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Accompanying document to the

Proposal for a Council decision

**on the Signing by the European Community of the Convention on Choice-of-Court
Agreements**

SUMMARY OF THE IMPACT ASSESSMENT

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1. PROCEDURAL ISSUES AND THE CONSULTATION OF INTERESTED PARTIES

The Impact Assessment was prepared on the basis of a “Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice-of-Court Agreements by the European Community”, which was undertaken for the Commission by an external contractor¹ with input from the Inter-Service Steering Group convened by the Directorate-General for Justice, Freedom and Security. Representatives of the Legal Service, Secretariat-General, DG ENTR, DG MARKT, DG SANCO and DG INFSO participated in the work of the Inter-Service Steering Group. This Impact Assessment was reviewed by the Impact Assessment Board (IAB). The recommendations for improvements have been accommodated in a revised version of the report.

The Impact Assessment was based on the abovementioned study, a review of the literature, analysis of the responses to the Commission’s 2004 Consultation Paper in preparation for the final round of negotiations at the Hague, reviews of the results of surveys undertaken by the International Chamber of Commerce (ICC)² and the American Bar Association (ABA)³ as well as analysis of trade statistics (from Eurostat).

2. PROBLEM DEFINITION

Matters of international jurisdiction of courts and recognition and enforcement of judgments in civil and commercial matters are governed within the European Community by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“the Brussels I Regulation”)⁴.

According to the case law of the European Court of Justice⁵, issues of international jurisdiction and recognition and enforcement of judgments with respect to third countries come under exclusive external Community competence. This means that Member States are no longer in a position, either individually or collectively, to enter into international obligations in respect of third countries as regards matters governed by external Community competence.

Conclusion of the Convention on Choice-of-Court Agreements under the Hague Conference on Private International Law in 2005 presented an opportunity for creating a worldwide judicial alternative for business-to-business dispute resolutions in cases where the parties concluded a choice-of-court agreement.

¹ GHK Consulting Ltd, Birmingham; study available at http://ec.europa.eu/dgs/justice_home/evaluation/dg_coordination_evaluation_annexe_en.htm

² ICC Survey regarding business practices on jurisdictional issues (2003) <http://www.iccwbo.org/law/jurisdiction/>

³ Survey conducted by the ABA Section of International Law (ABA Working Group on the Hague Convention on Choice-of-Court Agreements) in October/November 2003.

⁴ OJ L 12, 16.1.2001, p.1.

⁵ Judgment of the Court of 31 March 1971, Case 22-70, Commission v Council — European Agreement on Road Transport, Opinion 1/03 of 7 February 2006 on the competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Inside the Community there is a predictable system of rules on jurisdiction based on the choice of the parties (choice-of-court agreements) and recognition and enforcement of resulting judgments. However, once outside the EU area, this predictability for EU businesses ends due to the limited number of multilateral or bilateral treaties with third countries and the absence of a worldwide system of applicable rules.

This lack of legal certainty may function as a “barrier to trade”. A survey has shown that global trade is being hampered by companies’ uncertainty about which national courts might hear a case regarding a contested contract. 41% of the companies surveyed indicated that a significant business decision of their company had at some point been determined by uncertainty regarding the court that would resolve disputes or the law that would apply to the contract. This was more frequent amongst large businesses (47%) than small (26%).

At the same time, any action the Community undertakes in respect of third countries should protect values developed within the Community which are of such importance that they must be protected also outside the European Union.

2.1. Summary of problems

Four main problems were identified in this policy area:

Problem 1

The cost of legal uncertainty for EU economic operators that:

- their choice-of-court agreements in favour of a court outside the EU are respected in the EU; and
- their choice-of-court agreements in favour of a court in the EU are respected in third countries.

Problem 2

The costs of insufficient foreseeability for economic operators that:

- a judgment given by the court chosen outside the EU is eligible for recognition and enforcement within the EU;
- a judgment given by the court chosen within the EU is eligible for recognition and enforcement outside the EU.

Problem 3

The costs and damage to a EU weaker party in case of insufficient protection due to the choice-of-court agreement in favour of court outside the EU (e.g. the choice of a foreign court could lead to deprivation of the protection provided to the weaker party by Community law).

Problem 4

Insufficient protection of legal relations specifically protected within the EU by way of rules on exclusive jurisdiction also in a wider, global context (e.g. relating to immovable property, intellectual property rights, etc.).

2.2. The size of the problems

It is difficult to assess the scope of the problems because there are no relevant statistics and the empirical data are limited. But the information obtained through the consultations shows that legal uncertainty linked to respect for the choice-of-court agreement and enforcement of judgments might indirectly influence business decisions.

As for Problem 1, two surveys available on the subject showed that for a large number of businesses (about 40%) a significant business decision had at some point been determined by uncertainty regarding the court that would resolve disputes or the law that would apply to the contract.

As for Problem 2, it is estimated that about 40% of companies experience difficulties, sometimes insurmountable, in connection with recognition and enforcement of judicial decisions.

The existence of Problems 3 and 4 was not corroborated by the results of the consultations, but it does not mean that these problems do not exist.

3. OBJECTIVES

3.1. General objective

The overall general objective is to address potential ‘barriers to trade’ through reducing legal uncertainty, i.e. to promote international trade (external to EU) and investment, through reducing legal uncertainty in commercial contracts.

3.2. Specific objectives

The general objective is reflected in four specific objectives, each of which is closely related to the underlying problems identified in Section 2. These specific objectives are the basis for the main assessment criteria applied to the individual policy options.

- (1) To increase EU economic operators’ legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected;
- (2) To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators;
- (3) To safeguard EU economic operators’ rights in determining the choice of court where they are the weaker party;
- (4) To promote the legal rights of EU operators protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.

The reasoning behind the choice of the specific policy objectives is as follows.

Specific objective 1. It would be beneficial if parties to an international contract who entered into a choice-of-court agreement could rely on the fact that such agreement would be upheld by the court chosen or by another not chosen court seized.

Specific objective 2. It would be beneficial if parties to an international contract who entered into a choice-of-court agreement could rely on the fact that the judgment of the chosen court would be respected (eligible for recognition and enforcement) in the countries of both parties and/or in the country of enforcement.

Specific objective 3. It would be beneficial to the Community if the solutions adopted safeguarded the rights of EU weaker parties entering choice-of-court agreements. Achieving the objective would both protect the weaker party and also ensure competition through increasing smaller companies’ confidence to enter into international contracts.

Specific objective 4. It would be beneficial if courts outside the EU protected legal rights similar to those within the EU. Such effects could come about through a process of ‘attrition’ whereby ‘familiarity breeds replication’ through cases involving EU companies being held in

courts in third countries and the arguments made on their behalf becoming embodied in the laws and practices of the third countries. This would have the potential consequence of increasing the likelihood that EU companies would choose to enter into international agreements and hence could lead to possible increases in trade.

4. POLICY OPTIONS

Policy Option		Description of policy option
<i>Status quo options</i>		
Policy Option 1	“passive” status quo	The Community does not conclude the Convention and no new initiatives are taken to address the policy objectives.
Policy Option 2	“active” status quo	The Community does not conclude the Convention, but bilateral agreements between the Community and selected third countries are negotiated that address the policy objectives.
<i>Non legislative options</i>		
Policy Option 3	provision of “public insurance”	Support for the provision and costs of insurance that covers the additional costs of disputes (such as the extra costs of trials held in third countries and the financial losses to EU operators from rulings made that undermine the rights the EU operators would have if they were operating in the EU) due to uncertainty in the choice of courts.
Policy Option 4	Provision of information to inform businesses of current risks stemming from uncertainty in the choice of courts.	Support for the costs of providing information to EU operators on the risks stemming from current uncertainties over the choice of court should they wish to trade with third countries, and the practical means available to them through which these risks could be reduced.
Legislative options ⁶		
Policy Option	Conclusion of the	The Convention is concluded by the Community

⁶ The Convention allows declarations limiting jurisdiction (Article 19), declarations limiting recognition and enforcement (Article 20), declarations with respect to specific matters (Article 21) and reciprocal declarations on non-exclusive choice-of-court agreements (Article 22). In view of the fact that the consultations preceding adoption of the Convention did not support the idea that the declarations allowed in Articles 19 and 20 should be utilised by the Community, and that there was resistance from a number of Member States against including non-exclusive choice-of-court agreements, the Impact Assessment policy options do not take the possibility of making declarations under Articles 19, 20 and 22 into account.

Policy Option		Description of policy option
5	Convention by the Community without making any declarations under its Article 21.	without excluding additional matters from its scope by a declaration under its Article 21.
Policy Option 6a	Conclusion of the Convention with a declaration under Article 21 excluding copyright and related rights.	The Convention is concluded by the Community making a declaration under its Article 21 excluding copyright and related rights from the scope of the Convention.
Policy Option 6b	Conclusion of the Convention by the Community making a declaration under its Article 21 excluding insurance matters.	The Convention is concluded by the European Community making a declaration under its Article 21 excluding insurance matters from the scope of the Convention.
Policy Option 7	Combination of policy options 6a and 6b.	The Convention is concluded by the Community making a declaration under its Article 21 excluding copyright and related rights and insurance matters from the scope of the Convention.

4.1. Comparison of the options

Assessment Criteria↓ Policy Options→	1. 'Passive' status quo	2. 'Active' status quo	3. Provision of "public insurance"	4. Awareness raising	5. Conclusion no exclusions	6a. Conclusion excluding copyright	6b. Conclusion excluding insurance	7. 6a +6b
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	0	√	0	0	√√√	√√ ^N	√√ ^N	√√
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	0	√	0	0	√√√	√√ ^N	√√ ^N	√√
To safeguard EU	0	√	√	√	√√	√√ ^N	√√ ^N	√√√

economic operators' rights in determining the choice of court where they are the weaker party.								
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	0	√	0	0	√√	√ ^N	√ ^N	√
Economic and social benefits.	0	√√	√ ^N	√ ^N	√√	√√ ^N	√√ ^N	√√√
Economic and social costs.	0	0	Potential competition effects	0	Conflicts with Community policies	Conflicts with Community policies	Conflicts with Community policies ⁰	0
Implementation costs.	0	Very low	High	Low to medium	Very low	Very low	Very low	Very low
Conflicts with Community policies.	No	No	No	No	Potential	Potential	Potential	0
Preferred option.	No	No	No	No	No	No	No	Yes

4.2. The preferred option

In the light of the assessment in Table 4.1 the preferred option is policy option 7 which involves the conclusion by the Community of the Convention with declarations under Article 21 concerning copyright and related rights and insurance matters. Even though policy options 5, 6a and 6b attain slightly better overall results in achieving the policy objectives (with the exception of the policy objective of safeguarding EU economic operators' rights), they all create potential conflicts with Community policies. Policy option 7 does not create such conflicts and is therefore preferred. This option is also expected to generate more economic and social benefits.

4.3. The potential scale and nature of impacts of the preferred option

The general objective of the preferred policy option is to reduce legal uncertainty for EU economic operators. In doing so, conclusion of the Convention should act as a stimulus to international trade and hence contribute to reducing the costs of goods and services in the EU.

Legal uncertainty is only one of several factors that constrain international trade. The preferred option would reduce legal uncertainty, but would not eliminate it. In particular the preferred option would increase the *likelihood* that choice-of-court agreements, and court judgments made in the agreed courts, would be respected and enforced.

4.4. The costs of the preferred option

The preferred option will involve only small implementation costs associated with preparing the legislative instruments linked with signing and conclusion of the Convention by the

Community. However, given that the Convention will not generate benefits to the EU unless EU trading partners also ratify it, some administrative and diplomatic resources will be required to encourage and negotiate with the potential Contracting Parties.

Additional costs will arise for monitoring implementation (functioning) of the Convention once it is concluded by the Community.

The preferred option does not generate either compliance or administrative costs for EU businesses trading internationally. Companies would remain free to include choice-of-court agreements in their contracts or to continue using alternative dispute-resolution methods.

4.5. EU added value

The preferred option would generate significant EU added value. Firstly, there would be one set of rules for EU operators within each of the Member States and thus, in effect, the ‘level playing field’ within the EU created by the Brussels I Regulation would be extended to the Contracting States of the Convention. Secondly, a series of bilateral agreements with varying exemptions could be counterproductive in trying to decrease legal uncertainty where the EU’s major trading partners are likely to wish that their goods and services can be traded within the EU and with other trading partners under the same regimes concerning choice-of-court agreements.

The costs of concluding the Convention are very low while the potential economic benefits are large. There are only a few potential ‘downsides’ to concluding the Convention. These might, for example, include the obligation arising under the Convention to respect within the EU “controversial” judgments given by third-country courts. However, the possibility to refuse recognition of such judgments on the basis of public policy (under Article 9(e) of the Convention) is always available, and it can also be anticipated that the number of such judgments would gradually decrease due to ‘convergence’ in case law.

5. MONITORING AND EVALUTION

It is the practice of the Hague Conference on Private International Law, under whose auspices the Convention was drawn up, to organise regular meetings of special commissions to evaluate the practical application of conventions, in order to monitor and evaluate their success.

In addition to this institutional monitoring, the Community as a Contracting Party should develop its own monitoring and evaluation mechanism.

There are no suitable ‘ready-made’ sources of information pertinent for accurately assessing the scale and nature of existing problems, and hence monitoring in the future the extent to which these problems will have been reduced.

In these circumstances the best way to proceed would be to adopt the same procedure as for other legislative instruments in the area, i.e. by reviewing the functioning of the Convention at regular intervals (for instance once every four years) assisted by a study of an external contractor.