC text provides first that the convention “applies to civil and commercial matters,” the final breadth of scope is not entirely clear. The next paragraph provides that the following matters are excluded from the scope of the convention:

- 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

C. The general rule of jurisdiction

Both the Brussels and Lugano Conventions provide a rule of general jurisdiction authorizing suit in the state of the defendant’s domicile.²⁶ Existing Hague Conference conventions on other matters generally focus instead on the defendant’s habitual residence as the relevant connecting factor. Domicile is a legal concept, subject to different definitions in different legal systems, while habitual residence is generally a factual determination that may be subject to more uniform interpretation. Article 3 of the PDC text remains consistent with Hague Conference practice and provides that “a defendant may be sued in the courts of the State where that defendant is habitually resident.”²⁷ Paragraph (b) of Article 3 then provides a similar rule for general jurisdiction over legal persons, allowing corporations to be sued in the state of statutory seat, the state of incorporation, the state of central management, or the state of the corporation’s principal place of business.

D. Choice of court clauses

Article 4 of the PDC text provides that a court chosen by the parties “shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise.” This reverses the normal U.S. presumption that a choice of court clause is not exclusive unless the parties specifically provide for exclusivity. Article 4 then goes on to provide that such an agreement may be in writing, “by any other means of communication which

²⁶Brussels Convention, *supra* note 7, art 2; Lugano Convention, *supra* note 7, art 2.

²⁷Committee Draft, art 3(a).

renders information accessible so as to be usable for subsequent reference,” “in accordance with a usage which is regularly observed by the parties,” or “in accordance with a usage... regularly observed... in the particular trade or commerce concerned.” Thus, the language of Article 4 goes some distance beyond current law in the United States concerning choice of court by the parties.

E. Special appearances under the convention

Article 5 of the PDC text provides that a defendant appearing to defend on the merits will be considered to have consented to jurisdiction, unless objection is raised prior to the first defense on the merits. Thus, there is an opportunity to enter a special appearance contesting jurisdiction without submitting to jurisdiction on the merits.

F. Specific bases of jurisdiction

In addition to Article 3, providing for general jurisdiction over a defendant for any claims, the PDC text includes a number of provisions authorizing jurisdiction in a court located in a state other than that of the defendant's habitual residence. These provisions provide an alternative forum for the plaintiff, usually based on specific circumstances relating to either the cause of action, the defendant's conduct, or the type of relationship between the plaintiff and the defendant. Thus, there are specific provisions for jurisdiction in contract (Article 6) and tort (Article 10) cases, and a provision for jurisdiction over claims related to the activity of the defendant through a branch, agency or establishment in the Contracting State (Article 9). There are also special jurisdictional rules favoring consumers (Article 7) and employees (Article 8), and rules authorizing exclusive jurisdiction for trust cases (Article 11), and in other specific circumstances, including cases involving the registration of intellectual property rights (Article 12).

G. Additional jurisdictional provisions

Articles 13–16 deal with jurisdiction for provisional relief and with multiple-party actions. While some of these matters are dealt with in the U.S. through rules of procedure, rather than rules of jurisdiction, they are all dealt with as jurisdictional issues in the PDC text.

H. Permitted and prohibited bases of jurisdiction

As noted above, Article 17 makes explicit that bases of jurisdiction neither required in earlier articles nor prohibited in Article 18 may still be used “under national law,” so long as doing so does not conflict with the exclusive or protective jurisdictional rules of the convention, or with an explicit choice of court provision under Article 4. Article 18 provides the

bases of jurisdiction that would be prohibited when a defendant is a habitual resident of another contracting state. Most notably for U.S. purposes, paragraph 2(e) is intended to prohibit general “doing business” jurisdiction commonly allowed under most state long-arm statutes and the Due Process clauses of the Fifth and Fourteenth Amendments. The language of this provision prohibits jurisdiction bases on “the carrying on of commercial or other activities by the defendant in the State, except where the dispute is directly related to those activities.” The final clause of this provision leaves for the permitted category of Article 17 common exercise of “specific” jurisdiction, in which the activities of the defendant within the state arise out of or otherwise are related to the cause of action.²⁸

Also prohibited under paragraph 2(f) is U.S. “tag” jurisdiction based only on the service of process on the defendant while temporarily present in the state.

Article 18(3) is intended to continue to allow (as a permitted basis of jurisdiction) any of the otherwise prohibited bases, when the case is brought for human rights violations under international law. This provision has been included at the request of human rights organizations concerned that the convention will frustrate developing methods for bringing suit against former state officials who have engaged in wrongful conduct, especially cases brought under tag jurisdiction in U.S. courts.

I. *Lis pendens* and *forum non conveniens*

The Brussels and Lugano Conventions contain a *lis pendens* rule that creates a race to the courthouse. When more than one jurisdiction is available, priority is given to the court first seised of the case, and other courts must either stay or dismiss any later proceedings. The U.S. approach in transnational litigation has been to focus instead on a race to judgment. The PDC text coordinates the adoption of a Brussels-style *lis pendens* approach with a modified *forum non conveniens*-type procedure (something generally considered available only in common law jurisdictions). Thus, Article 21 provides that a court second seised generally must suspend its proceedings and then decline jurisdiction if the court first seised has jurisdiction. Article 22 sets up a modified version of the traditional U.S. (and other common law states’) doctrine of *forum non conveniens*.

²⁸The distinction between “general” jurisdiction, based on continuous and systematic contacts with the state sufficient to allow jurisdiction over unrelated claims, and “specific” jurisdiction, for which the contacts must be related to the cause of action, is set forth in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). It was first suggested in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-1164 (1966).

J. Recognition and enforcement of judgments

Chapter III of the PDC text provides the rules on recognition and enforcement of judgments, generally providing that judgments based on required bases of jurisdiction “shall be recognized or enforced” (Article 25(1)), judgments based on prohibited bases of jurisdiction under Article 18, or in conflict with a choice of court clause or exclusive basis of jurisdiction, “shall not be recognized or enforced,” (Article 26), and judgments based on a permitted basis of jurisdiction are to be treated under national law as if the convention did not apply (Article 24).

K. Recognition of punitive, multiple and “excessive” damages.

Article 33 of the PDC text reflects a compromise approach to concerns about punitive damage awards and what are considered “excessive” compensatory damage awards in U.S. courts. Courts are authorized to refuse recognition and enforcement of punitive and multiple damages unless “similar or comparable damages could have been awarded in the State addressed.” As to compensatory damage awards, courts may enforce less than the full amount if the judgment was for “grossly excessive damages.”

L. Other issues

A convention designed to be applied by the national courts of all the contracting states will have no single source for definitive interpretation. The possibility of conflicting interpretations from the courts of multiple jurisdictions is a real one. Alternatives range from a system of recording and disseminating interpretive decisions to rules requiring deference to prior decisions in other jurisdictions, to the establishment of an advisory or binding source of declaratory judgments on an international level. Article 38 of the PDC text calls for each court to interpret the Convention with “regard... to... its international character and the need to promote uniformity in its application.” Articles 39 and 40 (in brackets, and thus not a full part of the text) would establish a system for collection of convention decisions from all contracting states, periodic review of the operation of the convention, and committees of experts to assist in the interpretation of the convention. Provisions on how the convention will operate in a federal system and how it will relate to other treaties are not yet completed.

III. INTELLECTUAL PROPERTY RIGHTS

Two provisions in particular raise concerns about intellectual property rights (IPR) and electronic commerce. Article 12, providing for exclusive jurisdiction in certain cases, reads as follows:

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 neighboring 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.]

Paragraph (4) of this Article raises questions about: whether the court of registration should have exclusive jurisdiction in all cases involving the resulting rights in some manner; whether other courts should be able to deal with related issues that are incidental to the primary issues under

consideration; and how a convention on jurisdiction that also contains provisions on recognition should deal with such matters. What this provision does not deal with is differences in systems of IPR protection, including distinctions between systems that provide for registration and those that do not in the case of certain types of rights.

While it is logical to have matters of registration (for IPR's that are subject to a system of registration) dealt with in the court of the state in which registration occurs, making jurisdiction for such matters exclusive is quite another step. Thus, careful consideration must yet be given to whether these issues require a rule of exclusive jurisdiction, or (for example) merely a rule in Chapter III that would allow refusal to recognize and enforce a judgment from another state that affects local registration of an IPR. How such a rule should affect litigation dealing with allegations involving multiple IPR registrations in multiple states also is not yet clear.

IV. ELECTRONIC COMMERCE

While Article 12 raises important questions for intellectual property rights litigation, Article 7 raises important questions in the burgeoning area of electronic commerce. That provision reads as follows:

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.

For electronic commerce, this provision creates some obvious problems. Paragraph 3, which prevents choice of court clauses entered into prior to a dispute, can frustrate efforts at predictability in electronic consumer contracts. By preventing a consumer from ever entering into a valid choice of court clause prior to a dispute, this article takes a paternalistic approach to consumer contracts, preventing the possibility that consumers may rather opt for other trade-offs, including a lower price. By subjecting an electronic commerce participant to the potential of suit in any state in which a consumer may purchase its goods, Article 7 raises the cost of entry in a manner that may well frustrate the growth of electronic commerce.

With the arbitration exclusion from the scope of the convention in Article 1(2), it is possible to include an arbitration clause in a consumer contract, and thus avoid the impact of Article 7 by removing the transaction from the scope of the convention altogether. It is a bit incongruous, however, for a convention designed in part to place litigation on a par with arbitration by providing litigation with benefits long available in arbitration under the New York Convention, to incorporate its own incentives to opt for arbitration over litigation as a preferred method of dispute settlement.

V. CONCLUSION

The Preliminary Draft Convention text represents nearly a decade of work within an organization committed to the improvement of private international law. While many strides have been made, there remains a good deal of work before a satisfactory convention text is achieved. In the areas of intellectual property rights and electronic commerce, success will require careful attention to the needs of those for whom these areas are most important. So far at least, input from these sectors has not been adequately reflected in the PDC text.

While the PDC text may raise many questions, the negotiations represent a special opportunity to move rules of transnational litigation forward in a manner that will benefit multiple interests in all contracting states. The opportunity to supplement existing rules for the cross-border movement of goods, services, capital, persons and intellectual property rights, with rules for the cross-border movement of the judgments that represent state

recognition of rights in those economic factors, is a very special one. Proper consultation with all interested parties, including those concerned with intellectual property rights and electronic commerce, can help lead to a convention that will facilitate business and litigation well into the twenty-first century.