



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

OTIF



ORGANISATION INTERGOUVERNEMENTALE POUR LES
TRANSPORTS INTERNATIONAUX FERROVIAIRES

ZWISCHENSTAATLICHE ORGANISATION FÜR DEN
INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL
CARRIAGE BY RAIL

**DIPLOMATIC CONFERENCE TO ADOPT A
RAIL PROTOCOL TO THE CONVENTION
ON INTERNATIONAL INTERESTS IN MOBILE
EQUIPMENT**

Luxembourg, 12 to 23 February 2007

UNIDROIT/OTIF 2007

DCME-RP – Doc. 22

Original: English

14 February 2007

The relationship between the Hague Convention of 30 June 2005 on Choice of Court Agreements, the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the draft Protocol on Matters specific to Railway Rolling Stock (draft Protocol)

**Comments submitted by the Hague Conference on Private International Law
to assist in the discussion of Article XX of the draft Protocol**

Summary:

At present, the Hague Convention of 30 June 2005 on Choice of Court Agreements (this is the correct and official title) is listed in Article XX h) of the draft Protocol. The provision is still in square brackets. These comments are provided with a view to facilitating the discussion and providing some background information. It is proposed to maintain the reference to this Hague Convention in the list and remove the square brackets around the paragraph. The result will be that in case of conflict between the draft Protocol and the Cape Town Convention on the one hand, and the Hague Convention on the other hand, the Cape Town regime will prevail. Where there is no conflict, the Hague Convention will be applied together with the Cape Town regime and will supplement and strengthen it.

Explanation in detail:

- **The scope of the three instruments overlaps as regards subject matter and the territorial scope.**
 - Hague Convention applies in civil or commercial matters (Article 1); rights *in rem* in movable property are not excluded from scope but may be excluded by a declaration under Article 21
 - Cape Town Convention and draft Protocol govern rights *in rem* in movable property (= civil matter)

- **Both Cape Town Convention and Hague Convention contain rules on forum selection clauses/choice of court agreements. They do not contradict each other but Hague Convention could usefully supplement Cape Town Convention and draft Protocol.**

- **Formal validity:** Cape Town Convention requires written form (Article 42(2) or compliance with the form requirements of the (substantive) law of the chosen forum.

According to the Official Commentary the reference to the law of the forum was inserted with a view to protecting the form requirements of Article 23 of the Brussels I Regulation. Where the Regulation does not apply (either because the forum State is not an EU Member State or because in courts of EU Member States, the Hague Convention gives precedence to the Brussels I Regulation in cases not involving parties resident in non-EU States that are Parties to the Hague Convention), the Hague Convention would be the *lex fori* referred to in Article 42(2) Cape Town Convention. So while the Brussels I Regulation provides a harmonized *lex fori* concerning form requirements for choice of court agreements before courts of the EU Member States, the Hague Convention could do the same for courts outside Europe. For business parties this would be easier to handle than various domestic form requirements and the Hague Convention could thus support and strengthen Cape Town Convention and draft Protocol.

- **Substantive validity:**

- The Cape Town Convention does not contain general rules on substantive validity (including consent and lawfulness); substantive validity is in general governed by the applicable law (see Official Commentary, Article 42, para. 3 *in fine*). So the conflict of laws rules of the forum have to be applied in order to determine the applicable law. Where the forum State is a Party to the Hague Convention, its Articles 5, 6 *a*) and 9 *a*) are part of the *lex fori* and prevail over internal law. These Articles contain a choice of law rule for the determination of the substantive validity of the choice of court agreement. This choice of law rule permits *renvoi* because it refers to the law of the chosen forum including its conflict of laws rules. The rule makes sure that all possible courts involved (i.e. a court chosen and seized; any court seized which was not chosen in the forum selection court, and later a court where recognition and enforcement is sought) will assess the substantive validity of the choice of court agreement under the same law. This will prevent parallel proceedings and contradictory decisions. Hence the interplay between Cape Town Convention, draft Protocol and Hague Convention would again strengthen the Cape Town system.
- **Exception to party autonomy:** In the Cape Town Convention, there is an exception to the general principle of party autonomy: Article 44 establishes exclusive jurisdiction to make orders against the Registrar. Where the Registrar has concluded a choice of court agreement and a suit concerning the validity of an entry in the register is brought in the chosen forum, the Hague Convention will not apply because the validity of entries in public registers is excluded from the scope of the Hague

Convention by Article 2(2) *p*). However, there could be other suits brought against the Registrar in a forum agreed between the Registrar and the other party (e.g. for damages), and they would be covered by the Hague Convention while such jurisdiction is not permitted under the Cape Town Convention. So there is a potential conflict.

- **Presumption of exclusivity:**

Both the Cape Town Convention and the Hague Convention establish a presumption that a choice of court agreement is exclusive unless the parties have explicitly provided otherwise. There is thus no conflict.

- **Operative rules:**

- **Jurisdiction:** The Cape Town Convention and the draft Protocol do not contain explicit rules on whether the chosen court has an obligation to hear the case or on whether any court not chosen is obliged to dismiss the case. Such obligations are nevertheless implied (see Official Commentary, Article 42, para. 1 *in fine*). The Hague Convention spells them out (Articles 5 and 6) and the Convention could therefore usefully supplement the Cape Town Convention system.
- **Recognition and enforcement:** The Cape Town Convention and the draft Protocol do not contain rules on recognition and enforcement of judgments given by the chosen court. The Hague Convention provides for this.

Conclusion: The three instruments overlap in their scope of application. The only conflict or contradiction between their rules appears to concern the exclusive jurisdiction for claims against the Registrar under Article 44 Cape Town Convention. In order to protect this exclusive jurisdiction, it may be useful to include the Hague Convention in Article XX of the draft Protocol. In order to ensure that also under the Hague Convention, precedence is granted to the Cape Town system, States Parties to the Cape Town Convention and one or more of its Protocols would moreover be required to make a declaration under Article 26(5) Hague Convention which allows treaties governing jurisdiction or the recognition and enforcement of judgments in relation to a specific subject matter (such as the Cape Town Convention) to prevail over the Hague Convention.