COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 5.9.2008
SEC(2008) 2389

COMMISSION STAFF WORKING DOCUMENT

Accompanying the

Proposal for a Council Decision

on the signing by the European Community of the Convention on Choice-of-Court Agreements

IMPACT ASSESSMENT

{COM(2008) 538 final}
{SEC(2008) 2390}

1. PROCEDURAL ISSUES AND THE CONSULTATION OF INTERESTED PARTIES

Agenda planning reference number: 2008/JLS/196

1.1 Procedural issues

This 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 contractor[1] 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. In particular, the following changes were made:

The baseline scenario has been assessed in more detail end provides an overview of existing dispute resolution procedures relevant in the field (court settlements, ADR and international arbitration) which set out their advantages and shortcomings. Regrettably, there exist no comprehensive and reliable data on the costs and length of dispute settlement procedure available.

Point 5.2 has also been expanded also to inform on the status of ratification process of the Convention.

The report explains further the reasons for exempting the copyrights and related rights (option 6 a) and insurance sectors (option 6 b) (additions made to points 5.7 and 5.8).

1.2 Consultations of interested parties

This 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[2], reviews of the results of surveys undertaken by the International Chamber of Commerce (ICC)[3] and the American Bar Association (ABA)[4] as well as analysis of trade statistics (from Eurostat). The choice of American surveys was motivated by the fact that poor information exists on the practice of choice-of-court agreements at European level. The agreements which are the subject of the Convention are international and so the opinions and (potential) behaviour of non-EU economic partners may contain valuable information.

---

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

2 For overview of responses see Annex 1.

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

4 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.

As a complement to the review of existing information, consultations with companies, insurance companies, business organisation and law firms on the various elements involved in current choices of court agreements and the implementation of these agreements were undertaken by the external contractor for the study.

In total more than 500 companies, eight insurance companies, seven business organisations and nine law firms were contacted during the study. However, only 27 interviews were carried out as difficulties were encountered with identifying companies trading with extra-EU markets and who, within these companies, was able to comment on the use of choice-of-court agreements. Also, companies were often reluctant to provide this kind of information or to take part in the interview.

Consequently, a total of 21 companies were interviewed on the use of choice-of-court agreements and the problems linked to them. The initial sample of companies to be interviewed reflected a geographical and sectoral spread. However, due to the low response rate and engagement of companies, more interviews were undertaken with French and Belgian companies (19 interviews were undertaken in both countries), which showed a greater interest in participating in the survey. Moreover, two insurance companies were interviewed and two questionnaires, filled in by the Agency of Lithuanian Copyright Protection Association and the British affiliate of the ICC, were forwarded respectively by GESAC (the European Grouping of Societies of Authors and Composers) and the ICC. Moreover, two law firms (based in Portugal and Finland) contributed to the study through interviews.

2. PROBLEM DEFINITION

2.1. Policy context

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 (referred to as the "Brussels I Regulation")[5] which replaced the 1968 Brussels Convention of the same name as of 1 March 2002. The provisions of that Regulation are currently applicable in all 27 Member States[6].

The Regulation covers issues concerning the jurisdiction of the courts of European Community Member States, and the mutual recognition and enforcement of judgments between Member States for the whole area of civil and commercial law[7], with the specific

---

5 OJ L 12, 16.1.2001, p. 1.

6 Even though Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, did not adopt the Regulation and the Regulation does not apply to it, Denmark is bound by the provisions of the Regulation by virtue of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 299, 16.11.2005, p. 62).

7 Community instruments adopted in certain specialised areas of civil and commercial law which contain specific rules on international jurisdiction and/or mutual recognition and enforcement of judgments make reference to the general applicability of the Brussels I Regulation. For instance, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

exclusion of family law (except for maintenance obligations), bankruptcy and insolvency, social security and arbitration.

The Regulation also specifically deals with the issues of jurisdiction based on choice-of-court agreements and subjects the resulting judgments to the benefits of mutual recognition and enforcement under the Regulation.

According to the case law of the European Court of Justice[8], issues related to international jurisdiction and recognition and enforcement of judgments with respect to third countries come under exclusive external Community competence.

2.1.1. Current legal situation in respect of third countries

The current legal situation with respect to third countries in the field in question is, however, very variable. The only international agreement concluded in this field so far between the Community and third countries is the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[9] which was signed by the Community but has yet to be ratified. It introduces provisions virtually identical to the Brussels I Regulation and thus extends the system of harmonised rules also to Switzerland, Norway and Iceland.

As regards the other third countries, only a small number of bilateral agreements covering the issues in question exist between some Member States and a limited number of third countries. Virtually no treaty relationships exist in this area between the individual Member States and the EC's main trading partners (such as the USA, China, Russia)[10], mainly because negotiation of such treaties would be difficult, if not impossible, due to different legal traditions and those countries having no tradition of negotiating such agreements[11].

Previous international efforts were not crowned with success[12], with the sole exception of the now worldwide system of recognition and enforcement of arbitral awards established by the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*.[13]

2.1.2. Consequences of the current legal situation

The absence of a worldwide (or at least widely accepted) system of jurisdiction and mutual recognition and enforcement of judgments creates uncertainty for European companies and

---

8 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.

9 OJ L 339, 21.12.2007, p. 3.

10 An exception is Russia in that it has a long-standing tradition of concluding bilateral agreements in the area of jurisdiction and recognition and enforcement of judgments in civil matters and has such bilateral agreements with certain Member States.

11 Conclusion of such agreements is, however, difficult even between countries sharing legal traditions, as demonstrated by the example of a bilateral UK-US Treaty on recognition and enforcement of judgments in civil and commercial matters which was negotiated in the 1970s, but was subsequently never ratified.

12 The latest attempt at negotiating a worldwide convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters within the Hague Conference on Private International Law failed in 2001.

13 Although this convention had a very difficult start, it now has 142 Contracting Parties.

entrepreneurs as to which court will have jurisdiction in a potential dispute arising from a contractual relationship with a party in a third country. This uncertainty may have a dampening effect on international trade[14].

The lack of certainty as to the applicable jurisdictional rules, depending on the national rules of individual countries, can be overcome by the parties to the dispute by their agreeing to designate a court which will have jurisdiction to adjudicate their dispute. Such party autonomy is, however, undermined by the lack of worldwide rules which would guarantee to the parties that:

- their choice of a court in a certain country will be respected by the courts in other countries, and that

- the resulting judgment given by the chosen court will be eligible for recognition and enforcement in a country other than the country of the chosen court.

As a result of this situation, businesses today usually opt for alternative methods of dispute resolution (mainly arbitration) to try to solve their international disputes, since the abovementioned existing worldwide system of recognition and enforcement of arbitral awards offers relatively high predictability.

2.1.3. The Convention on Choice-of-Court Agreements

The Convention on Choice-of-Court Agreements concluded on 30 June 2005 at the Twentieth Session of the Hague Conference on Private International Law (referred to below as 'the Convention') is designed to offer greater certainty and predictability for parties involved in business-to-business contracts and international litigation by creating an optional worldwide judicial alternative to the existing arbitration system.

The European Commission negotiated this Convention on behalf of the European Community on the basis of a Council Decision.

Due to the active participation of the USA, Canada, Japan, China, Russia, among a great number of other countries, in drawing up the final text, the Convention has a chance to become a viable option for creating a basis for the recognition and enforcement of judgments resulting from a choice-of-court agreement between the EC and these States, provided it is widely ratified.

In view of the general trend in international negotiations, where States prefer to consider ratification of existing multilateral international agreements before entering into the commitment of negotiating bilateral treaties in the same field, it is to be expected that the Convention will be the basic instrument of reference when it comes to choice-of-court agreements in civil and commercial matters. The signing and subsequent conclusion of the Convention by the European Community and other economically strong States would certainly improve the chances of the Convention becoming a truly worldwide instrument. Conclusion of the Convention by the Community would also avoid the need to negotiate individual bilateral treaties between the EC and individual third countries, which in itself

---

[14] A worldwide survey conducted by the International Chamber of Commerce (see footnote 3 for reference) states that of 100 leading companies that took part in the survey, 40 said there had been occasions when a significant business decision had been determined by jurisdictional uncertainty.

could lead to an additional level of uncertainty and complexity since the individual bilateral treaties could contain different rules applicable to the same kind of legal relations.

Most international contracts do not lead to disputes. Where disputes arise there are methods for resolving them that avoid going to court (mediation, arbitration, etc.). Going to court is often seen as a last resort because of its perceived relative high cost, publicity and finality in terms of the prospects for future business relations between the parties.

2.2. Identification of the problem

International trade is growing and more companies are taking part in international business. As global business expands, the number of business disputes is also on the rise. It can be assumed[15] that:

- between 92% and 96% of companies set up international contracts including provisions addressing dispute resolution; and
- between 17% and 50% only of companies' international contracts include an exclusive choice-of-court clause.

2.2.1. Lack of legal certainty

As specified in points 2.1.1 and 2.1.2 above, Community operators have no legal certainty that a judgment given by a court within the EU, which they chose to deal with their dispute, will be recognised and enforced outside the EU, nor that a judgment given by the chosen court outside the EU will be recognised and enforced within an EU Member State.

In addition, where the parties to the dispute agreed to choose a court (or courts) of a country to have jurisdiction to resolve their dispute, the existing legal situation does not guarantee that their choice of a non-EU court will always be respected by the EU courts, nor that a non-EU court will respect their choice of EU courts. This means that one of the parties of the contract may seize a court other than the one chosen by both parties and thus disadvantage the other party that relied on the agreement. The court seized but not chosen may adjudicate the matter differently than the court chosen, because it may apply different substantive law. Consequently, the outcome of the dispute may be different than what was the expectation of the parties when they agreed on the choice of court.

This lack of legal certainty may function as a "barrier to trade". The ICC survey[16] showed that global trade is indeed being hampered by companies' uncertainty about which national courts might hear a case involving 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%).

The conclusion from this is that a company may prefer not to enter into a contract with a third-country partner if the issue of which court that will have jurisdiction to decide a potential dispute arising from that contract is not sufficiently clear and predictable. As regards

---

15 Based on results of the ICC survey (footnote 3), ABA survey (footnote 4) and the interview conducted for the study.

16 See footnote 3.

any choice-of-court agreement included in a contract, this lack of certainty relates to the factor that the court chosen by the parties will indeed be able to exercise its jurisdiction and the dispute will not be taken away from that court by the fact that a court seized, but not chosen, will disregard such choice.

As the above numbers suggest, small and medium enterprises may have bigger problems in accessing information on risks stemming from trade with third countries. Bigger companies usually have qualified staff or lawyers providing legal advice, while SMEs have smaller human and limited financial resources to hire specialised staff. They might therefore enter a business relation without full knowledge of risks associated with a business relation with a third-country partner (including consequences of any choice-of-court agreement included in the contract), as well as without the means available to reduce these risks. This situation may, however, also lead to the consequence that a small company may prefer not to enter into a contract with a larger company in a third country for fear of the unknown risks associated with such a contract.

In the circumstances described, it may seem sufficient that a global arbitration solution exists, when trading partners prefer to solve their disputes by arbitration anyway. This, however, is only partially true. It depends very much on a series of variables, such as the legal culture (trust in arbitration as opposed to courts), contractual bargaining power and perception of costs (court costs versus costs of arbitration). While it is true that large international companies will usually not choose a court to settle their dispute because it would be more costly for them, small and smaller companies might take a different attitude. This is true especially for situations where the balance of bargaining powers in the contract relationship is unequal. For a small company with a grievance against a stronger trading partner, the option of going to the court in its own country, as opposed to conducting international arbitration abroad, is a much better option. Not only from the point of view of costs (hiring a local lawyer rather than paying for the costs of a lawyer abroad specialised in international arbitration), but also as regards equality of position (courts are perceived to be more neutral in decision taking, whereas arbitration is "forcing" them to compromise).

2.2.2. Protection of Community legal values

Through its legislation and case law the Community has developed a certain set of values in the field of civil and commercial matters, and any activities undertaken by the Community in respect of third countries should reasonably respect these values, in particular values which are of such importance that they must be protected also outside the European Union. Even though there is ultimately a political choice to be made whether certain values must be protected in relation to third countries, there are certain legal values (standards) which by their nature demand such protection.

In the area relevant for this exercise, these values are reflected in provisions creating exclusive jurisdiction for courts within the EU Member States as well as in the provisions prohibiting or limiting party autonomy (choice of court) in certain cases, in certain sets of legal relations (so called "protective jurisdiction").

In addition to the jurisdictional rules mentioned, there might be other areas where the interest of the Community to protect certain legal relations beyond the borders of the European Union might arise. In connection with negotiation of the Convention one particular area was singled out as creating difficulties, i.e. the validity of copyright and related rights.

2.2.2.1. Protective jurisdiction

Chapter II of the Brussels I Regulation contains rules on "protective jurisdiction" in three areas: insurance (Section 3), consumer contracts (Section 4) and individual contracts of employment (Section 5). The protective nature of these jurisdictional rules lies in the fact that they do not allow the perceived "weaker" party in the legal relation (such as the policyholder, consumer or employee) to be forced into a choice of court which might be disadvantageous to that party.

2.2.2.2. Exclusive jurisdiction

The areas of jurisdiction which fall under the exclusive jurisdiction of courts in the European Union are set out in Article 22 of the Brussels I Regulation. Their relevance for party autonomy (choice-of-court agreements) lies in the fact that where a court within the EU has exclusive jurisdiction, the parties to a dispute should not be able to bypass this jurisdiction by their choice of another court, be it a court within the EU or in a third country.

Community instruments containing rules on special venues were analysed in order to assess whether they involve a similar need of protection as do the rules of the Brussels I Regulation. These were:

a) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark;

b) Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs;

c) Council Regulation (EC) No 585/93 of 12 March 1993 on the implementation of promotional and publicity measures in respect of milk and milk products;

d) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings;

e) Regulation (EC) No 874/2004 of 28 April 2004 laying down policy rules concerning the implementation and function of the .eu Top Level Domain and the principles governing registration.

Only Regulations mentioned under (a) and (b) above contain rules referred to as "exclusive jurisdiction". However, both these Community instruments also expressly allow choice-of-court agreements with reference to the Brussels I Regulation. Accordingly, the provisions in these Community instruments need to be construed as designating or delimiting the court within each Member State rather than in general. If a court in a Member State is designated by choice-of-court agreement, it must be that special court only. These Community instruments were, however, not designed to limit the possibility of choice of court by the parties in general.

2.2.2.3. Copyright and related rights

Although neither the Brussels I Regulation[17] nor other Community instruments adopted in the area of copyright and related rights[18] establish either exclusive jurisdiction of a court within the EU or protective jurisdiction for the holders of such rights, in view of the attention paid to the issue during negotiation of the Convention and by the Community legislator, these intellectual property rights deserve to be taken into special consideration for the purposes of this exercise.

The term intellectual property refers broadly to creations of the human mind. Intellectual property rights ("IPR") protect the interests of the creators/inventors by giving them property rights over their creations/inventions — patents, trademarks, industrial designs, copyright, etc. With the exception of 'copyright and related rights', which cover not only literary and artistic works but also computer programs, all other intellectual property rights are excluded from the scope of the Convention[19].

Like all intellectual property rights, copyright is also territorial in nature, i.e. protection of the authors' rights is restricted to the State where the right has been created or registered. However, the question about the validity and the scope of copyright not only affects the rightsholder and his contract partners, but also the users and the whole of society. This is because issues such as public interest and freedom of expression are involved. In this context, decisions about the validity and scope of copyright rendered by non-EU courts may directly affect Community rightsholders' and users' interests.

A recent Intellectual Property Enforcement Survey[20] indicated that infringements of IPR are very frequent in many third countries. These infringements are especially frequent in China, the second largest EU trading partner, where the second most common type of IPR infringement (after the counterfeiting of trademarks) is piracy.

The situation is further worsened by the digitalisation of cultural products and the development of the World Wide Web which made piracy easier, in particular due to reduced costs and the global presence of the Internet. The Internet environment has also made it problematic to identify the countries in which the infringement took place, due to the lack of physical references such as "borders" and "physical person" in cyberspace.

At European level, certain aspects of copyright and related rights[21], as well as of enforcement[22] of these rights, are harmonised.

---

17 Under the Brussels I Regulation, the general principle of jurisdiction based on the domicile of the defendant or jurisdiction based on the place where the harmful event occurred apply to copyright and related rights.

18 For instance Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, and Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.

19 Article 2(2)(n) and (o) of the Convention, "Exclusions from scope".

20 Gowers Review of Intellectual Property, The British Copyright Council, http://www.britishcopyright.org/

21 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, etc.

At international level, apart from several international conventions in the IPR field[23], the most comprehensive and effective instrument for addressing IPR infringements is the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[24]. The TRIPS Agreement is an attempt to narrow the gaps in the way IPRs are protected around the world, and to bring them under common international rules. The Agreement establishes minimum levels of protection that each State has to give to the intellectual property of other WTO members by respecting national treatment and most-favoured-nation principles. Despite that, many differences remain on the scope and measures for enforcing those rights.

The stakeholders' replies to the Commission Consultation Paper during preparation of the Convention, the conduct of negotiations at The Hague and ultimately the study undertaken by the external contractor confirmed the problematic status of these relations under the Convention.

2.2.2.4. Situation under the Convention

As regards protective jurisdiction (2.2.2.1), Article 2 of the Convention excludes consumer contracts and employment contracts from its scope, so the only area covered in terms of protective jurisdiction by the Brussels I Regulation and not excluded from the scope of the Convention are insurance contracts.

As regards exclusive jurisdiction (2.2.2.2.), all fields of exclusive jurisdiction recognised by the Brussels I Regulation are excluded from the scope of the Convention[25].

As regards copyright and related rights (2.2.2.3.), the Convention applies to both regarding the question of validity of copyright and related rights as well as infringements of such rights.

Article 21 of the Convention allows a State with a strong interest in not applying the Convention to a specific matter to make a declaration that it will not apply the Convention to that matter.

Consequently, the Community could make a declaration under Article 21 to exclude copyright and related rights as well as insurance contracts from the Convention's scope of application.

Were the Convention to be concluded by the Community without such exclusion, the copyright holders from the EU could enter into choice-of-court agreements that could lead to cases being heard in the chosen court in a non-EU country and the resulting foreign judgment would be eligible for recognition and enforcement in the EU as a Contracting Party to the Convention. On the other hand, the exclusion of copyright from the scope of the Convention would make it possible to refuse recognition of such a foreign judgment as there would be no international obligation to recognise and enforce it. The special jurisdiction provided in

---

22 Directive 91/250/EEC, Directive 2001/29/EC.

23 Berne Convention for the Protection of Literary and Artistic Works 1886; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961; WIPO Copyright Treaty 1966; WIPO Performances and Phonograms Treaty 1996, Paris Convention for the Protection of Industrial Property 1883, etc.

24 http://www.wto.org/english/docs_e/legal_e/27-trips.pdf

25 Strictly speaking, the Convention does not exclude *expressis verbis* exclusive jurisdiction for enforcement proceedings (Article 22(5) of the Brussels I Regulation), but there is no doubt about the fact that choice-of-court agreements on enforcement jurisdiction are not covered (allowed) by the Convention (see definition of a choice-of-court agreement in Article 3(a) of the Convention).

matters of insurance by Chapter II, Section 3 of the Brussels I Regulation aims to protect the weaker party and the economic interests of the general public of the place where the policyholder is located. An exclusive choice-of-court agreement under the Convention in favour of a court in a country which is not the policyholder's country would, therefore, contradict the Brussels I Regulation and the special provisions covering insurance. Although this would not necessarily create a direct legal contradiction between the Brussels I Regulation and the Convention, there might be conflicts in policy aims if the Convention were to be concluded without any exemption on insurance.

2.3. Summary of problems

Taking the above analysis into account, four main problems can be identified in this 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 will be respected in the EU; and
- their choice-of-court agreements in favour of a court in the EU will be 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 an EU weaker party in case of insufficient protection due to the choice-of-court agreement in favour of a 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).

Small businesses or individuals in the EU dealing with enforcement of intellectual property rights and insurance contracts are particularly vulnerable.

Specific barriers for small businesses or individuals are:

- difficulties in enforcing rights;
- costs of proceedings;
- lack of easily accessible and readily understood specialist knowledge;
- high level of uncertainty of success in pursuing a case.

This may lead to a small business being unwilling to enter into a contract with a larger third-country company, because it cannot well assess the risks associated with such a contract or it may enter into such contract unaware of the risks and thus face adverse effects.

Problem 4

Insufficient protection of legal relations specifically protected within the EU also in a wider, global context The protection of these relations could be undermined by choice-of-court agreements in favour of a court in a third country. Problems could arise for certain specific areas in which the EU and its Member States wish or might wish to exercise exclusive control.

The problem associated with this is that a court in a third country is not bound by the Community rules of exclusive jurisdiction or protective jurisdiction or the rules of substantive Community law, and thus may adjudicate cases which are of a sensitive nature for EU Member States and this possibly in different ways, and potentially produce a different result than a court in the EU would arrive at that is potentially of detriment to an EU party.

2.4. Scale of the problems identified

It is difficult to assess the scope of the problems identified because there are no relevant statistics and the empirical data are limited. But the information available 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, useful information on the frequency of the problem was provided by a survey carried out by the ABA[26]. 26.2% of respondents stated that enforcing a choice-of-court agreement designating a court or courts in an international transaction had been difficult, while 12.3% of respondents said it had been extremely difficult. Moreover, 3.1% stated that the problems linked to enforcement had been insurmountable. Difficulties linked to enforcement of choice-of-court agreements seem, however, to affect a minority of economic operators, as almost 50% of respondents indicated that they had not experienced such problems.

On the other hand, problems linked to the recognition or enforcement of judgments in countries other than the country in which such a judgment was rendered (problem 2) often arise. Whilst 32% of respondents to the ICC survey[27] stated that they had not experienced such problems, almost 40% stated that obtaining recognition or enforcement of judgments had been difficult. Moreover, 7.4% declared that this had been extremely difficult and practically insurmountable.

The results of the ABA survey also show that, when asked if economic operators had ever successfully enforced a foreign judgment in the USA, 70% of respondents answered negatively. Similarly, 62% of respondents answered in a negative way when asked if they had ever successfully enforced a US judgment abroad.

As for problems 3 and 4, consultations undertaken have not corroborated that stakeholders widely experience such problems. Only one stakeholder reported such problems. Admittedly,

---

[26] See footnote 4.
[27] See footnote 3.

the results of consultations do not reveal the full scope of the problems, or problems bound to be experienced regularly to a smaller or larger degree, given that rules of jurisdiction, applicable law and relevant substantive law vary from country to country and are not harmonised with the rules existing within the EU.

3. POLICY OBJECTIVES

The following general, specific and operational policy objectives reflecting the problems analysed in Section 2 have been identified.

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 the EU) and investment, and this by 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 highlighted 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 and by another court seized, but not chosen.

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 in third countries were to protect legal rights similar to those protected within the EU. Such effects could come about through the fact that, in cases involving EU companies in courts of third countries, arguments made on behalf of the EU companies could become anchored in the case law and, consequently, the laws of the third countries. Thus even third countries would "protect" the interests which are being protected within the EU. This would have the potential consequence of increasing the extent to which EU companies choose to enter into international contracts with parties from third countries and hence could lead to possible increases in trade.

3.3. Operational objectives:

There are a number of operational objectives that can be linked to each of the specific objectives:

Operational objectives linked to Specific objective 1:

- to increase the number and value of contracts (between EU operators and those in third countries) containing a choice-of-court agreement;
- to reduce (preferably eliminate) the instances of choice-of-court agreements not being respected.

Operational objectives linked to Specific objective 2:

- to reduce the uncertainty of outcome of court judgments dependent on the law applied by the court adjudicating the matter;
- to reduce the uncertainty that court judgments might not be respected in other countries;
- to reduce the uncertainty that court judgments would not be enforced.

Operational objectives linked to Specific objective 3:

- to reduce the time and costs of resolving disputes in court;
- to increase smaller companies' willingness to enter into international contracts with larger companies;
- to increase the likelihood of smaller companies challenging larger companies with whom they are in dispute.

Operational objectives linked to Specific objective 4:

- to reduce differences in the outcome of disputes dependent upon the country in which the case is heard;
- to reduce variation between the judgments made in EU courts and those made in third countries.

4. THE POLICY OPTIONS

4.1. Introduction

The list of policy options incorporates both legislative and non-legislative proposals and a 'status quo' option where no new proposals would be put forward.

4.2. The policy options

Policy option 1 — "passive" status quo

Under this policy option the Community would not conclude the Convention and no new initiatives would be taken to address the policy objectives.

Policy option 2 — "active" status quo

Under this policy option the Community would not conclude the Convention, but bilateral agreements would be negotiated between the Community and selected third countries which would address the policy objectives.

For the purpose of illustration it is assumed that bilateral agreements would be negotiated, containing provisions equivalent to the substantive provisions of the Convention (without declarations under its Article 21), between the Community and the USA, China and the Russian Federation, the EU's three main trading partners[28].

Policy option 3 — provision of "public insurance"

This policy option would involve support for the provision and costs of insurance to cover the costs of proceedings arising from suing or being sued in third countries and the financial losses to EU operators from rulings made in third countries that undermine the rights the EU operators would have if they were operating in the EU.

Such public insurance, established at EU level, would function as a sort of "export credit guarantee". This insurance would be suitable for companies trading with third countries. It would provide companies with insurance against the risk of not being paid under their international contracts. It would cover against buyer risks and political risks in third countries.

In the current situation, export credits in Member States can be backed by official/governmental support. Official support can take the form of direct credits/financing, refinancing, interest-rate support (where the government supports a fixed interest rate for the life of the credit), aid financing (credits and grants), export credit insurance and guarantees. Export credits are generally divided into short-term (usually under two years), medium-term (usually two to five years) and long-term (usually over five years).

---

[28] The value of merchandise trade (extra-imports + extra-exports) of EU25 with the USA amounted to 446 billion euro, i.e. 18% of the total value of merchandise trade for 2006. The value of merchandise trade (extra-imports + extra-exports) of EU25 with China amounted to 257 billion euro, i.e. 10% of the total value of merchandise trade for 2006. The Russian Federation is the EU's third biggest economic partner. The value of merchandise trade (extra-imports + extra-exports) of EU25 with the Russian Federation amounted to 213 billion euro, i.e. 8% of the total value of merchandise trade for 2006.

As indicated in a report by the Export Credits Guarantee Department (ECGD, the UK's official export credit agency)[29], there are seven main national agencies providing export credit guarantees: CESCE Spain, COFACE France; ECGD UK; EKN Sweden; ATRADIUS Netherlands; EULER HERMES Germany; and SACE Italy. Their annual returns range from 10 billion dollars (EKN) to 2 billion dollars (SACE). They provide export credit guarantees for exports to the majority of third countries (with the exception of Nigeria, Argentina and Pakistan).

Policy option 4 — provision of information to businesses on current risks stemming from uncertainty in the choice of court

This policy option would involve support for the costs of providing information to EU operators on:

- the risks stemming from current uncertainties over the choice-of-court agreements, should they wish to trade with third countries; and

- the practical means available to reduce these risks.

Information could be provided on the website of the national ministries (Trade or Justice) or chambers of commerce. Some Ministries and chambers of commerce (for example the Chamber of Commerce and Industry of Paris) already provide such information on international trade and choice-of-court agreements. However, there is no consistency in the information provided by the organisations and "information packs" are not available.

In addition to information provided on the Internet on the sites of the main sectoral and business organisations, brochures or posters containing the main messages to be provided to economic operators might also be distributed. This information campaign should be as decentralised as possible, and local authorities and stakeholders should be involved in order to reach a large number of companies.

The provision of information to business on current risks stemming from uncertainty in the choice of court could also be implemented further by developing information campaigns towards companies in the EU through the Specific Financing Programme Civil Justice.

Such provisions of information would reduce the legal uncertainty because the business would be consciously aware of the legal consequences of their actions (e.g. that it is not certain whether the court in the chosen country will respect such choice). This would lead the business to verify the private international law rules of the country in question concerning jurisdiction, in order to clarify, if such clauses are respected or not. If the result is negative, the business might prefer to choose another court (of the country of the legal order they know for sure).

Policy option 5 — conclusion of the Convention by the Community without making any declaration under its Article 21.

Article 21 of the Convention allows a State with a strong interest in not applying the Convention to a specific matter to make a declaration and thereby exclude such matter(s) from the scope of application of the Convention.

---

[29] Report on the Comparison of Export Credit Agencies, http://www.ecgd.gov.uk/intcompfinal2004.pdf

Under this policy option, the Community would conclude the Convention without indicating specific exemptions where the Convention would not be applied under Article 21.

Policy option 6a — conclusion of the Convention by the Community with a declaration under its Article 21 excluding copyright and related rights.

When making a declaration under Article 21 to exclude copyright and related rights, it would be important not to limit this exclusion to copyright holders within the EU only, as EU citizens may not be only holders but also users (and potential infringers) of copyright. The objective of this policy option is to protect the EU and its Member States against third countries' court decisions with an impact on copyright and related rights within the EU.

Policy option 6b — conclusion of the Convention by the Community with a declaration under its Article 21 excluding insurance matters.

The insurance exemption in this policy option should only go as far as is necessary to address this particular conflict with Community policy. This policy option would therefore involve the conclusion of the Convention with a declaration under Article 21 excluding insurance matters only if and when the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU.

Policy option 7 — combination of policy options 6a and 6b.

This policy option would involve the conclusion of the Convention by the Community with a declaration under Article 21 excluding copyright and related rights as well as insurance matters form the scope of the Convention.

5. THE IMPACTS OF THE POLICY OPTIONS

5.1. Introduction

This Section outlines the main advantages and disadvantages of each policy option in terms of their social and economic impacts[30] on different target groups, risks and trade-offs.

A common grid has been used for systematic comparison of the policy options. Each of the policy options outlined in Section 4 and their component actions has been assessed against the following criteria:

- The impacts with respect to the four specific policy objectives — i.e. how far does the action contribute to making progress in achieving each objective?
- What are the potential economic benefits to the EU?
- What are the preconditions and essential accompanying measures?
- Is there complementarity with existing (and forthcoming) acquis?

[30] Environmental impacts have not been considered. However, achieving the general objective would have repercussions through increasing the volume of international trade.

- What are the main economic and social impacts in the EU and third countries?

- What are the costs for the Community?

For each policy option, the anticipated impact with respect to the assessment criteria related to the four specific policy objectives has been assessed on an 'intuitive' scale of positive impact from √ to √√√√ (√√√√ being the best possible score). Also, the views expressed by the stakeholders have been included in the assessment of each policy option.

5.2. Policy option 1 — 'passive' status quo

As indicated in Section 2, the absence of a worldwide system of jurisdictional rules and rules on recognition and enforcement in civil and commercial matters causes a number of problems.

The existing legal disputes settlement procedures in international commercial relations are court settlement, alternative dispute resolution (so-called "ADR"), such as mediation and recourse to international commercial arbitration.

Recourse to national courts to regulate commercial disputes is the most traditional method in use in all judicial systems. Its main advantage is that it confers the certainty of enforcement of the decision given in the forum. But this advantage varies considerably from one State to another in terms of periods of time and procedure costs, depending on the effectiveness of the judicial system. On the other hand, in international sphere, recourse to courts comprises certain disadvantages which enabled international commercial arbitration to develop: with the exception of international recognition agreement, the effectiveness of the judicial decisions given in a state is limited to its territory. This is why States have developed bilateral then multilateral conventions, in particular under the auspices of The Hague Conference of Private International Law for the recognition and enforcement of judicial decisions. In the European context, since 1968, Member States adopted the Brussels Convention on the recognition and enforcement of judicial decisions which facilitates free movement of commercial judgments among themselves and which were replaced in 2000 by Regulation n° 44/2001 having the same object and which even more reduces the intermediate measures for enforcement of decisions. This regulation contains a provision which guarantees the exclusivity of choice of court clauses for commercial contracts and ensures the recognition of the decisions given within this framework in the Union. However, this regulation applies only if the clause was concluded between parties one of which at least has its residence in the Union. The Member States and the States of EFTA concluded on 16 September 1988 the Lugano Convention on the recognition and enforcement of decisions in civil and commercial matters, which is a parallel agreement to the Brussels Convention of 1968.

On the other hand, there exists no agreement on the recognition and enforcement of court decisions in commercial matters at worldwide level. The Hague convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters never entered into force. The negotiation of a global instrument on international jurisdiction and the recognition and enforcement of judicial decisions, which comprised a provision on choice of court clauses, failed after a diplomatic conference in 2001. It is from this failure that the more limited project on a global Hague Convention on Choice-of-Court Agreements of 2005 arose.

Recourse to the friendly methods of resolution of settlement of the disputes is relatively recent and is still developing. Certain contracts envisage indeed optional or mandatory preliminary recourse to mediation before referring to national or arbitral courts. The main advantage of mediation is that it makes it possible to maintain business relationships between economic partners and that it is more flexible than judicial proceedings. It allows recourse to more imaginative and less legal solutions. It is not a without any costs procedure since the mediator has often to be remunerated. The general costs of mediation, according to CMAP (Centre de Mediation et d'Arbitrage de Paris), are in the range of 1,000 to 4,000 Euro which is affordable for SMEs. It comprises nevertheless also important disadvantages in international trade: the quality of the mediators is not always guaranteed. Secondly, its development is restricted by legal uncertainty which surrounds it at three levels: non recognition of confidentiality of the mediation elsewhere, risk of exhaustion of legal prescription periods in courts in the event of recourse to mediation and non recognition of the mediation agreements at global level. A Recommendation on Civil Mediation has been adopted under the auspices of the Council of Europe which has no prescriptive value. Upon initiative of the Commission, the European Parliament has adopted a Directive on Civil Mediation in April 2008, the rules of which intend to remedy these three disadvantages, but its scope is limited to procedures within the EU. Therefore, it appears that mediation is surrounded by legal uncertainty for companies in international trade, as, in particular, the full enforcement of mediation agreements, although by recourse to courts themselves, cannot be guaranteed.

International commercial arbitration is currently, by default, the most widespread dispute settlement method for international commercial disputes. International arbitration clause contracts have to be respected and the arbitral award can be enforced by virtue primarily of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention in the States having ratified it[31]. But, arbitration is nevertheless also a rather expensive commercial dispute resolution to which large companies have recourse because the fees charged by specialized lawyers or arbitrators might be high or sometimes excessive[32].

But, it is precisely why these advantages have to be mitigated with regard to effectiveness of court settlement systems with which it is in competition, since arbitration also borrows some of its procedural mechanisms from judicial proceedings (e.g.: designation of the arbitration court, preparation of the cases and hearings with specialized lawyers, form of the awards of the arbitrators..).

In this regard, since 2000, the United Nations Commission on International Trade Law (UNCITRAL) has examined a number of questions concerning arbitration considering it likely to be the subject of future work, including questions not dealt with by the New York Convention and problems encountered in practice but not treated in the existing texts on arbitration (for example: the questions of the arbitrability of the dispute, the possibility of enforceability of an award that has been se aside in the State of origin, the provisional and

---

[31] 142 States are Parties to this Convention, including all Member States of the EU

[32] See point 20 of Document n° A/CN.9/646 of the Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008) United Nations Commission on International Trade Law
http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

conservative measures, the electronic clauses, whether the arbitration agreement was null and void or could not be performed etc…[33]).

For most of these questions, the dispute settlement system of the Choice-of-Court Convention presents many advantages. For example, the uncertainties as to whether the subject matter of some dispute was capable of arbitration (the arbitrability of the dispute), has caused problems in international commercial arbitration. On the contrary, the Choice-of-Court Convention provides the parties a clear delimitation of the matters that could be subject to a valid choice. In particular, the proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a governmental agency or any person acting for a State, is a party thereto.

Moreover, the court settlement system of the Convention has the advantage of render possible the concentration of the procedures in a single court. Arbitration, which is private justice, cannot totally perform without recourse to State courts for important remedies such as for example the nomination of the arbitrator in case of a dispute between the parties, for solving differences on the validity of the arbitration convention, for court-enforceability of interim measures of protection in support of arbitration, for carrying out provisional and conservative measures, in case of exaggerated fees and the possibility of having a sentence cancelled in the State of origin carried out,

The Convention also takes into account the growing use of electronic commerce as the agreement could be concluded or documented by any electronic means of communication which render the information accessible. In international arbitration concerns were raised as whether electronic communications complied with formal requirements for arbitration agreements.

Conflicts arose on one hand between foreign court judgments, presented for their recognition in violation of arbitration agreements by one of the parties, and, on the other hand the arbitration agreement between itself them invoked by the defendant or a pending arbitral proceeding or even an arbitral award, which are not solved in international law an legal practice. The Convention has the advantage firstly to give court chosen by the agreement exclusive jurisdiction to deal with the dispute and this exclusivity should be respected by the other States ratifying the Convention and the parties. Nevertheless, the Convention has the important advantage of giving certain flexibility for EU companies in a twofold system: Firstly, the court designated in the agreement has the possibility to consider it null and void. More importantly, it allows the defendant to seize a court not chosen by the parties in the agreement but nevertheless it organizes in its articles 5 and 6 a sound and clear procedure to deal with such a conflict of jurisdiction. It also provides a clear rule on the possibility to obtain interim measures of protection in its article 7. Lastly, the Convention contains a simplified and uniform procedure for recognition and enforcement of decisions.

In the absence of a global instrument on the recognition and enforcement of judicial decisions similar to the New York Convention referred to above, arbitration is naturally perceived as providing advantages in terms of speediness and confidentiality. Nevertheless, arbitration is not a method of disputes resolution that would be in all circumstances more effective than courts dispute settlements in terms of effectiveness (implementation of the decision).

---

[33] http://www.uncitral.org/uncitral/fr/index.html

A global court settlement procedure would have the first advantage to benefit for these companies that already have recourse to choice-of-court clauses[34]. Moreover, it will represent an incentive for other companies to use court settlements. Consequently, majority of the interested parties considers that the existence of a global convention that would provide for the recognition and enforcement of choice of court decisions, largely ratified, would be likely to bring them tangible profits in relation to the current situation, especially for companies that cannot currently afford international arbitration, but not only.

Companies that could not afford arbitration today would certainly have more recourse to choice of court clauses as indeed demonstrated in an ABA survey[35]. It is estimated that the typical cost of arbitration is 20,000 Euro. For many small, and may be also for medium, business companies, it appears already as a significant amount to afford although the average cost of international civil litigation could be higher depending of the court system and the amount of the dispute.

There are unfortunately no reliable data available on the costs and length of dispute settlement under the different procedures. It appears that the costs of judicial proceedings considerably vary from State to State. In particular, the cost of court proceedings can vary to a great extent between third States, like the United States and European Member States and between the European countries themselves and that it will depend on the monetary value of the dispute. In addition, there is a need to take into consideration the European rule of "the looser pays all" or the American rule of "each side bears its own cost of litigation".

The companies contacted by ABA replied that the mere existence of the Convention would have an effect on their willingness to go to court instead of using arbitration. The majority of stakeholders consulted declared that, substantial problems are generated by the absence of a world-wide system of jurisdictional rules and rules of recognition and enforcement. These are mainly:

- Delays and costs caused in enforcing judgments of courts of EU Member States;

- Uncertainty as to enforceability of international contracts.

International trade involves risk some of them derives from legal uncertainty. Legal uncertainty arises in part from at the same time: uncertainty as to within which court a dispute may be heard; and, uncertainty as to whether the judgement of the court will be upheld in the countries of both parties in dispute; but also uncertainty as to whether the arbitral award or the mediation agreement will be upheld in the countries of both parties. Legal uncertainly has also a cost for companies.

These risks has been successfully reduced by the Brussels Regime for companies trading within the EU and EFTA countries, which prove the advantages of having a comprehensive and modern system of court settlement for trade disputes. But in spite of the alternative dispute settlement systems, the risk remains high for EU companies trading with parties elsewhere in the world.

---

[34] *Almost 75% of the companies specified* courts in more than half of their international contracts according to an overview of choice of court practices of companies engaged in international business (Survey undertaken by the ICC in 2003 –see foot-note 3)

[35] see foot note 4

Therefore, the ratification of the Hague Convention by the Community would, should the Convention also be ratified by other trading partners, reduce, like it happened in the EU framework, legal uncertainty by: ensuring that choice of court agreements in international trading contracts are respected; and ensuring that the judgements of the courts would be recognised by the courts within the EU and other countries that are Parties to The Hague Convention.

In this regard, it should be noted that if the Convention enter into force without the European Community being Party to it, EU companies could not benefit from its advantages and EU companies may suffer drawbacks:

- Only agreements designating a court of a Contracting Party could benefit from the exclusivity rule of its Article 4 and could be respected by other courts;

- Only judgments given by courts of a Contracting Party could be recognised and enforced according to its simplified procedure.

This would be particularly detrimental to EU companies if several of our major trading partners were to be Parties to the Convention and not the EC. Indeed, in case where the agreement designates EU courts to settle any dispute, it will not be enforceable in any of the Contracting Parties according to the Convention. The defendant could easily raise any defence in another court than the chosen court in the EU to refuse to comply with the agreement and any foreign court could refuse to uphold it. On the contrary, a judgement given on the basis of an agreement with a party domiciled in a State applying the Convention, and designating the court of that foreign State, could be enforced easily against an EU defendant in any of the other State Parties and without any possibility to raise the defences of article 5 of the Convention.

Therefore a need exist for a coordination between the Member Hague Conference on ratification process of the Convention. The perspectives for this ratification were discussed during the Council on General Affairs and Policy of The Hague Conference that took place in April 2008. The EU's largest trading partner, the USA, indicated during that meeting that its intends to sign the Convention already this year after a consultation process. Mexico has already acceded to the Convention and Canada has started the consultation process with the provinces in order to sign it. Russia told the Commission that it is exploring the possibility to ratify it. The signature of the Convention on Choice-of-Court Agreements by the two major economies of the world (EU and USA) in 2008 would increase considerably the willingness of other important trading partners like China and Japan to proceed towards its signature and ratification swiftly.

This policy option would therefore not contribute to achieving any of the defined objectives although EU economic actors interviewed observed that in the current situation international arbitration is used to resolve disputes in the absence of a worldwide system of jurisdictional rules and rules on recognition and enforcement. It must be noted that the possibility of parties to a contract or to a dispute to choose international arbitration to solve their dispute will not be affected by any of the policy options. However, as explained above the availability of arbitration does not give sufficient breadth of options to all parties involved in international business transactions and, as pointed out by some stakeholders, the only reason arbitration is chosen today is the relatively high foreseeability of the enforcement of arbitral awards as opposed to enforcement of judicial decisions.

5.3. Policy option 2 — "active" status quo

The conclusion of bilateral agreements with the USA, China and the Russian Federation would increase the legal certainty of EU economic operators trading with these countries that their preference for the choice of court will be respected and that judgments made in relation to the disputes will be recognised and enforced in these countries. Safeguarding the right of EU weaker economic operators in determining the choice of court would be ensured for the matters falling within the scope of such an agreement. Also, there would be slightly increased familiarity with EU law in American, Chinese and Russian courts because of a greater willingness to use courts to resolve disputes. In the longer term, and as a consequence of the improved legal certainty, the value of trade between the EU and the three trading partners could increase.

The assessment is illustrated in Table 5.1. The effects of the policy option on the policy objectives would be small even though the total value of trade with these three countries is very high. Legal certainty would be achieved only to a very limited degree, solely with the countries bound by the agreement. It would not protect against the possibility of one of the contracting partners seizing a court in a third country that will not respect the choice-of-court agreement in favour of a court in the Contracting Party. The same applies for all the other objectives: while the other Contracting Party to the bilateral agreement would be bound to honour the solutions agreed, no other third country would be bound to do so if the dispute is brought before a court of that country.

Depending on the willingness of the other Contracting Party to arrive at a solution different from the Convention, some (or the same) problems related to copyright and insurance might exist and additional inconsistencies with the Brussels I Regulation might arise.

This policy option involving bilateral agreements with selected trading partners would be inconsistent with the Convention's overall aim, which is to promote a worldwide system of jurisdictional rules and rules on recognition and enforcement in civil and commercial matters. It would also depend on third countries' willingness to negotiate such bilateral agreements in parallel to the exiting multilateral Convention, in whose negotiation they invested time and resources in order to create a harmonised system with more than just one contracting partner (see point 2.1.3. above).

Such approach would also have administrative and budgetary repercussions on the Commission who would have to negotiate these individual agreements (such as allocations of staff, hosting part of negotiations and missions to the respective third countries).

Table 5.1 — Summary assessment of policy option 2

Policy option 2: 'active' status quo		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve	√	*Small effect:* EU economic operators would be sure that their agreed preference of court would be respected vis-à-vis the

Policy option 2: 'active' status quo		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
international commercial disputes will be respected.		other Contracting Party to the individual bilateral agreement, but not in any other country.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	√	*Small effect:* EU economic operators would be sure that the judgment made by the chosen court would be respected on the territory of the other Contracting Party, but not in any other country.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√	*Small effect:* the stronger partner (based in the other Contracting Party) would be limited in its attempts to seize a court other than that agreed in the contract with the weaker party. This limitation would, however, exist only in respect of the courts of the respective Contracting Parties.
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	√	*Small effect:* the policy option would lead indirectly to increased familiarity with EU law in the other Contracting Parties' courts because of a greater willingness to use courts to resolve disputes. This would not extend to any other country.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	The reduction would be proportionate to: the contribution of choice-of-court issues to overall legal uncertainty; and the additional number of choice-of-court agreements entered into between companies from the EU and the other Contracting Party; potential positive impact expected.	
Reduce time and costs of resolving disputes	The reduction would be proportionate to the number of disputes that would be resolved in court and the relative costs of courts versus other means of resolving disputes; potential positive impact expected.	
Increases in international trade	As a consequence of increased legal certainty, an increase in EU trade with the other Contracting Parties would be possible.	
Perceptions of advantages and	**Advantages**	**Disadvantages**

Policy option 2: 'active' status quo		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
disadvantages		
Existing EU economic actors (including their representatives)	No direct evidence of views, but likely to be perceived as beneficial.	
International lawyers	No direct evidence of views, but likely to be perceived as beneficial.	
Preconditions and essential accompanying measures	A precondition would be the willingness of the other Contracting Party to negotiate such an individual bilateral agreement.	
Complementarity with existing (and forthcoming) acquis	Complementarity can be achieved in bilateral negotiations.	
Economic and social impacts in EU and third countries	Problems with intellectual property rights (unless excluded from the scope of the bilateral agreement) because they could be tried in courts where such rights are less protected (although the rightsholder would have had to agree). Especially China offers a low level of protection of such rights. Problem with insurance (unless excluded from the scope) because they could be tried in courts without a close link with the action (this would be unfavourable to the weaker party). The existence of a bilateral agreement with a certain third country might raise the EU operator's willingness to enter into choice-of-court agreements with an operator from that country and vice versa. It would guarantee the possibility of recognition and enforcement of judgments given by the chosen court in a third country, Contracting Party to the bilateral agreement, in the EU and vice versa.	
Implementation costs	Costs would be incurred by the Commission in the process of negotiation and conclusion of bilateral treaties.	

5.4. Policy option 3 — provision of 'public insurance'

This policy option could give advantage to EU companies involved in disputes through offsetting the costs of legal insurance. Some positive effects could be expected as far as increased international commerce is concerned, as companies would be more willing to establish business relations with international partners knowing that, in the event of a dispute, their costs of proceedings might be covered by the insurance.

The creation of such a system at EU level would be problematic, since significant financial resources would be required at EU and/or Member State level to implement this policy option.

The policy option would in no way increase the legal certainty of EU economic operators that their preference for the choice of court to resolve international commercial disputes will be respected, nor increase the predictability of the choice of court to resolve international commercial disputes.

An indirect consequence of implementing such an option would be an overall increase in court cases. As indicated in a report published by the British Copyright Council[36], such insurances can unreasonably raise the expectations of those insured and encourage litigation where this is unnecessary and where negotiated settlement would be better.

Table 5.2 — Summary assessment of policy option 3

Policy option 3 — provision of 'public insurance'		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	**0**	*No effect:* the insurance would cover the costs of disputes, it would help the companies, but not reduce the 'economic' legal uncertainty.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	**0**	*No effect:* the insurance would cover the costs of disputes, it would help the companies, but not reduce the 'economic' legal uncertainty.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√	*Small effect:* it would help the weaker party to accept the inclusion of choice-of-court agreements in contracts, as their potential costs would be offset by the insurance.

[36] The British Copyright Council, http://www.britishcopyright.org/

Policy option 3 — provision of 'public insurance'		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
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**	*No direct effect:* it is possible that more cases might be heard in third-country courts, but otherwise the status quo would be maintained.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	Benefits would accrue to the operators receiving the support.	
Reduce time and costs of resolving disputes	No impact on the actual (economic) time and costs, indeed these could increase as the insurance might lead to cases going to court that would not otherwise do so. However, the companies involved would benefit financially.	
Increases in international trade	Some positive effects expected.	
Perceptions of advantages and disadvantages	**Advantages**	**Disadvantages**
Existing EU economic actors (including their representatives)	No direct evidence of views, but likely to be perceived as beneficial.	
International lawyers	No direct evidence of views, but likely to be perceived as beneficial.	
Preconditions and essential accompanying measures	Significant financial resources would be required at EU and/or MS level; however, such a policy option could be limited to particular sectors or types of company that experience the greatest legal uncertainties when trading internationally.	
Complementarity with existing (and forthcoming) acquis	Potential conflicts over State aids.	
Economic and social impacts in EU and third countries	In effect the EU or the Member States would be paying the costs of the legal uncertainty to the economy, through subsidies for insurance rather than reducing the costs to the economy. The support could give advantage to EU	

Policy option 3 — provision of 'public insurance'		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
	companies in disputes.	
Implementation costs	There would be significant implementation costs involved in implementing this policy option.	

5.5. Policy option 4 — provision of information to businesses on current risks stemming from uncertainty in the choice of courts

This policy option is expected to increase the awareness of legal uncertainty among economic operators, which might change their behaviour and consequently they may take appropriate action to protect their rights. This is expected to be particularly beneficial to smaller companies.

The effects of the policy option on international trade are difficult to predict: the option might have a possible small positive effect, but it could also potentially reduce international trade through pointing out the 'pitfalls' of legal uncertainty.

Table 5.3 — Summary assessment of policy option 4

Policy option 4 — provision of information to businesses on current risks stemming from uncertainty in the choice of courts		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	√	*Small effect:* it would increase awareness of legal uncertainty.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	**0**	*No effect:* status quo.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√	*Small effect:* operators may take steps to protect their rights.

Policy option 4 — provision of information to businesses on current risks stemming from uncertainty in the choice of courts		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
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**	*No effect:* status quo.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	Possible small effect through EU operators being better aware of the uncertainties, and taking appropriate action.	
Reduce time and costs of resolving disputes	Possible small effect through EU operators being better aware of the different dispute-resolution options available and choosing the appropriate one for their dispute.	
Increases in international trade	Possible small positive effect, but it could also potentially backfire and reduce international trade through pointing out the 'pitfalls' of legal uncertainty.	
Perceptions of advantages and disadvantages	**Advantages**	**Disadvantages**
Existing EU economic actors (including their representatives)	Some EU operators are not fully aware of the extent and potential consequences of legal uncertainty.	
International lawyers		Currently lawyers are an important source of this information; this policy option might lead to a decrease in demand for their services.
Preconditions and essential accompanying measures	Would require commitment and financial resources, most likely at Member State level.	
Complementarity with existing (and forthcoming) acquis	No impact.	
Economic and social impacts in EU and third countries	Provision of general information might lead to a decrease in demand for lawyers' services.	

Policy option 4 — provision of information to businesses on current risks stemming from uncertainty in the choice of courts		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
	The effect on third countries might result in a decrease in trade due to EU companies' higher awareness and unwillingness to take risks in respect of those countries.	
Implementation costs	Only minor implementation costs would accrue at EU level. Costs would occur at national, regional and local levels commensurate with the financial resources committed and activities implemented.	

5.6. Policy option 5 — conclusion of the Convention by the Community without making any declarations under its Article 21

The conclusion of the Convention by the Community without any declaration under Article 21 would mean that in two areas identified as problematic (insurance and copyright and related rights) the status quo would be affected to the potential detriment of the "weaker" party in the contractual relationship, even if the weaker party would have had to agree to the choice of a court in a third country.

The conclusion of the Convention by the Community would increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes would be respected. This increased legal certainty would affect all the trading sectors falling within the scope of the Convention as no specific matters would be excluded from the Convention.

This policy option would increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators, because the judgments of the courts would be eligible for recognition and enforcement in all the countries which are Contracting Parties to the Convention.

The policy option would help safeguard the rights of the smaller and weaker EU economic operators in determining the choice of court. The stronger partner would be limited in its attempts to seize a court other than the one agreed in the contract with the weaker party.

The policy option could lead indirectly to increased familiarity with EU law in third-country courts, because of a greater willingness to use those courts to resolve disputes. Consequently, legal rights protected under EU legislation could be given increased protection also in courts resolving international commercial disputes involving EU economic operators outside the EU.

However, the benefits to EU economic operators from this policy option are based on the assumption that at least the EU's main trading partners (such as the USA, China and the Russian Federation) also ratify the Convention[37].

Some negative consequences could arise from this policy option. If not excluded from the Convention, some problems might arise in connection with copyright and related rights because the courts of third countries (agreed upon by the parties to a contract) would be allowed to decide issues concerning validity of copyright linked with the EU and such judgments would be eligible for recognition within the EU. Such results may have an impact on actors unrelated to the dispute or even the public at large, when the type and level of protection differs in detail from what EU legislators deem proper.

Furthermore, problems can arise in relation to insurance matters. Some discrepancies with the Brussels I Regulation might arise, since the Regulation allows the insured usually to sue the insurer at his own place of domicile irrespective of any other jurisdiction available under the law or under a choice-of-court agreement. It also limits party autonomy as regards the choice of court (which is not the case under the Convention). The application of the Convention in this field would therefore contradict the policy of the Brussels I Regulation.

Companies and law firms perceive the Convention as a beneficial instrument for increasing legal certainty for economic operators engaging in international trade. Another impact of the conclusion of the Convention would be increased willingness by companies to opt for litigation instead of arbitration in international contracts.

In this regard, the ABA survey[38] demonstrated that, when asked if a Convention on choice-of-court agreement would make economic operators more willing to opt for litigation instead of arbitration in contracts, 70% of respondents answered positively. Almost all the respondents, i.e. 98%, stated that such a Convention would be useful for their economic practice.

The majority of the companies contacted when the Impact Assessment was being drawn up stated that the Convention would be useful for setting up a worldwide system of jurisdictional rules and rules on recognition and enforcement of judgments in civil and commercial matters. Also, the companies affirmed that the existence of the Convention would impact on their willingness to go to court instead of using arbitration. According to the companies, the Convention would reduce the risks of companies going through the entire complicated court process but not seeing the final judgment enforced.

One stakeholder pointed out that the absence of a worldwide system of jurisdictional rules and rules on recognition and enforcement in civil and commercial matters generates uncertainty and delays, thereby raising the cost of investment and trade. Another stakeholder stated that ratification of such a Convention would probably have only a marginal impact on companies' willingness to go to court instead of using arbitration. The most common problems associated with courts would not be solved through the Convention, namely the length of court

---

37 All these countries were very active in the negotiations on the Convention and the final result achieved reflects also their preoccupations. Consequently, it is expected that these countries will ratify the Convention. Indeed, according to informal work contacts with the US authorities, they are currently preparing to sign the Convention and could be ready in the second half of 2008. The signing of the Convention by the Community and the USA would be a strong impetus for other countries to become Parties to the Convention.

38 See footnote 4.

procedures, high cost and impartiality issues. Therefore, it was felt that the relevance of arbitration in international disputes would probably not be affected.

On the other hand, two stakeholders stated that the Convention would possibly impact on companies' willingness to go to court instead of using arbitration, since the better enforceability of arbitral awards was considered a major advantage of arbitration compared to court proceedings.

One stakeholder expressed a contrasting opinion about the effectiveness of the Convention, saying that although the Convention would introduce a clear legal framework, arbitration would still normally prevail over proceedings in courts because it would still take less time, which is always crucial in doing business.

Table 5.4 — Summary assessment of policy option 5

Policy option 5 — conclusion of the Convention without making any declarations under its Article 21		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	√√√	*Significant effect:* EU economic operators would be sure that their agreed preference of court would be respected in other Contracting Parties to the Convention. The extent of legal certainty would depend on the number of Contracting Parties.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	√√√	*Significant effect:* EU economic operators would be sure that the judgment made by the chosen court would be respected in all the other Contracting Parties. The extent of legal certainty would depend on the number of Contracting Parties.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√√	– *Some effect:* the stronger partner would be limited in its attempts to seize a court other than that agreed in the contract with the weaker party. However, there is a potential for difficulties in the area of insurance matters and copyright and related rights.
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	√√	*Some effect:* the policy option would lead indirectly to increased familiarity with EU law in third-country courts because of a greater willingness to use courts to resolve disputes.

Policy option 5 — conclusion of the Convention without making any declarations under its Article 21		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	The reduction would be proportionate to: the contribution of choice-of-court issues to overall legal uncertainty; the countries ratifying the Convention; and the additional number of choice-of-court agreements entered into.	
Reduce time and costs of resolving disputes	The reduction would be proportionate to: the number of disputes that would be resolved in court; and the relative costs of courts versus other means of resolving disputes.	
Increases in international trade	The decrease in uncertainty might work as an impetus for increased interest in concluding international contracts and thus increase the amount of trade.	
Perceptions of advantages and disadvantages	**Advantages**	**Disadvantages**
Existing EU economic actors (including their representatives)	98% of the ABA survey respondents stated that such a Convention would be useful for their economic practice. The majority of the companies contacted stated that the Convention would be useful in order to set up a worldwide system of jurisdictional rules and rules on recognition and enforcement of judgments in civil and commercial matters.	The application of the Convention to copyright and related rights may present some risks for individual authors and/or performers, who are generally the weaker party to a contract. The latter may find themselves having to accept as valid a choice-of-court clause which is imposed on them by and more favourable to a co-contractor in a stronger position.
International lawyers		The Convention may not be ratified by many countries, because of significant differences in legal systems and historic and political animosities between some countries.

Policy option 5 — conclusion of the Convention without making any declarations under its Article 21		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
Preconditions and essential accompanying measures	The benefits to EU economic operators that emerge from this policy option are based on the assumption that the main commercial partners also ratify the Convention.	
Complementarity with existing (and forthcoming) acquis	The policy option would affect the Brussels I Regulation[39], in particular its Article 23 and the rules on *lis pendens*[40] (Chapter II, Section 9) when one of the parties to the dispute has residence in the EU and the other party has residence in another Contracting Party.	
Economic and social impacts in EU and third countries	The potential for increased international trade with third countries is high, but: – problems with certain intellectual property rights may arise, because they could be tried in courts where these rights are less protected (although the rightsholder would have had to agree to the jurisdiction of such courts); – problem with insurance: the EU weaker party is not protected enough. Litigants would have an increased guarantee that their choice-of-court agreements in favour of the court in a third country (Contracting Party to the Convention) would be upheld by the courts within the EU (and vice versa), and that judgments given by the chosen court in third countries would be eligible for recognition and enforcement within the EU (and vice versa).	
Implementation costs	The costs of conclusion of the Convention are very low. The costs at Community level would involve only the time inputs of policy makers for undertaking the conclusion. The Convention would be implemented directly by the courts.	

[39] For further analysis see Annex 4 of the study referenced in footnote 1.

[40] *Lis pendens* is Latin for "suit pending". In the Brussels I Regulation it refers to situations where the fact that one court was seized of a dispute prohibits another court seized of the same dispute from proceeding as long as the jurisdiction of the court first seized has been established.

5.7. Policy option 6a — conclusion of the Convention with a declaration under its Article 21 excluding copyright and related rights, where the validity of these rights is linked to a Member State

Taking into consideration the sensitivity of the copyright issue and its implications for society as a whole (see point 2.2.2.3. above), the exclusion of copyright and related rights from the scope of the Convention would have the following advantages:

- the Convention would not apply to the choice-of-court agreements that could weaken protection with respect to copyright and related rights and would maintain the standards set by the EU on these matters;

- EU holders of copyright and related rights could not be forced into choice-of-court agreements that would undermine the protection of their rights accorded to them within the EU.

The consultations with different stakeholders on the Commission's 2004 Consultation Paper on the draft Convention showed diverging opinions on exclusion of copyright and related rights from the scope of the Convention.

Member States that contributed to the consultation (France, Estonia, Latvia and the Czech Republic) answered that copyright should be included in the scope of the Convention. Two stakeholders stated that copyright should be treated in the same way as the other intellectual property rights under the Convention. For them there was no reason to exclude copyright from the Convention and deprive authors of benefiting from the Convention.

On the other hand, three stakeholders stated that copyright and related rights should be left outside the scope of the Convention. The application of the Convention to copyright and related rights may present some risks for individual authors and/or performers, who are generally the weaker party to a contract. The latter may find themselves having to accept as valid a choice-of-court clause which is imposed on them by a co-contractor in a stronger position. It is therefore necessary to protect the authors (and performers) against choice-of-court agreements which may oblige them to plead far from their country, with all the possible consequences in terms of complexity and costs.

It has to be taken into account that there are areas in which the Community has set standards for the protection of certain parties which, within the EU, may not be infringed by choice of court clauses. The protection of these parties could nevertheless be undermined in case of a choice of court clause in favor of a court in a third State. Problems could arise for the specific area in which the EU and its Member States might wish to exercise exclusive control such as intellectual property rights and, specifically, copyrights. The most important factor, as shown by an EC survey, is that the frequency of intellectual property rights infringements in third countries is growing. These infringements affect more and more often EU operators trading with these countries.

The exclusion suggested under this policy option will therefore address most of the concerns raised by stakeholders.

Table 5.5 — Summary assessment of policy option 6a

Policy option 6a — conclusion of the Convention with a declaration under its Article 21 excluding copyright and related rights, where the validity of these rights is linked to a Member State		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	√√√	*Important effect:* EU economic operators would be sure that their agreed choice of court would be respected in other Contracting Parties to the Convention in the areas covered by the Convention. The extent of legal certainty would depend on the number of Contracting Parties.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	√√√	*Important effect:* EU economic operators would be sure that the judgment made by the chosen court would be respected in all the Contracting Parties. Choice-of-court agreements in the field of copyright and related rights would not benefit from the rules of the Convention.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√√√	*Important effect:* the stronger partner would be limited in its attempts to seize a court other than that agreed in the contract with the weaker party. Community policies in the area of copyright and related rights would be safeguarded.
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	√√	*Some effect:* the policy option would lead indirectly to increased familiarity with EU law in third-country courts because of a greater willingness to use courts to resolve disputes.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	The reduction would be proportionate to: the contribution of choice-of-court issues to overall legal uncertainty; the additional number of choice-of-court agreements entered into; and the countries that ratify the Convention. Arguably the reduction would be less than in policy option 5. However, without this exclusion some costs could arise for copyright holders.	
Reduce time and costs of resolving disputes	The reduction would be proportionate to: the number of disputes that would be resolved in court; and the relative	

Policy option 6a — conclusion of the Convention with a declaration under its Article 21 excluding copyright and related rights, where the validity of these rights is linked to a Member State		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
	costs of courts versus other means of resolving disputes. Arguably the benefits of reduced time and costs of resolving disputes would be less than in policy option 5. However, without this exclusion some costs could arise for copyright holders.	
Increases in international trade	The decrease in uncertainty might work as an impetus for increased interest in concluding international contracts and thus increase the amount of trade, arguably with the exception of the area excluded by declaration.	
Perceptions of advantages and disadvantages	**Advantages**	**Disadvantages**
Existing EU economic actors (including their representatives)	Two organisations were of the opinion that the application of the Convention to copyright and related rights may present some risks for individual authors and/or performers, who are generally the weaker party to a contract.	All Member States that responded to this particular question answered that copyright should be within the scope of the Convention. Similarly, some stakeholders declared that copyright and related rights should be treated in the same way as other intellectual property rights under the Convention.
International lawyers	One law firm stated that copyright and related rights should also be outside the scope of the Convention.	
Preconditions and essential accompanying measures	The benefits to EU economic operators that emerge from this policy option are based on the assumption that the main commercial partners also ratify the Convention.	
Complementarity with existing (and forthcoming) acquis	The policy option would affect the Brussels I Regulation, in particular its Article 23 and the rules on *lis pendens* (Chapter II, Section 9) when one of the parties to the dispute has residence in the EU and the other party has residence in another Contracting Party.	

Policy option 6a — conclusion of the Convention with a declaration under its Article 21 excluding copyright and related rights, where the validity of these rights is linked to a Member State		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
Economic and social impacts in EU and third countries	The potential for increased international trade with third countries is high, but: – problem with insurance, the EU weaker party is not protected enough. Litigants would have an increased guarantee that their choice-of-court agreements in favour of the court in a third country (Contracting Party to the Convention) would be upheld by the courts within the EU (and vice versa), and that judgments given by the chosen court in third countries would be eligible for recognition and enforcement within the EU (and vice versa). There would be no negative social impacts for the weaker parties in the area of copyright and related rights.	
Implementation costs	Very low (same as policy option 5).	

5.8. Policy option 6b — conclusion of the Convention by the Community with a declaration under its Article 21 excluding insurance matters, where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU

This policy option would mean that EU policyholders could not be 'pressed' into litigating insurance benefits at courts which might reduce the protection of their rights, and the economic interests of the areas in which they are located, to a level below what is applicable within the EU.

The Convention on Choice of Court Agreements contains exclusion from its scope which takes into account the many concerns raised during the consultations. Very importantly for EU interests and with regard to protective rules for such parties existing in Community law, it applies only to business to business relations and not to business to consumer and excludes employment contracts that were important points for EU States and some stakeholders[41]. Insurance contracts are a matter not excluded from the scope of the Convention but EU

[41] Article 2 Exclusions from scope
1. This Convention shall not apply to exclusive choice of court agreements -
a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;
2. Relating to contracts of employment, including collective agreements.

legislation contains protective rules of jurisdiction. This exclusion is important to avoid that the choice of a foreign court could lead to the deprivation of the protection provided to these weaker parties by Community law.

In relation to insurance, it has been decided in the EU that the weaker party should be protected by rules of jurisdiction more favorable to his interests than the general rules of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so-called "Brussels I")[42]. In particular, for this reason, the autonomy of the parties to an insurance, consumer or employment contract to determine the courts having jurisdiction has been limited. If there would be no exclusion from the scope of the Convention for insurance sector, there could be a conflict between the Convention and the Community legislation on jurisdiction in matters of insurance. Indeed, the Convention foreseen in its Article 26 (6) related to the relationship with other international instruments, that it shall not affect the application of the EC rules only where none of the parties is resident in a Contracting State that is not a Member State of the European Community. It means that when one of the parties to the dispute has its residence in the EU and the other party has its residence in another Contracting Party, the Convention would apply and affect negatively the EC Regulation "Brussels I". This regulation indeed also applies in this case and contains protective rule for the policy holder, the insured or the beneficiary, even if the insurer is not domiciled in the EU, but has a branch, agency or other establishment in one of the Member States[43]. It should be noted however that the exclusion is limited to risk or insured event, item or property related exclusively to the EU

This exclusion may have also negative implications. For instance, a judgment given by the court at the domicile of the policyholder would not benefit from recognition and enforcement abroad under the Convention.

However, these are minor disadvantages/downsides compared to the possibility of excluding insurance matters either completely from the scope of the Convention or excluding them whenever the policyholder and the risk are located in the EU.

---

42 See Council Regulation (CE) No 44/2001 of 22.12.2000, OJ L 12, 16.1.2001, p. 1, and, in particular Chapter I, section 3.

43 Article 12:

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or
2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

The impacts of this policy option depend on the scope of the EU insurance sector. A recent EC report on the business insurance sector showed that the size of the global non-life insurance market was over 1.1 trillion euro in 2005. The European non-life insurance market, collectively, is comparable but smaller in size to that of the USA, the other major world market. The number of non-life insurers in Europe has declined steadily in recent years. However, there are still close to 3 000 non-life companies operating within the EU insurance market.

Table 5.6 — Summary assessment of policy option 6b

Policy option 6b — conclusion of the Convention with a declaration under its Article 21 excluding insurance matters, where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	√√	*Important effect:* EU economic operators would be sure that their agreed choice of court would be respected in other Contracting Parties to the Convention. The extent of legal certainty would depend on the number of Contracting Parties.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	√√	*Important effect:* EU economic operators would be sure that the judgment made by the chosen court would be respected in all the Contracting Parties. Companies acting in the field of insurance would not benefit from the Convention.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√√	*Important effect:* the stronger partner would be limited in its attempts to seize a court other than that agreed in the contract with the weaker party. Community policies in the area of protection of weaker parties in insurance contracts would be safeguarded.
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	√	*Some effect:* the policy option would lead indirectly to increased familiarity with EU law in third-country courts because of a greater willingness to use courts to resolve disputes.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	The reduction would be proportionate to: the contribution of choice-of-court issues to overall legal uncertainty; the	

Policy option 6b — conclusion of the Convention with a declaration under its Article 21 excluding insurance matters, where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
	additional number of choice-of-court agreements entered into; and the countries that ratify the Convention. Arguably the reduction would be less than in policy option 5. However, without this exclusion some costs could arise for those entering insurance contracts.	
Reduce time and costs of resolving disputes	The reduction is proportionate to: the number of disputes that would be resolved in court; the relative costs of courts versus other means of resolving disputes. Arguably the reduction in time and costs of resolving disputes would be less than in policy option 5. However, without this exclusion some costs could arise for those entering insurance contracts.	
Increases in international trade	The decrease in uncertainty might work as an impetus for increased interest in concluding international contracts and thus increase the amount of trade, arguably with the exception of the area excluded by declaration.	
Perceptions of advantages and disadvantages	**Advantages**	**Disadvantages**
Existing EU economic actors (including their representatives)		Insurance companies might be disappointed by exclusion of insurance matters from the scope of the Convention. The representatives of the sector expressed a positive opinion towards inclusion of the sector within the scope of the Convention.
International lawyers	No direct evidence of views.	
Preconditions and essential accompanying measures	The benefits to EU economic operators that emerge from this policy option are based on the assumption that the main commercial partners also ratify the Convention.	
Complementarity with existing (and	The policy option would affect the Brussels I Regulation,	

Policy option 6b — conclusion of the Convention with a declaration under its Article 21 excluding insurance matters, where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
forthcoming) acquis	in particular its Article 23 and the rules on *lis pendens* (Chapter II, Section 9) when one of the parties to the dispute has residence in the EU and the other party has residence in another Contracting Party. If the insurance sector is not excluded from the scope of the Convention, there could be a conflict in policy aims with Chapter II Section 3 of the Brussels I Regulation.	
Economic and social impacts in EU and third countries	The potential for increased international trade with third countries is high, but: – problems with certain intellectual property rights may arise, because they could be tried in courts where these rights are less protected (although the rightsholder would have had to agree to the jurisdiction of such courts). Litigants would have an increased guarantee that their choice-of-court agreements in favour of the court in a third country (Contracting Party to the Convention) would be upheld by the courts within the EU (and vice versa), and that judgments given by the chosen court in third countries would be eligible for recognition and enforcement within the EU (and vice versa). There would be no negative social impacts for the weaker parties in the area of insurance contracts.	
Implementation costs	Very low (same as in policy option 5).	

5.9. Policy option 7 — combination of policy options 6a and 6b

This policy option achieves overall results comparable to policy option 5 as regards policy objectives. By excluding, however, both problem areas (insurance matters and copyright and related rights) it has does not generate a negative effect on existing Community policies.

Table 5.7 — Summary assessment of policy option 7

Policy option 7 — combination of policy options 6a and 6b

Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
To increase EU economic operators' legal certainty that their preference for the choice of court to resolve international commercial disputes will be respected.	√√	*Some effect:* EU economic operators would be sure that their agreed preference of court would be respected in other Contracting Parties to the Convention. The extent of legal certainty would depend on the number of Contracting Parties. Operators in the areas of insurance and copyrights and related rights would not benefit from the Convention.
To increase the predictability of the choice of court to resolve international commercial disputes involving EU economic operators.	√√	*Some effect:* EU economic operators would be sure that the judgment made by the chosen court would be respected in all the other Contracting Parties in all areas covered by the Convention. Operators in the areas of insurance and copyrights and related rights would not benefit from the Convention.
To safeguard EU economic operators' rights in determining the choice of court where they are the weaker party.	√√√	*Significant effect:* Community policies in protecting the weaker parties in the area of insurance matters and copyright and related rights would be safeguarded.
To promote the adoption of legal rights protected under EU legislation in courts resolving international commercial disputes involving EU economic operators outside the EU.	√	*Small effect:* the policy option would lead indirectly to increased familiarity with EU law in third-country courts (with the exception of the areas of insurance and copyright and related rights), because of a greater willingness to use courts to resolve disputes.
Potential economic benefits to the EU		
Reduced transaction costs associated with legal uncertainty	The reduction would be proportionate to: the contribution of choice-of-court issues to overall legal uncertainty; the countries ratifying the Convention; and the additional number of choice-of-court agreements entered into. Effects expected to be positive.	
Reduce time and costs of resolving disputes	The reduction would be proportionate to: the number of disputes that would be resolved in court; and the relative costs of courts versus other means of resolving disputes. Effects expected to be positive.	

Policy option 7 — combination of policy options 6a and 6b		
Objective to be achieved/problem addressed	***Anticipated impact (rated up to √√√√)***	***Explanation of rating and aspects of the policy option necessary to achieve impact***
Increases in international trade	The decrease in uncertainty might work as an impetus for increased interest in concluding international contracts and thus increase the amount of trade.	
Preconditions and essential accompanying measures	The benefits to EU economic operators that emerge from this policy option are based on the assumption that the main commercial partners also ratify the Convention.	
Complementarity with existing (and forthcoming) acquis	This policy option would affect the Brussels I Regulation, in particular its Article 23 and the rules on *lis pendens* (Chapter II, Section 9) when one of the parties to the dispute has residence in the EU and the other party has residence in another Contracting Party.	
Economic and social impacts in EU and third countries	The potential for increased international trade with third countries is high. Litigants would have an increased guarantee that their choice-of-court agreements in favour of a court in a third country (Contracting Party to the Convention) would be upheld by the courts within the EU (and vice versa), and that judgments given by the chosen court in third countries would be eligible for recognition and enforcement within the EU (and vice versa). No negative social impacts on the weaker parties in the area of insurance and copyright and related rights.	
Implementation costs	Very low (same as in policy option 5).	

6. COMPARISON OF THE POLICY OPTIONS

6.1. Comparison of individual policy options

In Section 5 each policy option has been assessed against a number of different criteria derived from the policy objectives and the wider considerations of costs and benefits. In this Section the assessments of the different policy options are compared with each other in order to highlight factors in favour or against their adoption.

All of the policy options (except policy option 1) would reduce the costs of legal uncertainty (the general objective as identified in Section 3), and thus have the potential to increase international trade and investment and hence lower prices of goods and services.

Table 6.1 presents a comparative assessment of the policy options in terms of achieving the specific objectives and other criteria used in Section 5.

Table 6.1 — Comparative assessment of policy 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 economic operators' rights in determining the choice of court where they are the weaker party.	0	√	√	√	√√	√√^{N}	√√^{N}	√√√
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
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

6.2. The preferred option

In the light of the assessment in Table 6.1 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.

7. ELABORATION OF THE PREFERRED OPTION

7.1. 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, the 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.

The extent to which the benefits possible from the preferred option would accrue would depend on the following factors:

- Which third countries ratify the Convention. Here it is possible to quantify the scale of benefits that will accrue, as they would be proportionate to the amount of current and future trade between the EU and these countries. The EU's largest trading partner is the USA (18% of total EU external trade). The USA has indicated its willingness to ratify the Hague Convention; there is also evidence that US economic operators would be more likely to make recourse to the courts if the Convention were ratified (as showed by the ABA survey). The second largest 'trading partner' is the EFTA countries (11%). In this case the preferred option would not increase legal certainty because the EFTA countries are already covered by the Lugano Convention[44]. The third largest trading partner and one of growing importance is China (10%). Because of the differences in commercial law between the EU and China and the latter's growing importance as a trading partner, reductions in legal uncertainty could be particularly beneficial. The next largest EU trading partners and their respective shares of total EU external trade are as follows: Dynamic Asian Economies[45] (9%), OPEC countries (9%), Russian Federation (8%), Japan (5%), Africa and Caribbean (5%) and Turkey (4%). All of these trading partners could ratify the

[44] Lugano Convention, Texts: Convention and Protocols http://curia.europa.eu/common/recdoc/convention/en/c-textes/_lug-textes.htm

[45] Singapore, Thailand, Malaysia, Korea, Taiwan and Hong Kong.

Convention, though it is considered unlikely that the OPEC countries would choose to do so because this would require mutual recognition of western courts by Islamic States. Thus the preferred option could lead to a potential reduction in legal uncertainty affecting up to 59% of the EU's external trade. The estimated total value of trade in 2006 was 2 260 billion euro, 59% of this amounts to 1 330 billion euro. The reduction in legal uncertainty would be proportionate to the trading partners that ratify the Convention.

- The extent of exclusions via Article 21. Because of the exclusions from the scope of the Convention under Article 21 in the preferred option, the potential for decreasing legal uncertainty is reduced to some extent. Although it is not possible to measure the scale of copyright and related rights and insurance in EU external trade, the relative importance of this economic activity within the EU provides some indication of their likely importance more widely. The copyright industry contributed more than 1.2 trillion euro[46] to the EU economy, while the size of the global non-life insurance market was over 1.1 trillion euro in 2005[47], although their importance in international trade is likely to be less. Some third countries also indicated during the Convention negotiations their intent or need to exclude additional matters under Article 21. For example, Canada would exclude asbestos-related matters.

- The nature of international contracts. It is likely that the conclusion of the Convention would have greater effects on larger and more complex forms of contract rather than smaller and more straightforward contracts involving the purchasing of goods or services. It is estimated that the costs of individual international business-to-business cases brought to court is in the order of 40 000 euro. Normally only contracts that involve disputes considerably in excess of this amount are likely to be brought to court. The preferred option would not directly influence the nature of contracts.

- Whether or not economic operators actually make choice-of-court agreements. Conclusion of the Convention would reduce legal uncertainty for companies that choose to conclude choice-of-court agreements. Empirical information on the number of choice-of-court agreements is limited. A survey carried out by the ICC showed that almost 75% of companies specify courts in more than half of their international contracts. In the ABA survey[48] over half of respondents said that more than half of their contracts included choice-of-court agreements. It is probable that the majority of international contracts include such agreements, but many do not. The preferred option could increase companies' propensity to include choice-of-court agreements in international contracts, especially if the conclusion of the Convention were to be accompanied by publicity and raised awareness.

- Whether or not disputes would be resolved in courts. As evidenced in Section 2, most disputes concerning business-to-business international contracts are resolved by means other than courts. Indeed, courts are perceived to be relatively expensive and very much a last resort. However, the conclusion of the Convention could increase the propensity to use courts as a means to solve disputes.

---

46 The Contribution of Copyright and Related Rights to the European Economy http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf

47 Business Insurance Sector Inquiry. Interim Report. EFTA Surveillance Authority http://www.eftasurv.int/information/reportsdocuments/competitionreports/dbaFile11953.pdf

48 See footnote 4.

7.2. Estimate of best-case economic benefits

The above analysis can be used to estimate the best-case economic benefits that could accrue from the preferred option:

The total international trade that could be affected is currently 1 800 billion euro per annum, although it is estimated that around half of this trade is intra-company trade.

All business transactions involve an element of legal uncertainty. Legal uncertainty increases where the transactions are international. The preferred option would reduce some of the legal uncertainty experienced in international trade, bringing it closer to levels of uncertainty that exist within the EU under the Brussels I Regulation and within the EU and EFTA countries under the Lugano Convention.

In the absence of reliable data[49] about the total costs of legal uncertainty, it can only be deduced from the fact that such costs are considered to be just a small component of the 'additional' risk of international business that the total costs of legal certainty will not likely exceed 1% of the value of international trade. Risks from security, cultural and political concerns drive businesses to expect larger returns from their dealings in international markets compared with domestic markets, in part to offset potential costs in seeking redress where contracts are not complied with.

The best-case reduction in legal uncertainty would be a proportion of all legal uncertainty. It is reasonable to assume that if the preferred option is adopted, this proportion would increase (due to similarities developing between legal systems and their outcomes). For the sake of argument it is reasonable to assume that 50% of legal uncertainty would be removed by the conclusion of the Convention.

The best-case reduction in legal uncertainty due to the preferred option would not affect the excluded sectors of international commerce, in particular copyright and related rights and insurance (i.e. perhaps 8% of extra-EU international trade).

The best-case reduction in legal uncertainty due to the preferred option would affect only contracts with choice-of-court agreements. It is reasonable to assume that 70% of the value of international trade would be subject to choice-of-court agreements.

The best-case reduction in legal uncertainty due to the preferred option would mainly affect contracts where resolution of disputes by court was a likely option. It is reasonable to assume that only a minor share, say 25%, of the value of international trade is of this type and alternative methods of dispute resolution will continue to be the main mechanisms applied.

Given these (rather tenuous) assumptions, a best-case estimate of the value of the reduction in legal uncertainty due to the preferred option would be: 1 330 billion euro per annum x 0.01 (legal uncertainty) X 0.5 (legal uncertainty affected by the preferred option) x 0.92 (exclusions) x 0.7 (value of international trade affected by choice-of-court agreements) x 0.25

---

[49] Although this Impact Assessment includes estimates of the costs of legal uncertainty these are, unfortunately, highly uncertain. Although there are analytical studies of the factors influencing legal uncertainty, little work appears to have been done to quantify it in monetary or other terms. This is regrettable as an improved theoretical and empirical understanding of the phenomenon would be of great relevance to policy making and could indicate the degree of priority that should be given to efforts to reduce what is a significant constraint on international trade.

(value of trade where courts are likely to be used). That is, assuming all trading partners ratify the Convention (except OPEC countries), possible benefits in the order of 1.07 billion Euro per annum can be achieved. Achieving such benefits would, however, depend, in particular, upon which trading partners ratify the Convention, the propensity to enter into choice-of-court agreements, the costs of going to court as opposed to using other means of dispute resolution and, critically, the success of enforcement of judgments recognised under the Convention.

7.3. The costs of the preferred option

The preferred option will involve only small implementation costs associated with preparing the legislative instruments linked with the signing and conclusion of the Convention by the Community, including drafting of the exemptions under Article 21, and involved in the process of signing and concluding the Convention on behalf of 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. There would also be merit in spending some resources to publicise the conclusion of the Convention and its ramifications.

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.

7.4. EU added value, proportionality and subsidiarity

The preferred option of the Community concluding the Convention with certain exclusions under Article 21 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 to 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.

As indicated above, 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 judgments given by third-country courts which are considered controversial. 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. The preferred option is thus proportionate.

Given the existence of exclusive Community competence in the area under the scope of the Convention, and the fact that individual Member States cannot achieve the defined objective through individual action, the conclusion of the Convention is appropriate and the principle of subsidiarity will have been followed.

7.5. Measures to maximise the benefits of the preferred option

There are two ways in which all the potential benefits of the preferred option could be improved:

- The scale of benefits accruing depends on the number of other Contracting Parties to the Convention. Once several countries have ratified the Convention, the potential costs of not ratifying it need to be stressed to those that have not ratified it.

- The scale of benefits will partly depend upon companies' awareness of the potential benefits of choice-of-court agreements and their propensity to include them in contracts. It would be beneficial to promote conclusion of the Convention through awareness-raising campaigns and providing information on the key similarities and differences in commercial law, court procedures and court judgments between the EU and the other Contracting States.

8. 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 its special commissions to evaluate the practical application of conventions, in order to monitor and evaluate their success and help resolve difficulties arising in their application and implementation.

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

Table 8.1 provides suggestions for monitoring and evaluation criteria, indicators and potential methods to inform these criteria. Achievement of the general objective could be monitored by reviewing trade statistics. However, there are many factors affecting trade and, as indicated in Section 7, the reductions in legal uncertainty that can follow from concluding the Convention are presumed to be very small when compared with the scale of international trade. The statistics are not sufficiently 'fine-tuned' to enable estimates of the contribution the preferred option would make when implemented.

The monitoring and evaluation will also need to focus on operational objectives. Examples of indicators are given in Table 8.1. 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 every four years) assisted by a study done by an external source. This approach would generate costs[50], but in the absence of specific data such an *ad hoc* approach seems to be the most suitable.

Also, at a later stage, further issues should be analysed such as:

---

[50] The value of such contracts varies between 60 000 and 300 000 euro, depending on the scope of the review.

- exploring the possibility of the Community making a declaration under Article 22 of the Convention which allows its scope to be extended to cover recognition and enforcement of non-exclusive choice-of-court agreements;

- excluding additional matters under Article 21 when the need arises due to new acquis; and

- the possibility of withdrawing some or all of the declarations made under Article 21.

Finally, if the Convention is concluded by the Community, an *ex post* evaluation should be carried out in the future to assess possible changes in companies' perception of the Convention and the use of choice-of-court agreements.

Table 8.1 Potential monitoring and evaluation indicators

General Objective	**Potential indicators**	**Notes, sources and responsibilities**
To promote international trade (external to the EU) and investment, through reducing legal uncertainty in commercial contracts	Levels of trading with main EU trading partners. Levels of trading with main EU trading partners in different sectors.	It will be useful to distinguish between those countries that have ratified the Convention and others. Use could be made of existing trade statistics.
Specific objectives	Given under operational objectives below.	In broad terms it would be helpful if responsibility for monitoring and evaluation were shared between DG JLS (legal impacts), DG ENTR and DG TRADE (economic impacts). In practice specific work may need to be contracted from third parties as the available secondary-source information is inadequate to properly inform evaluation of the effectiveness of the preferred option.
Operational objectives		
1.1 To increase the number and value of contracts (between EU operators and those in third countries) indicating an exclusive choice of court.	Proportion of EU companies entering into choice-of-court agreements. Proportion of value of EU companies' international trade covered by choice-of-court agreements.	Specific work may need to be contracted from third parties.
1.2 To reduce (preferably eliminate) the instances of choice-of-court agreements not being respected.	Number and proportion of choice-of-court agreements not respected.	
2.1 To reduce the uncertainty of outcome of court judgments.	Number and type of anomalous court judgments made by courts in third countries.	Instances reported in press and via EU trade associations.
2.2 To reduce the uncertainty that court judgments might not be respected by courts in the countries of both parties.	Number and type of court judgments not respected.	Specific work may need to be contracted from third parties.

2.3 To reduce the uncertainty that court judgments would be enforced.	Number and type of court judgments not enforced.	Specific work may need to be contracted from third parties.
3.1 To reduce the time and costs of resolving disputes in court.	The time taken and costs of resolving disputes (of different types) in (different types of) courts.	Case histories.
3.2To increase smaller companies' willingness to enter into international agreements with larger concerns.	Numbers of SMEs entering EU external markets. Levels of trade involving SMEs in external markets. The actual courts specified in choice-of-court agreements made by EU economic operators.	Feedback from representatives of SMEs in the EU. Specific work may need to be contracted from third parties.
3.3 To increase the likelihood that smaller companies would challenge larger concerns with whom they are in dispute.	Numbers of SMEs challenging larger concerns.	Specific work may need to be contracted from third parties.
4.1 To reduce differences in the outcome of disputes dependent upon the country in which the case is heard.	Number of instances where legal rights that would pertain in the EU are breached.	Specific work may need to be contracted from third parties.
4.2 To reduce the variation between the judgments made in EU courts and those made in third countries.	Number and nature of judgments made.	Qualitative assessments of convergence of laws and judgments illustrated by cases.

ANNEX 1

Analysis of previous consultations: contribution to the Consultation Paper

In addition to consultations with companies, insurance companies and sectoral EU representatives (list in Annex 2), the answers of various stakeholders to the Consultation Paper have been analysed. Specific focus has been placed on those questions in the Paper which might give more insights for the Impact Assessment.

The public consultation launched by the European Commission in August 2004 received a total of 24 contributions from a wide range of stakeholders. The list of respondents is given at the end of this Annex.

The table below provides an overview of responses to the issues raised in the process of public consultation. The responses are classified by the types of respondent and give a summary of opinions expressed on each particular question. Where no consensus existed on a particular question, the difference in opinions is indicated (e.g.☺ ☹).

Respondents → Issues as outlined in the consultation document ↓	**Governments and public administration**	**NGOs, consumer and interest associations**	**Industry, entrepreneur associations and companies**	**Law and academic**
Do you consider the current exclusions from the scope sufficient?	☺ ☹	☹	-	☺ ☹
Are these exclusions for industrial property rights sufficient?	☺	☹	☹ -	☺
Is the inclusion within the scope for copyright and related rights acceptable and should the Convention take into account the position of individual authors as the weaker to a contract?	☺	☺	-	☺
Is the protection accorded to the defendant by Article 9(c) sufficient?	☺	☺	NA	☺
Should the Community avail itself of the possibility	☺	NA	☹	☹

given in Article 18 and make a declaration in respect of courts within the Community?				
Is it acceptable, as a matter of general policy, that the Convention would prevail over other previous international instruments, thus affecting the international obligations assumed prior to the ratification of this Convention?	☹ -	NA	☺	☺
Do you think that the Convention should allow the recognition and enforcement of judgments given on the basis of a non-exclusive choice-of-court agreement?	☹	NA	☺ ☹	☺

Key to symbols:

☺ Yes (most respondents)

☹ No (most respondents)

- Mixed opinion expressed

NA No Answer on specific question

This following Section of the Annex presents an overview of responses to a number of selected issues particularly relevant to the Impact Assessment and raised in the process of public consultation. The relevant questions in the Consultation Paper that have been analysed are:

Q2. Do you consider the current exclusions from the scope sufficient?

Q3a. Are these exclusions for industrial property rights sufficient?

Q3b. Is the inclusion within the scope for copyright and related rights acceptable and should the Convention take into account the position of individual authors as the weaker to a contract?

Q 14. Is the protection accorded to the defendant by Article 9(c) sufficient?

Q22. Should the Community avail itself of the possibility given in Article 18 and make a declaration in respect of courts within the Community?

Q24.a Is it acceptable, as a matter of general policy, that the Convention would prevail over other previous international instruments, thus affecting the international obligations assumed prior to the ratification of this Convention?

Q 26.a Do you think that the Convention should allow the recognition and enforcement of judgments given on the basis of a non-exclusive choice-of-court agreement?

It has to be stressed that due to the low number of responses to the Consultation Paper the sample is not fully representative.

Q2 of the Consultation Paper: Do you consider the current exclusions from the scope sufficient?

Member States and institutional bodies

The attitude of this group of stakeholders towards the issue of current exclusions is mixed. Two Member States reacted positively, stating that the exclusions mentioned under Article 2 were sufficient. On the other hand, the Czech Republic and Russia stated that the list of exclusions is not sufficient enough as:

Article 2 should also exclude international transport by air.

Only disputes related to employment contracts are excluded, while many kinds of agreement to which an employee is a party would fall under the scope of the Convention.

NGOs, consumer and interest organisations

The majority of respondents expressed a negative opinion. They pointed out that:

- Contracts that restrain competition or impede the transfer of technology should be excluded.
- It is of critical importance that the current wording of Article 2(2)(k) be revised to exclude trademark validity determinations.
- It would be very detrimental to deprive natural persons acting as entrepreneurs from the benefit of the Convention. This exclusion (Article 2(1)(b) should not affect contracts with authors, including collective bargaining agreements negotiated, for example, with authors and performers.

Industry, entrepreneur associations and companies

The two organisations which answered this specific question expressed some concerns about the current exclusions from the Convention.

- The wording in Article 2(2)(k) should differentiate more precisely between the rights being subject to the Convention and those that should be left aside. Otherwise, the uniform interpretation provided by Article 21 is at risk.

- The current exclusions raise a problem concerning the definition of "consumer". In fact, European documents use the definition of consumer as "any natural person who is acting for purposes which are outside his trade and business profession". It is important to keep this positive definition and not the one proposed by the Convention.

Law and academic

The attitude of this group of stakeholders towards exclusions was varied. Some concerns were pointed out:

- The bracketed words in Article 2(2)(f) should be retained, thereby excluding all other admiralty and maritime matters. Maritime law is the subject of a number of international agreements. In particular, the Convention should apply to claims for salvage or the ability of ship-owners to limit their liability, or cargo owners' liability to pay general average. Equally, passenger claims should be excluded as they are governed by the Athens Convention.

- Stronger protection should be introduced for weaker parties falling within the current scope.

- Under certain circumstances (see the example of the passenger in the Consultation Paper) persons who should be excluded will remain within the scope of the Convention. Non-profit organisations should also be excluded because the Convention is meant to be applicable to business-to-business situations.

- Not all natural persons should be excluded from the scope of the Convention. The purpose of the exclusion is to protect weaker parties. Consumers are generally accepted to be weaker parties, but a natural person acting in a commercial capacity is not necessarily either weak or weaker than a company.

Q3a. Are these exclusions for industrial property rights sufficient or on the contrary too broad?

Member States and institutional bodies

Most of the Member States responding to this question replied positively. Only one of them stated that the scope of the Convention should be extended, taking into account how intellectual property rights and particularly industrial property rights can be subject to litigation in practice, including litigation before the designated court pursuant to choice-of-court agreement.

NGOs, consumer and interest organisations

The majority of this group of stakeholders responded negatively on this issue. They pointed out that:

- It is necessary to include the following phrase: "The Convention shall not apply to proceedings that have as their main object any of the following matters — ... n) parallel trade or the exhaustion of intellectual property rights".

- IPR is not a defined legal term as different legal fields summed up as IPR have different bases. It is important to break this down field and create *sui generis* provisions. Patent law and copyright law, for example, are totally different legal fields. Trademarks and patents are granted by the State while copyright has a natural rights foundation.

- Decisions on trademark validity should be within the exclusive jurisdiction of the courts or administrative agencies of the State where the rights arose, and decisions on trademark validity made by other States should not be within the scope of the draft.

- The current wording of Article 2(2)(k) excludes trademark validity determinations from the scope of the draft. A decision on trademark validity rendered in the context of proceedings over a trademark licence agreement would be within the scope of the draft as currently worded. As claims of trademark validity often arise in disputes over trademark licence agreements, it is critically important that the current wording of Article 2(2)(k) be revised to exclude trademark validity determinations.

- Another problem with Article 2(2)(k) is its limitation of agreements within the scope of the draft to licence agreements and assignment agreements. Trademark owners enter into many other sorts of agreement, such as agency agreements, distribution agreements and coexistence agreements. It would benefit trademark owners for these agreements to be within the scope of the draft.

- There is a need to exclude from the scope the validity of IPRs when this validity depends on the sovereign act of a State. However, infringement proceedings should not be excluded from the Convention. Moreover, Article 2(2)(k) of WD 110 is very complex and may create diverging interpretations as to what is excluded or not concerning IPRs other than copyright. Moreover, it will be essential to list which IPRs are exactly excluded and decide whether there should be an exhaustive list of exclusion. An exhaustive list or some other approach, which would preserve legal certainty, would be preferred. This list should be limited to those IPRs agreed upon internationally.

Industry, entrepreneur associations and companies

The two organisations which answered this question expressed some concerns about the exclusions for industrial property rights.

- It is not acceptable that the Convention stipulates special treatment for the matters linked to intellectual property (though excluded from the scope of the Convention under Article 2(2)(k), stating that a chosen court can stay proceedings when the decision incidentally relates to the matters excluded from the scope of the Convention.

- The wording in Article 2(2)(k) should differentiate more precisely between the rights that are subject to the Convention and those that should be left aside.

Law and academic

The majority of stakeholders who answered this question commented positively. However some concerns were put forward:

- It is difficult to understand the reason why copyright and related rights are treated differently from other intellectual property rights under the Convention. Copyright, like

other IPRs, is territorial in scope and depends for its recognition on the national law of the State where protection is sought.

- It is not clear why "copyright and related rights" should be singled out for special treatment. There seems no reason not to include other unregistered rights, such as database and design rights. It is also unclear why only licence and assignment agreements are covered. There are other forms of agreement which relate to unregistered intellectual property rights, such as security agreements, settlement agreements, coexistence agreements and delimitation agreements.

- The current Regulation under the Convention seems complicated and is probably difficult to administer in practice. A point of discussion would be an exception for individual authors — as the creators of their works — as the weaker party to a contract who might require some appropriate safeguard.

Q3b. Is the inclusion within the scope for copyright and related rights acceptable and should the Convention take into account the position of individual authors as the weaker to a contract?

Member States and institutional bodies

All the Member States that responded to this question answered positively.

NGOs, consumers and interest organisations

The majority of this group of stakeholders replied positively. However, one stated that:

- Copyright is seen as an individual author's right in Germany. If physical persons are excluded, there would be nobody to exercise such rights. Therefore, compatibility with the concept of author's rights has to be checked. The weaker party should be protected by public policy exception. The phrase "related rights" is not defined. It has to be affirmed that exclusive rights such as patents are not "related rights".

Law and academic

Most stakeholders answering this question commented positively. However, some concerns were put forward:

- Copyright and related rights should also be outside the scope of the Convention, except for proceedings to enforce a licence. Intellectual property rights are territorial in nature, being an expression of the sovereignty of the State conferring protection. Decisions on the validity of individual rights should be reserved to the courts of the country conferring protection. It will be difficult to make a principled distinction between those authors that are truly in a weaker bargaining position, and internationally successful writers able to negotiate from an equal bargaining position.

Q 14. Is the protection accorded to the defendant by Article 9(c) sufficient?

Member States and institutional bodies

Most Member States that responded to this question answered positively. However, one (Latvia) pointed out that:

- In relation to protection accorded to the defendant, another possibility could be contemplated whereby the defendant has the opportunity to appear before a court and defend his position in the process of litigation.

NGOs, consumers and interest organisations

All the stakeholders who answered this question commented positively.

Law and academic

Similarly to NGOs, consumers and interest organisations, law and academic stakeholders answered this question positively.

Q22. Should the Community avail itself of the possibility given in Article 18 and make a declaration in respect of courts within the Community?

Member States and institutional bodies

Most Member States that responded to this question answered positively. However, one pointed out that:

- The possibility given in Article 18 limits the benefit of the Convention and would have to be abolished. The chosen judge should not have the possibility to refuse to exert his competence.

Industry, entrepreneur associations and companies

One stakeholder expressed a negative opinion towards the possibility given in Article 18. As the body stated, there are several specialised courts in Europe. For example, the London court, specialised in matters concerning maritime law, is often chosen even if no connection exists with the United Kingdom or even the EU.

Law and academic

Most law and academic stakeholders that responded to this question answered negatively. They pointed out that:

- The Community should not avail itself of the possibility under Article 18 as the same considerations applying to domestic cases (in the sense of domestic to one particular Member State) do not apply for the Community as a whole. There is not a single "Community interest" at stake. Such declarations should be a matter for individual States.

- If individual States do not wish the resources of their courts to be used in disputes unconnected with that State, it is a matter for them. Some States, such as the UK, regard litigation services as providing a valuable export.

- The English courts are commonly chosen by parties as a neutral forum even though they may have no other connection with the parties or the dispute. The promotion of London as a forum for resolution of international litigation is and has for many years been a policy of the United Kingdom, and generates considerable invisible earnings for the UK. The English courts have also developed considerable expertise in insurance and maritime law disputes even where the accident or policy has no connection with the UK. Therefore,

Article 18 should not apply to the English courts. Should other States take a different approach, and it is possible to apply Article 18 on a basis that varies from Member State to Member State, then there would not be any objection to the European Commission entering a reservation in respect of those states.

Q24.a Is it acceptable, as a matter of general policy, that the Convention would prevail over other previous international instruments, thus affecting the international obligations assumed prior to the ratification of this Convention?

Member States and institutional bodies

All the Member States that responded to this question answered negatively. The governments have pointed out that:

- Article 23 lacked clarity and coherence in its actual outline. The interlinking with other international instruments is particularly complex and raises complex concerns related to its application. It is therefore not acceptable that the Convention would prevail over previous international instruments as it would affect the stability that these instruments have already created.

- The current Convention should not put States in a position where they are forced to violate previously accepted international obligations.

Industry, entrepreneur associations and companies

The two organisations which answered this question replied positively on the Convention predominating over other previous international instruments.

It seems logical that, in case of conflict between the Convention and Regulation (EC) No 44/2001 on judicial competence, the rules set by the Convention would prevail (as far as forum selection clauses between an EU Member State and a third country are concerned).

Law and academic

Similarly to the previous group of stakeholders, the majority of organisations which answered this question expressed a positive opinion on the Convention predominating over other previous international instruments.

However, a stakeholder stated that:

- An approach that placed Member States in breach of their existing international obligations is not acceptable. It follows from Article 30(4) of the Vienna Convention on the Law of Treaties that whilst the Member States may agree to modify the requirements existing under the Brussels Regulation *inter se*, they cannot modify their obligations towards non-Member States that are Contracting Parties to the Lugano Convention without denouncing those treaties. On the assumption that the Lugano Convention is retained, it will need to prevail over the proposed Convention in respect of any judgment required to be enforced by a Contracting State to the Lugano Convention that does not ratify the proposed Convention. The position will need to be the same in respect of any other international convention or treaty to which a Member State is party which does not allow for a choice of court, or contains rules on exclusive jurisdiction. As it does not achieve this result, Article 23(4) would place Member States in breach of their obligations under public

international law. The rules set out in the Convention should also be subject to existing international conventions or treaties to which a Contracting State is subject which regulate a particular area or subject matter and contain rules that restrict party autonomy, or rules of exclusive jurisdiction.

Q 26.a Do you think that the Convention should allow the recognition and enforcement of judgments given on the basis of a non-exclusive choice-of-court agreement?

Member States and institutional bodies

The attitude of this group of stakeholders towards this issue was varied. One Member State was in favour of recognition and enforcement of judgments given on the basis of non-exclusive choice-of-court agreements while other countries voiced more negative comments:

- Considering the difficulties met during negotiations, a realistic way should be preferred. The Convention would have to be limited to exclusive choice-of-court agreements.

- This issue could be subject to further debate and discussion. By providing for the possibility to recognise judgments delivered by the courts designated in non-exclusive choice-of-court agreements, the scope of the Convention would become substantially broader as would its practical effects and utility.

NGOs, consumer and interest organisations

Similarly to the Member States, NGOs, consumer and interest organisations also expressed varied opinions. One stakeholder responded positively, while another supported limiting the Convention to recognition and enforcement of judgments given on the basis of exclusive choice-of-court agreements.

Law and academic

All the stakeholders that answered this question were in favour of recognition and enforcement of judgments given on the basis of non-exclusive choice-of-court agreements. One argued that such extension was of vital importance as:

- Non-exclusive jurisdiction clauses are very commonly used in international trade and finance. The use of a non-exclusive jurisdiction clause reflects a legitimate choice by parties where they wish the chosen forum to have jurisdiction but to retain the flexibility to bring proceedings before any other court of component jurisdiction. Such clauses respond to a genuine commercial need and would not be used in business-to-business contracts if this were not the case. Failure to include such clauses will seriously reduce the advantages of an international convention for international trade and finance.

List of respondents to the Consultation Paper

Governments and public administration
Délégation française
Czech Republic (Ministry of Justice)

Estonia
Ministry of Foreign Affairs of the Russian Federation
Latvia
NGOs, consumer and interest associations
European Consumers' Organisation
British Music Rights
Foundation for a Free Information Infrastructure (FFII)
European Grouping of Societies of Authors and Composers (GESAC)
International Trademark Association (INTA)
Motion Pictures Association (MPA)
Trade Marks, Patents and Designs Federation (TMPDF)
Industry, entrepreneur associations and companies
Association Française des Entreprises d'Investissement
BASF
EUROCHAMBRES (Association of European Chambers of Commerce and Industry)
La Fédération Bancaire Française
MEDEF
Federal Association of German Industry
Law and academic
Council of Bars and Law Societies of the European Union (CCBE)
Clifford Chance
Conference of the Notariats of the European Union
Deutscher Richterbund
Slaughter and May international law firm
Faculty of Law, Bond University, Australia

ANNEX 2

Companies and other stakeholders interviewed

Companies
Skanska AB (Sweden)
Innogenetics (Belgium)
Ontex NV (Belgium)
Micotron a/s (Denmark)
Packard Bell (France)
Umicore SA-NV (Belgium)
Hamilton Precision Metals Europe (HPM) (France)
Teyssou Rhônes Alpes SAS (France)
Pom'Alliance (France)
Medicasoft (France)
Dismat SAS (France)
Acim Jouanin S.A. (France)
Decanova NV (Belgium)
HORLOGES HUCHEZ SAS (France)
Norail S.A. (France)
Dagnaud Fabrications (France)
Indusafe Bvba (Belgium)
SENSY (Sensors and Synergy) SA (Belgium)
Thermax Ltd (Belgium)
Maersk Benelux BV (Belgium)
Nestlé (Switzerland)

Insurance companies
ATE Insurance (UK)
Euler Hermes Credit Insurance (Belgium)
Law firms
Carlos de Sousa e Brito & Associados
Hannes Snellman Attorneys at Law
ABA
Business and sectoral organs
Agency of Lithuanian Copyright Protection Association
British affiliate of the ICC