REFLECTIONS ON THE RELEVANCE OF PUBLIC INTERNATIONAL LAW TO PRIVATE INTERNATIONAL LAW TREATY MAKING

by

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INTRODUCTION

The purpose of this single lecture at the beginning of the 2009 Hague Academy of International Law is to bridge the gap between those studying public international law at the academy and those studying private international law. In order to do that I will range across a number of matters where, as a private international lawyer, it has been important to me to understand public international law - in particular treaty interpretation, reservations, declarations, relationships between international instruments, and decision making methods in an international institution.

I do not bring the insights of an academic public international lawyer. Rather I bring my experience as a Treaty maker. I have been involved in making Treaties at the Hague Conference on Private International Law as a member of the UK delegation since 1996. My initial experience, on the proposed Judgments Convention, was ultimately unsuccessful. However it did prove highly instrumental in shifting the Hague Conference away from majority voting towards a consensus based decision making method. The frustration of the United States with the early part of those negotiations, when it perceived that it was being consistently outvoted by a European bloc, led to a growing realisation that if the Hague Conference was to be a forum for global Treaty making in private international law it had to expand its membership and move to a consensus decision making method.

Thankfully I have now had the experience of successfully concluding the Hague Choice of Court Agreements Convention 2005 (hereinafter the “Choice of Court Convention”)*, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007 (hereinafter the

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“Maintenance Convention”) and the Hague Protocol on the Law Applicable to Maintenance Obligations 2007 (hereinafter the “Applicable Law Protocol”), and the revision of the Statute of the Hague Conference (hereinafter the “Hague Statute”) that was concluded in 2005 and entered into force in 2007. I was a member of the UK delegation throughout these negotiations and also served throughout the negotiations on the drafting committees for both Conventions and the Protocol. This lecture is a “practitioner’s” insight into public international law in action in this small sample of new treaties and a revised international agreement constituting the legal basis for the operation of an international organization.

The key document for any person who wants to understand the public international law of Treaties is the Vienna Convention on the Law of Treaties of 1969 (hereinafter the “Vienna Convention”). It is now in force in 110 States and many, if not all, of its provisions can be regarded as customary international law.

The Vienna Convention provides some agreed definitions of some key words that will be used in this lecture.

“Article 2

Use of terms

1. For the purposes of the present Convention:
   (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
   (b) “ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

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4 For the full current status of the ratifications and accessions to the Treaty see http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&temp=mtdsg3&language=en (last accessed on 8 January 2010). Notable States that are not parties to the Vienna Convention include France, India and the USA. However the vitality of the Convention is shown by the fact that Brazil ratified it in 2009.
... 
(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State; 
(e) “negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty; 
(f) “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force; 
(g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force; 
(h) “third State” means a State not a party to the treaty; 
(i) “international organization” means an intergovernmental organization.’

I TREATY INTERPRETATION

The key provisions on Treaty interpretation in the Vienna Convention are set out below for ease of reference.

“Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

Treaty makers are, of course, concerned about how the users of the treaty will interpret it. Even within countries like the United Kingdom, where sometimes the domestic legislation that implements the Treaty reformulates the words of the Treaty, case law has shown that regard is had to the words of the Treaty itself.6 Initially they are concerned that each State that consents to be bound by the Treaty will devote sufficient resources - human, financial and legal - to ensure that the Treaty is implemented in that State fully and effectively. They are also concerned that the judges in the courts of States that consent to be bound by the Treaty will do their best to interpret the Treaty correctly. Treaty makers know that they cannot control what the various national governments and courts7 will do when interpreting a provision in the private international law treaty that they are creating but they are aware of the tools that they have to influence those courts. They are aware that Article 31 of the Vienna Convention makes the “ordinary meaning” of the terms of the Treaty the starting point for Treaty interpretation. Thus they have to carefully select the words adopted in the Convention so that the ‘ordinary meaning’ of those words reflects the will of the plenary

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sessions. This is why many hours are spent in Hague drafting committees trying to select the best wording. This careful selection is done initially in English and then, in the same meeting of the committee, an appropriate French text is selected to match the meaning of the English text. When the fluent French speakers are not content that the English text can be reflected accurately in the French text the committee revisits the English text to try to find complementary English and French texts which by their ordinary meaning convey the will of the plenary session as to the policy that is being sought.

Treaty makers are also aware that the ‘ordinary meaning’ of words in a Treaty is influenced by the “context” and the “object and purpose” of the Treaty. This is why care is taken in drafting the preamble and, where it exists, an objects Article. Of the Treaties examined in this study only the Maintenance Convention and the Hague Statute have objects Articles. The latter is very important because it constitutes a meta-purpose for all Hague Conventions and for the Organization itself. Article 1 of the Statute says that:

“The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”

Although the literal meaning is the starting point the correct interpretation of the words of a Treaty require them to be looked at contextually and in the light of the object and purpose of the Treaty. Thus the words contained in Treaties should be given a contextual and purposive interpretation. Therefore it is important to look at the words of the preamble and any Article that describes the object of the Convention to analyse what the purpose of the Convention is and to see if there are any words that might assist decision makers as to how the Convention should be interpreted and applied. There is no doubt that one of the great innovations of the Maintenance Convention compared to previous Hague Conventions on Maintenance is the system of administrative and judicial cooperation that it establishes. That system is, of course, not an end in itself but rather a means to the agreed end spelt out very clearly in Article 1 ‘to ensure the effective

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8 Even though they know, like Ian Sinclair says, that Articles 31 and 32 ‘are expressed at such a level of generality sufficient to ensure that questions of interpretation will still give rise to serious divisions of opinion…’ I. Sinclair, The Vienna Convention on the Law of Treaties (2nd edn, 1984) at 154.
9 See Vienna Convention Article 31(1).
international recovery of child support and other forms of family maintenance’. The ‘effective’ international recovery is to be achieved by ‘procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair’ (preamble) and by a ‘comprehensive system of co-operation between the authorities of the Contracting States’ (Article 1). Whilst the Convention says very little about the end product of the maintenance creditor getting her money through the enforcement of maintenance decisions, the key commitment to this happening speedily and reliably is set out in Article 1: ‘requiring effective measures for the prompt enforcement of maintenance decisions’. There seems to be no doubt that the words of the preamble and of Article 1 should be used by the competent authorities in States to put enough investment into their Central Authorities and their enforcement systems to ensure that Convention maintenance cases are handled quickly, fairly and efficiently. Judges will also find these words helpful in giving, as far as possible, a strong purposive interpretation, short of a contra legem interpretation, to the words of the Convention to achieve the goal of ‘effective’ and ‘prompt’ international recovery of maintenance.

The preamble to the Choice of Court Convention provides for “enhanced judicial co-operation” as the means to “promote international trade and investment”. The preamble promotes a virtuous circle by suggesting that the level of such “enhanced co-operation” can be “enhanced” by “uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters”. The drafters believe that “such enhanced co-operation requires in particular an international regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to

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13 Not just between Central Authorities because other competent authorities of Contracting States, including the courts and administrative authorities, have a role to play in the cooperation. The Convention does not just create a system for processing applications by Central Authorities but requires States to make available certain types of applications that can be taken in their courts or administrative systems and to provide the legal assistance to make those applications possible (including free legal assistance for child support applications).

14 ‘So far as possible’ interpretation is very familiar to European Union lawyers in the context of interpreting national law consistent with non-directly effective EU law and can be traced back to the Von Colson case, Case 14/83 [1984] ECR 1891. The limit on such an interpretation is that it does not require a contra legem interpretation to be given to the national law, see S Weatherill and P Beaumont, EU Law (3rd ed, 1999), 409-413; T Hartley, The Foundations of European Community Law (6th ed, 2007), 216-220; P Craig and G de Burca, EU Law, Text, Cases and Materials (4th ed, 2008), 287-296.
commercial transactions”. These statements in the preamble are strong evidence that the exceptions in the Convention, to the general rule of making choice of court agreements effective, should be construed strictly or narrowly. It seems logical that only a strict construction of the exceptions will ensure the “effectiveness” of exclusive choice of court agreements and be consistent with legal certainty. Therefore the preamble is – and should be – much more than the “empty shell”\textsuperscript{15} that Degan claims. It gives the drafters the opportunity to shed light on the purpose of the Articles of the Convention.

It is more difficult to classify statements made about the text of the Convention that are not contained in the Convention itself. Some such extrinsic material could be regarded as falling within the types of agreement referred to in Article 31(2) of the Vienna Convention, and therefore always available as an aid to determine the ordinary meaning of the words of the Treaty in their context, whereas other material is regarded as purely supplementary, falling within Article 32 of the Vienna Convention, and therefore resort to such aids to interpretation is restricted to the situations outlined in that Article.\textsuperscript{16} Young goes to the extreme of arguing that this could rule out the use of dictionaries,\textsuperscript{17} where the conditions in Article 32 are not met, but this is unpersuasive. The WTO Panels use dictionaries for treaty interpretation regularly.\textsuperscript{18} Dictionaries should be seen as a sensible tool to help Treaty interpreters to know what the range of ‘ordinary’ meanings there are for the words in the Treaty that they have to interpret. If the correct meaning of a word is not clear from within that range after recourse to the material that falls within Article 31 of the Vienna Convention, including the preamble and any objects clause, is it permissible to refer to the sources described in Article 32 of the Vienna Convention.

The Hague Conference publishes its travaux préparatoires in addition to finalised text\textsuperscript{19} but this will almost always fall within the scope of Article 32. However, the travaux préparatoires may contain some

\textsuperscript{15}V.D. Degan, Sources of International Law (1997) at 501.
\textsuperscript{16}Article 32 is seen as definitely secondary to Article 31: “Interpretation must be based above all upon the text of the treaty” The Libya / Chad case, ICJ Reports, 1994, 6 at para. 41.
\textsuperscript{18}Ibid at 922. See also the Appellate Body Report, United States--Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US--Gambling),WT/DS285/AB/R, adopted 20 April 2005. Thankfully in that case they also recognised the limitations of the use of dictionaries by noting the specialised nature of law and stating ‘dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized.’, at para. 164.
\textsuperscript{19}See van Loon supra n 6 at 239 who notes that it is rarely referred to but it can be very useful in understanding the origins and intent of a Convention provision, see eg the analysis of the Hague Trusts Convention in Paul Beaumont,
provisions that meet the conditions for the application of Article 31 of the Vienna Convention. The Choice of Court Convention may provide one such example. At the 2005 Diplomatic Session on the Choice of Court Convention one of the most controversial provisions was Article 11 on damages. An essential mechanism for reaching an agreement on the text of Article 11 was for a working group comprising many of the key delegations and chaired by the Chairman of the Drafting Committee (Gottfried Musger) to agree a lengthy statement on Article 11. This statement was adopted by the Diplomatic Session by consensus. Its significance is also clear from the fact that the statement is reproduced in full in the explanatory report to the Convention. This statement could be regarded as an ‘agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ for the purposes of Article 31(2) of the Vienna Convention. In that case the statement should be considered by courts as to the correct interpretation of Article 11 even if there is no ambiguity in the meaning of the words in Article 11 in the absence of considering the statement. The explanatory report on the Choice of Court Convention does not attempt to define the status of this statement on Article 11 in terms of the Vienna Convention. Interestingly, however, it does not attempt any further elaboration or analysis of the statement in the explanatory report. Brand and Herrup are clear that the statement’s role as an interpretative aid is under Article 32 of the Vienna Convention. They believe the statement is the “principal example” of a statement made in plenary that provides “strong evidence of consensus” as to how a provision of the Convention should be interpreted. There is no doubt that the wording of the Article 11 statement was carefully crafted in the working group and adopted under no time pressure and by consensus by the plenary at the Diplomatic Session that concluded the Choice of Court Convention. Therefore decision-makers and judges should regard it as an ‘agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty’ under Article 31(2) of the Vienna Convention and therefore should have regard to it automatically when faced with a question of interpretation of Article 11 of the Choice of Court Convention.

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20 See Minutes No 19 of the Twentieth Session, Commission II, paras. 13 and 14.


Brand and Herrup make a few rather guarded comments about the value of statements made in plenary at the 2005 Diplomatic Session on behalf of other working groups but they do not identify clearly what they are referring to.\textsuperscript{23} They do, however, highlight one such situation in relation to the definition of “personal injury” offered by a working group to the plenary session. They concede that the suggested interpretation “may be the ultimate resolution reached by national practice under the Convention” but then say the “issue properly should be viewed as largely open.” The reason for this appears to be that the definition was produced by the working group while under a lot of pressure (a fair point) and that delegates had only a very short time to consider whether to challenge the interpretation in the plenary and to weigh up how important the issue is given that any challenge might have delayed the Convention.\textsuperscript{24} David Goddard QC, from New Zealand, and the present author, from the United Kingdom, were charged by the chair of the Plenary, Professor Andreas Bucher, with chairing working groups at the latter stages of the Diplomatic Session to try to resolve difficult questions. These working groups contained representatives from the major negotiating parties including the United States, China, Russia, Japan, the EU, the rapporteurs, Andrea Schulz and other interested States for specific matters affecting them. Compromises in these groups were hard fought and if the chairmen of the working groups were to have reflected a wrong interpretation of the compromise when introducing the working group’s proposal in the plenary it is hard to believe that this would not have been corrected at the time by other members of the group or challenged by non-members as being incorrect or unacceptable. It is important therefore to give weight to the interpretations emerging from these working groups that have the duty to broker deals on the intractable problems in the Convention negotiations especially when they are linked to an understanding of a compromise text. Having said that, the chairmen of these working groups were speaking under immense pressure and not every word uttered by them in the plenary should be regarded as authoritative in interpreting the words agreed by the groups.\textsuperscript{25}

\textsuperscript{23} *Ibid* 31: “Although views may have been expressed by individual delegates or working groups on the interpretation of certain aspects of those provisions, many delegations simply did not have time to take these points on board and to think them through in a thorough fashion, or did not want to interrupt progress through the agenda. Nonetheless, to the extent those provisions are clear in the text, no contextual analysis of the negotiations should be allowed to prevent the application of the rules created.” Of course the last sentence is a fair reflection of Article 32 of the Vienna Convention if these statements fall under that provision. See also a similar sceptical reference by Brand and Herrup to the value of “authoritative presentations in the plenary” at 32.

\textsuperscript{24} *Ibid* 64.

\textsuperscript{25} See eg Working Documents 71, 78, 79 and 85 for the texts agreed by the working groups and the relevant minutes of the plenary session will give the interpretation placed on those documents by the chairmen of the working groups.
The statements by the chairs of the working groups could not possibly have the status of an Article 31(2) agreement because they were not the product of a carefully concluded, relatively unhurried, negotiation process like the statement on Article 11. However, those statements are a legitimate source for national courts to rely on under Article 32 of the Vienna Convention. Thus, if the text of any provision of the Choice of Court Convention is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, even after contextual and purposive interpretation in accordance with Article 31 of the Vienna Convention, the courts should look to see if there is a statement in the records of the negotiation at the Diplomatic Session on behalf of a working group as to the meaning of those words. In the context of personal injury there is such a statement. The explanatory report explains that there is an ambiguity in the interpretation of the Convention because the French and English texts are different. The French text implies that “personal injury” encompasses “nervous shock” only when the nervous shock is accompanied by physical injury. This is not implied by the English text, on which the compromise was negotiated, and the statement of the working group that nervous shock does fall within personal injury even if there is no physical injury should be relied on by the courts as reflecting the consensus of the Diplomatic Session. The statement went further and said that “personal injury” does not cover humiliation or hurt feelings and therefore actions for invasion of privacy and defamation, where there is an exclusive choice of court agreement, are not outside the scope of the Convention. Whatever doubts Brand and Herrup may have about this it seems appropriate to recognise that this was the consensus view and that it has the benefit of avoiding the Convention having a more restrictive scope than is necessary and therefore achieves the objective of uniform rules on jurisdiction and recognition and enforcement of judgments for exclusive choice of court agreements.

The excellent Hungarian chairman, Maria Kurucz, of the Maintenance Convention plenary sessions called upon experts from Canada and the EU to chair crucial working groups that resolved the details of the deals on the most important issues: scope, legal aid, vulnerable adults, and procedures for recognition and enforcement. The statements introducing those compromises that are contained in the

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26 She succeeded the chairman of the early Special Commissions, Fausto Pocar from Italy.
minutes of the Diplomatic Session were not statements agreed by the working groups and therefore are a supplementary aid to interpretation under Article 32 of the Vienna Convention.

The next question is how to classify the explanatory report by the rapporteurs, Professors Trevor Hartley and Masato Dogauchi, on the Choice of Court Convention. It was written by the rapporteurs after the Diplomatic Session had been concluded. Drafts of the report were prepared at various stages of the negotiations including a very full and helpful draft prepared for the Diplomatic Session. When the rapporteurs had prepared their report after the Diplomatic Session it was put out for comment to all the Members of the Conference and adjustments were made by the rapporteurs to take account of those comments before the final version was published. However, as Brand and Herrup point out, “the consensus document is the Convention itself and not the Report, and that not all comments of the national delegations were accepted in creating the final Report.” A case could be made that the explanatory report falls under Article 31(3) of the Vienna Convention on the basis that it is a “subsequent agreement between the parties regarding the interpretation of the treaty” because all the States and REIO’s involved in concluding the Convention had the opportunity to input to the report before it was adopted. However, this seems to be a very weak case. There was no opportunity for the Members of the conference and other States that participated in the adoption of the Convention to meet in The Hague to discuss the parts of the explanatory report that were controversial. Therefore, the explanatory report is a supplementary aid to interpretation under Article 32 of the Vienna Convention. However, judges and decision-makers should regard it as the single most important supplementary aid to interpretation and should not hesitate to refer to it whenever they have any doubt as to how the relevant provision of the Choice of Court Convention should be interpreted.

The Explanatory Report on the Hague Maintenance Convention has recently been finalised. It is in the same category as the Explanatory Report on the Choice of Court Convention in that it is not simply the

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29 See supra n 20.
30 Supra n 21 at 29-30.
31 For an example of where I would not advise judges to follow the advice of the explanatory report, see Paul Beaumont, supra n1 at 137-140 on the meaning of “agreement”.
views of the rapporteurs, as the final text takes account of the comments of the States and REIOs, but is not within the scope of Article 31(3) of the Vienna Convention as there was no meeting in The Hague where the final text of the Report could be approved.

Of course with the lapse of time comes change and courts may use this as an excuse to give an evolutionary interpretation to a treaty. The International Court of Justice in the Gabčikovo-Nagymaros Project (Hungary/Slovakia) in 1997 said: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law." Thirlway argues for a cautious use of such evolutionary interpretation and only in cases where the Treaty makers expressly allow for it in the text of the Treaty. In the Hungary/Slovakia case the Treaty makers had allowed the parties to the Treaty to take “new environmental norms into consideration”. It is very hard for a treaty drafter to explicitly rule out the possibility of evolution but it is to be hoped that national and international courts will only give an evolutionary interpretation to a treaty where the express purpose of the treaty or the clear evidence from the travaux préparatoires justifies such an interpretation. In relation to the Hague Statute, the Hague Choice of Court Convention and the Hague Maintenance Convention and Protocol there is no evidence to support an evolutionary interpretation of those texts. The meta-purpose of the Hague Conference of “progressive unification of private international law” should influence the choice of meaning given to words in Hague Conventions that are capable of more than one meaning but does not justify words in a Treaty being ignored or added to in order to achieve greater “unification of private international law” than the Treaty makers managed to do.

33 Ibid at para. 419 the final version of the report is clear - “However, the rule in Article 18 operates as a rule of negative jurisdiction.” - that Article 18 is a rule of jurisdiction thanks to the comments of the EU on the penultimate version of the text which had erroneously indicated that Article 18 only had any effect at the stage of recognition and enforcement. The point that Article 18 is a jurisdiction rule had already been made by Paul Beaumont, supra n2 at 532.


36 Supra n 33.

37 Attempts can be made at Special Commissions of the Hague Conference that are reviewing the operation of Hague Conventions to guide the interpretation of the Treaty. Such guidance reflects the consensus view of the States present at the Special Commission and therefore could fall within Article 31(3)(a) of the Vienna Convention. A recent example of this is the “Conclusions and Recommendations of the 2009 Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions” February 2009 available at
II RESERVATIONS AND DECLARATIONS

1. Reservations

The Vienna Convention gives a definition of reservations in Article 2(1)(d) quoted above and it contains the following detailed provisions on reservations.

“Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

http://www.hcch.net/upload/wop/jac_concl_e.pdf (last accessed on 8 January 2010) which adopted two interpretations of the Hague Access to Justice Convention (paras. 61-2) that were consistent with the ordinary meaning of the text and one interpretation (para. 63) that requires a very broad construction of the object and purpose of the Convention:

“Scope of application of the Convention

61. Notwithstanding other approaches in bilateral or regional instruments, the SC considers, in light of the Explanatory Report and the prevailing view in comparative law, that the wording of Article 1 does not accommodate the inclusion of legal persons within its scope of application.

62. The SC is of the view that the word “presence” in Article 2 is to be interpreted in a literal way.

63. The formulation of Article 14 leaves some uncertainty with regard to who is exempt from giving security for costs. Nevertheless, the SC is of the view that nationals of a Contracting State who are habitually resident in the State where the proceedings are brought fall within the scope of application of this provision.”

38 This definition is followed by the UN Secretary-General in his practice as a depositary of treaties, see P. T. B. Kohona “Some Notable Developments in the Practice of the UN Secretary General as Depository of Multilateral Treaties: Reservations and Declarations” (2005) 99 American Journal of International Law 433 at 434.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   (c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

**Article 21**

*Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

**Article 22**

*Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:
   (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

It is generally considered good practice to insert some sort of guidance as to reservations into the text of the treaty. The UN General Assembly, for instance, recommends the insertion of provisions in all multilateral conventions “relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.”\(^{39}\) It is also normal practice in the Hague Conference to have a clause in the Convention preventing reservations\(^{40}\) or a clause allowing only certain specified reservations.\(^{41}\) The US announced during the Diplomatic Session that it wanted the Choice of Court Convention to remain silent on reservations. This was ultimately agreed by other States because the US made it clear it was an issue it was prepared to block consensus on. The reason for the US position was that the US Senate, which has to vote in favour of a Treaty by a two-thirds majority of the members present before the US can ratify it, likes to maintain some discretion in the way international treaties will apply in the US and therefore expects the State Department when negotiating Treaties on behalf of the US to leave open the possibility of

\(^{39}\) Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, para 162 Accessed online at http://untreaty.un.org/English/Summary.asp on 25th September 2009

\(^{40}\) For example Article 21 of the Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary. The text of this Convention was finalised before the Choice of Court Agreements Convention but due to a different rule as to when it is concluded it is dated as 5 July 2006.

\(^{41}\) For example Article 56 of the Hague Convention on the International Protection of Adults of 13 January 2000.
reservations. The US negotiators believed that by obtaining a Convention with no clause on reservations – thus giving the Senate the maximum flexibility possible – they were increasing the likelihood of the US ratifying the Convention. This may well be true. It is encouraging that the US signed the Choice of Court Convention in January 2009. Certainly it is to be hoped that the US will ratify the Convention without any reservations. The result of the silence on reservations in the Convention is that any reservation is permitted under the Convention ‘subject to the normal rules of customary international law (as reflected in Article 2(1)(d) and Articles 19 to 23 of the Vienna Convention on the Law of Treaties 1969).’ Other States found the US position hard to accept in the context of this Convention which already had three carefully crafted declaration schemes in Articles 19-21 to give States the flexibility to modify the application of the Convention in a number of ways. It was not at all clear in policy terms why a reservation might be needed beyond these declarations and there was a fear that other States, not the US, might use the availability of reservations to greatly weaken the Convention. In order to try to avoid this risk the Diplomatic Session attached by way of an exhortation some of the conditions it had already attached by law to the making of declarations:

“It is the understanding of this Commission that no reservations should be encouraged in any way and that whenever a State wants to make a reservation – it should be made only if a State has a strong interest to do so; it should be no broader than necessary and be defined clearly and precisely;
it should not deal with a specific matter that can be the object of a declaration; and it should not be detrimental to the object and purpose and to the coherence of the Convention.46

Apart from the use of the language of Article 21 this statement of the Diplomatic Session also exhorts States not to use a reservation when it can use the declaration system in Article 21. This is, to be honest, an attempt to salvage all the hard work that had been done on Article 21 in creating a hard law legal framework for excluding specific matters. The problem is that the, at best soft law, exhortation of the Diplomatic Session to give priority to Article 21 over a reservation does not stop States from using a reservation when they want to exclude not only specific subject matters but perhaps specific matters where the chosen court is not one of their own courts – something not permitted under Article 21.47 The only prohibition in strict law against a reservation is that it undermines the “object and purpose” of the Convention.48 The “object and purpose” of the Choice of Court Convention is not set out in a specific Article.49 The UK has been sceptical of the use of the term “object and purpose of the treaty” as an abstract definition of a concept and wondered whether the search for object and purpose is necessarily identical in different contexts. The UK takes the view that ‘identifying the object and purpose is a question of interpretation’ and commended the International Law Commission for having adopted a ‘flexible approach’ to its guidelines on this issue.50 However it is reasonable to argue that the object of the Convention is set out in the preamble51 and that one object and purpose is to create a legal regime that “ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions”. Therefore any reservation which makes exclusive choice of court agreements in commercial transactions “ineffective” would be contrary to the object and purpose of the Convention and therefore unlawful. Thus, it could be argued that any reservation which discriminates between the courts of certain Contracting States by only permitting the selection of the courts

46 Emphasis added, see para. 319 of the explanatory report, supra n 20, citing Minutes No 23 of the Twentieth Session, Commission II, paras. 1 to 31, in particular paras. 29 to 31. Brand and Herrup believe that “due weight” should be given to this statement, see supra n 21, 180.
47 See the explanatory report para. 235, supra n 20, which says that an Article 21 declaration “could, for example, exclude ‘contracts of marine insurance’, but not ‘contracts of marine insurance where the chosen court is situated in another State’.”
48 See Art 19(c) of the Vienna Convention on the Law of Treaties set out supra.
49 For discussion on the problem of ‘object and purpose’ interpretation when the treaty is silent on reservations and the role of the depositary in such matters, see P. T. B. Kohona supra n 37 at 440–43.
51 Brand and Herrup make this argument, supra n 21, 27-29.
of some States would be an unlawful reservation as it makes exclusive choice of court agreements in relation to the unfavoured States completely ineffective. However, the problem with this argument is that even a reservation taking a specific matter outside scope would be unlawful as being contrary to the object and purpose of the Convention as it makes exclusive choice of court agreements relating to that subject matter ineffective. Yet precisely this reduction in the effectiveness of choice of court agreements is permitted by way of declaration under Article 21. In effect it might be wise to treat Articles 19-21 as the permitted categories of “reservations” where the negotiators recognised that they do undermine the effectiveness of choice of court agreements but for policy reasons, including the need to get consensus, such undermining is uniquely deemed not to be contrary to the object and purpose of the Convention.

This analysis is perhaps reinforced by the implications of another object and purpose of the Convention set out in the preamble, ie “co-operation can be enhanced by uniform rules on jurisdiction and on the recognition and enforcement of foreign judgments”. If an object of the Convention is to create “uniform rules” then any departure from those rules, other than those expressly permitted by declarations, can be regarded as contrary to the object and purpose of the Convention. Therefore it seems that any reservation beyond what is allowed by the declarations in Articles 19-21 will be of dubious legality as it could be deemed to be contrary to the object and purpose of the Convention. Of course the courts in the State making the reservation might be very reluctant to hold that the reservation made by their own State is unlawful in international law and therefore the practical limitation on the effectiveness of a reservation may be only in the ruling on the validity of such a reservation where it becomes relevant in litigation in other Contracting States. It is to be hoped that another object of the Convention contained in the preamble – “an international legal regime that provides certainty” – will not be undermined by reservations that may be the subject of debatable challenge as to their conformity with the object and purpose of the Convention.

52 If this is so then the example given supra n 46, taken from the explanatory report, of an unlawful declaration would also be an unlawful reservation. For a full discussion on ‘disguised reservations’ see L.D.M. Nelson, “Declarations, Statements and ‘Disguised Reservations’ with respect to the Convention on the Law of the Sea” (2001) 50 International and Comparative Law Quarterly 767-786. However, that discussion is of limited help in the context of the Choice of Court Convention because it focuses on the Law of the Sea Convention which expressly excludes any reservations.

53 A valid reservation has automatic reciprocal effect, see Article 21 of the Vienna Convention on the Law of Treaties quoted supra.
The Convention’s silence on reservations was designed to allow States to make any reservation compatible with the Convention’s object and purpose but at least some of the drafters, perhaps naively, also hoped that the silence might lead States not to even consider the question of reservations. Less naively it may be hoped that States having considered whether or not to make a reservation decide not to on the basis that it would be bad for their international trade and investment to do so and would undermine legal certainty because of the unpredictable consequences as to whether the reservation would be regarded as contrary to the object and purpose of the Convention.

The Maintenance Convention allows, in Article 62, for a relatively short list of permitted reservations. The first two permitted reservations are particularly significant. However, only the first one has the reciprocal effect that Article 21(1) of the Vienna Convention on the Law of Treaties envisages. The reciprocal effect does apply when a State uses a reservation under Article 2(2) to restrict the core scope of the Convention by reducing the age limit for a child support application from under 21 to under 18. The reason for this is to remove any financial imbalance in States having to provide administrative co-operation and free legal aid for incoming applications from 18-20 year olds from reserving States while their own nationals would be unable to get such help for outgoing applications to reserving States. The second permitted reservation relates to the indirect grounds of jurisdiction that form the bases for recognition and enforcement of maintenance decisions in Article 20. There are six indirect grounds of jurisdiction and three of them can be made the subject of a reservation under Article 20(2): (i) habitual residence of the creditor; (ii) choice of court agreements between adults concerning adult maintenance obligations; and (iii) where jurisdiction was based on the rules applicable to matters of personal status or parental responsibility. However, it is clear from Article 62(4) that any such reservation will not have reciprocal effect. Thus when the United States enters the reservation in relation to habitual residence of the creditor and another Contracting State does not enter such a reservation, a maintenance decision where the creditor was habitually resident in the US at the time proceedings were instituted will be recognised and enforced in the

54 Thereby reducing the benefit of the Convention and reducing that State’s participation in the preamble’s desire “to promote international trade and investment”.
other Contracting State even though a maintenance decision where the creditor was habitually resident in the other Contracting State at the time proceedings were instituted will not be recognised and enforced in the US.

The policy behind this lack of reciprocity is the desire of the Contracting States to maximise as far as possible “the effective international recovery of child support and other forms of family maintenance” (Article 1). The reason for the reservation by the United States is due to constitutional difficulties caused by the way the US Supreme Court interprets its due process clause.\(^\text{56}\) Other provisions in Article 20 are designed to maximise reciprocity in an upward direction in terms of recognition and enforcement of maintenance decisions whereas the strict application of reciprocity in relation to reservations under Article 21 of the Vienna Convention would have had the effect of reducing the amount of recognition and enforcement of maintenance decisions. Article 20(3) requires any State making a reservation under Article 20(2) to “recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.” So for example if a German maintenance decision for child support is based on the habitual residence of the creditor but in fact Germany was where the child was conceived then this factual basis may be enough for a US court to exercise jurisdiction and therefore to recognise and enforce the German judgment. Article 20(4) provides that if a reservation State cannot recognise and enforce a judgment from a Contracting State due to its reservation under Article 20(2), and if the debtor is habitually resident in the reservation State, then it must “take all appropriate measures to establish a decision for the benefit of the creditor”. Furthermore, under Article 20(5), if the child is under 18 the reserving State has to accept that the decision from the Contracting State establishes the ‘eligibility’ of that child for maintenance in the State addressed. The combination of Article 20(4) and (5) is designed to put an obligation on the reserving State to take the necessary legal proceedings in that State to establish the amount of maintenance owed by the debtor because the liability for maintenance is not a contestable issue.\(^\text{57}\)

\(^{56}\) See P. Beaumont, supra n 2 at 518.

\(^{57}\) However, the interpretation of Article 20(5) as to what is meant by “the eligibility of that child for maintenance” is a matter that is likely to be controversial. There was not a consensus interpretation of the provision at the Diplomatic Session.
The Applicable Law Protocol provides in Article 27 for no reservations. This was possible because the United States had no interest in ever ratifying the Convention and also because many other States that might have been interested in principle in negotiating provisions on applicable law, eg Canada, decided not to push for a Protocol that they could ratify. Those States allowed the States who had a shared vision of what the uniform rules on applicable law should be to go ahead and agree the Protocol they wanted. Hence the Protocol was really negotiated between the EU, Switzerland, Japan and China (Macau).

2. Declarations

The Vienna Convention on the Law of Treaties is silent on the issue of declarations. They are an important tool for treaty makers as they create options within a Treaty where consensus on a single approach is not possible. They were particularly important in negotiating the Choice of Court Convention and the Maintenance Convention.

Choice of Court Convention

(a) Articles 19 and 20 Declarations on choice of court agreements unconnected with the State chosen - non-unified legal systems and relevance of choice of law clauses

Article 19 of the Choice of Court Convention permits a “State” to declare “that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.” This is designed to enable a State not to have to hear a case that has no connection with that State just because the parties have chosen that State’s courts in an agreement. Brand and Herrup raise the question whether a State could make a declaration under Article 19 for only a part of a non-unified legal system. The answer surely is that it can, eg China might ratify the Convention and only make the declaration for the mainland because Hong Kong and Macau want to be seen as neutral centres for resolution of international commercial disputes. This

59 Supra n 21, 147. Brand and Herrup say Article 25 is not clear on the point.
approach seems to emerge naturally from the fact that Article 28 allows States with non-unified legal systems to declare that the ratification of the Convention applies to only one or more of its territorial units. Therefore, if disparity in the very application of the Convention to different parts of a State with more than one legal system is permitted by the Convention it seems appropriate to give a contextual and purposive interpretation to the Convention permitting variable declarations under Article 19 (and indeed under Articles 20-22 as well). Brand and Herrup also cast doubt on the interpretation of the English version of Article 19 but, with some help from the French text, correctly argue that it should be interpreted as meaning that it can only apply if “neither a party nor the dispute has any connections to the state of the chosen court.”

In relation to both Article 19 and Article 20 it is interesting that neither Brand and Herrup nor Hartley and Dogauchi in the explanatory report discuss the significance of a choice of law clause. Does a choice of law clause create a connection between the State of the chosen court and the “dispute” (in terms of Article 19) and does a choice of law clause constitute one of the “other elements relevant to the dispute” (in terms of Article 20)?

Certainly a choice of law clause is “relevant” for a dispute because it determines which law will govern the contract and therefore will be applicable to the dispute. It also seems to create a “connection” between the State of the chosen court and the “dispute” because that State’s law will determine how the dispute is to be resolved. However, recital 15 of the Rome I Regulation expressly says that, in the reverse situation, where there is only a choice of law clause connecting a matter with a country, the addition of a choice of court clause does not constitute an “element” that is different from the choice of law clause for the purposes of Article 3(3) of the Regulation.

For Article 3(3) of Rome I to apply the other “element” has to be “relevant to the situation at the time of choice”. It is hard to define “situation”. Without the recital it would be natural to give “situation” a very wide meaning that would include the question of where any dispute under the contract would be resolved, provided the choice of court took place before or at the same

60 Ibid. at 148.
61 Article 20 provides that: “A State may declare that its courts may refuse to recognise or enforce a judgment given by a court in another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.”
62 See Reg 593/2008 OJ 2008 L177/6. Article 3(3) of Rome I is a limit on party autonomy in choice of law in contract for EC States and says: “Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.” The relevant part of recital 15, which relates to Article 3(3), says: “This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal.”
time as the choice of law. Arguably the lack of any clarification in Articles 19 and 20 of the Hague Choice of Court Convention, or in the explanatory report, unlike Recital 15 in Rome I, points towards an interpretation that a choice of law clause combined with an exclusive choice of court clause pointing to the same State would render any declaration made under Articles 19 and 20 inapplicable.

(b) Article 21 Declarations - excluding “specific matters” from scope

One of the most hard fought provisions in the Hague Choice of Court Convention was Article 21. It is one of the elements of the Convention that provides the necessary flexibility to allow States to accept that choice of court clauses will be binding on States and that the substantive validity of the clauses will be determined by the law of the State of the chosen court. It is linked to arguments about scope. Canada had particular concerns about its asbestos industry which meant that it wanted to exclude asbestos from scope. Other countries were concerned about the impact of the Convention on some of their industries and wanted special exclusions from scope. In order to avoid a Convention that would have covered very little within its core scope it was agreed to allow States to exclude ‘specific matters’ from scope by way of declaration. If a State does so then it does not gain any benefit from the Convention in relation to that subject matter. The Convention no longer applies in other Contracting States in relation to that subject matter when parties enter into an exclusive choice of court agreement designating the courts of the country that made the declaration. So all other Contracting States do not have to decline jurisdiction in favour of the chosen court and do not have to recognise and enforce a judgment from the chosen court when the agreement falls within the declared subject matter. The final compromise on Article 21 reached in working groups during the Diplomatic Session requires any State making the declaration to have a “strong interest” in doing so and to “ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.” Part of the compromise was a suggestion that it would be good practice for a State intending to make a declaration to first send it in draft to the Secretary General who would circulate it to Contracting States for comments. Such comments would potentially help to ensure that the exclusion of a specific matter “is clearly and precisely defined”. Brand and Herrup argue convincingly that there should be

63 See supra text accompanying n 19 and following.
64 See n 274 in the explanatory report, supra n 20.
an interpretation of this requirement that leads to a narrow construction of the scope of any exclusion of specific matters by an Article 21 declaration:

“something can come within the exclusion under Article 21 only if it is clearly and precisely stated in the declaration that it does so. Any doubt over the field of application of an Article 21 declaration should be resolved in favour of inclusion within the scope of the Convention.”  

Another part of the compromise was that the operation of declarations would be part of the periodic review of the Convention in Special Commissions or at The Hague’s Council on General Affairs and Policy. The discussion of the lack of a no reservation clause above shows how central the Article 21 declaration system is to determining the limit of lawful reservations. It may well be that Article 21 cannot be widened by a reservation because any such reservation would be unlawful as contrary to the object and purpose of the Convention.

(d) Declarations extending the scope of the Convention to non-exclusive choice of court agreements - Article 22

Article 22 of the Convention contains an ambitious attempt to broaden the scope of the Convention to cover the recognition and enforcement of judgments given by the courts of a Contracting State designated in a non-exclusive choice of court agreement. It happens for any Contracting States that make a reciprocal declaration under Article 22. Professor Brand was very much the architect of this Article and therefore it is not surprising that the analysis of the article by Brand and Herrup is lucid and thorough. One of the important technical observations made by the authors is that the provision on priority of judgments in Article 22(2)(b) is materially different from its equivalent in Article 9 (f) and (g). The provision in the latter only gives priority to the judgment of another State if it is “inconsistent” with the judgment of the chosen court and if it “fulfils the conditions necessary for its recognition in the requested State.” Article 22(2)(b) however provides that:

“Where recognition or enforcement of a judgment given in a Contracting State that has made [a declaration on non-exclusive choice of court agreements], the judgment shall be recognised and

65 Supra n 21 at 152.
66 See Article 24 and para. 239 of the explanatory report, supra n 20.
enforced under this Convention, if- ... (b) there [is not] a judgment given by any other court before
which proceedings could be brought in accordance with the non-exclusive choice of court agreement”.

Brand and Herrup argue that the best reading of Article 22(2)(b) is that “it does not expand the grounds of
non-recognition and non-enforcement in Article 9.”

There is nothing in the explanatory report on this point but it makes sense to read the word “inconsistent” into Article 22(2)(b) because unless the other judgment is “inconsistent” with the judgment from the chosen court there is a false conflict. For the same reason, a desire to avoid false conflicts, it also makes sense to read in the requirement that the judgment from another court must be capable of being recognised in the requested State. If the judgment from the other court cannot be recognised in the requested State then it makes no sense to deny recognition to a judgment that can be recognised under the reciprocal declaration scheme under the Convention. However, although both these interpretations make sense from a policy point of view they are extremely hard to reconcile with the wording of Article 22(2)(b).

An issue that is not properly addressed by Brand and Herrup or in the explanatory report is the question of the relationship between the seemingly mandatory requirement to recognise a judgment if the conditions in Article 22(2) are met and the discretionary grounds for not recognising and enforcing an exclusive choice of court agreement in Article 9(a)-(e) of the Convention. If none of the grounds contained in Article 9 was covered in Article 22(2) it might reasonably be inferred that the latter provision supplements rather than replaces Article 9 but the fact that Article 22(2)(b) overlaps with or is inconsistent with Article 9(e) and (f) makes it difficult to come to that interpretation. A further problem is that the Convention, the explanatory report, and Brand and Herrup do not clarify whether all the other provisions in the chapter on recognition and enforcement apply mutatis mutandis to cases falling under the reciprocal declarations in Article 22.

In order to make the declaration system workable it seems that the provisions in Article 22 should simply be read as supplementary to all the provisions in Chapter III of the Convention. The alternative construction might lead us to the view that a judgment from a court of origin that meets the specific requirements in Article 22 would have to be recognised in the State addressed even if that court were to find that the choice of court agreement was invalid on substantive validity grounds (in cases where

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67 Supra n 21 at 157.
68 See Chapter III, Articles 8-15.
the chosen court had not ruled on this point) or that the recognition or enforcement of the judgment would be “manifestly incompatible with the public policy of the requested State”.  

*Maintenance Convention*

Article 2(3) is drafted to create the flexibility for States to declare the extension of the scope of the Maintenance Convention as widely or as narrowly beyond the core as they wish.  

States that are party to the previous Hague Conventions on maintenance can secure the replacement of those Conventions by extending the scope at least as far as those Conventions applied to them.

Two of the major features of the Convention are the provisions on legal aid for child support applications and the streamlined procedure for recognition and enforcement of maintenance decisions. In both cases it was necessary to provide two alternatives in order to keep China within the consensus. The Convention’s great feature is its commitment to free legal aid for child support applications between Contracting States in Article 15(1). However, the Chinese delegation feared that such a provision would be a barrier to China ratifying the Convention even if it were to ratify it in the first instance only for Hong Kong and Macau. Therefore it was agreed that a State might declare to apply Article 16 instead of Article 15(1). Article 16 permits a means test but it can only be based on ‘an assessment of the means of the child’ not on the means of anyone who has parental responsibility for the child. Therefore, unless the child has a lot of independent wealth generating a large income it will still be eligible for legal aid. Professor Borras questions whether this is “really a declaration”. She speculates whether it is “really a reservation” because it might be a “unilateral statement, however phrased or named” in the terms of Article 2(d) of the Vienna Convention. However, all declarations are “unilateral statements” made by a State when they sign, ratify or accede to a Treaty. The key point of distinction between a reservation and a declaration is the nature of the unilateral statement. A reservation in terms of Article 2(1)(d) of the Vienna Convention “purports to

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69 See Article 9(a)-(e).
70 Admittedly this can create problems in knowing what the scope of the Convention is between two Contracting States who have made declarations in different terms, see the explanatory report, *supra* n 12, at paras. 53-54.
71 See the discussion in P. Beaumont, *supra* n 2 at 516-519.
72 *Supra* n 55 at 137. The author raises the same questions in relation to the declaration under Article 24 discussed next in the text of the lecture and the same response is appropriate.
exclude or to modify the legal effect of certain provisions of the treaty in their application to that State” whereas, as Professor Borras acknowledges, the declaration under Article 16 permits States to opt for an “alternative solution”. It is not the case that Article 15(1) provides a rule that States can take a reservation against (ie unilaterally decide what rules they will have on legal aid for child support cases) instead Article 15(1) provides one Treaty rule on legal aid for child support cases and Article 16 provides an alternative Treaty rule on legal aid for child support cases that is defined by the Treaty and which States can opt in to by a declaration.\(^73\)

The provisions on recognition and enforcement were put in place relatively early in the negotiations apart from the procedure to be applied to an application for recognition and enforcement of a maintenance decision. However, the latter issue was one of the issues that required hard bargaining and eventual resolution by an informal working group at the Diplomatic Session.\(^74\) The deal that was struck allowed for two different procedures. The standard procedure is set out in Article 23 and the alternative procedure is set out in Article 24. Article 23 is the default procedure whereas Article 24 only applies to States who make a declaration opting for that procedure. The details of the two procedures are discussed elsewhere.\(^75\) The significant point is that the alternative procedure that requires an opt in by way of declaration was designed to accommodate the Chinese delegation in order to preserve the consensus in the negotiations.

It is hoped that most States that ratify the Convention will adopt the simple system in Article 23 that creates an almost automatic system of registration of foreign maintenance decisions. It is certainly intended that when the EU ratifies the Convention it will apply the Article 23 procedure as this was the understanding of the Commission and the delegations of the EU Member States at the Diplomatic Conference that agreed the Convention. In the vast majority of cases there will be no appeal and contentious proceedings will be avoided. Maintenance creditors will then be able to get their decision enforced in the State addressed very quickly. Article 24 was designed to create a process that has a maximum of two stages rather than three and where the first stage permits submissions by the parties and wider *ex officio* review than is permitted under Article 23.

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\(^73\) Professor Borras is one of the authors of the explanatory report (*supra* n 12 at paras. 394-5) which regards Article 16 as an ‘alternative’ to Article 15: “The compromise reflected in Article 16 was developed by the Working Group on effective access to procedures to satisfy the internal legal requirements of certain countries, notably China, Japan and Russia.” The report says that it is not ‘envisaged that many States’ will opt for Article 16 and acknowledges that the compromise was agreed to try to secure ‘the widest possible ratification’ of the Convention.

\(^74\) See *Working Document No. 62*. On file with the author.

\(^75\) Paul Beaumont, *supra* n 2 at 536-539 and the explanatory report (*supra* n 12 at paras. 490-525).
Article 23. For these States it is likely that the first stage will be more protracted than under the Article 23 system and therefore in the vast majority of cases it may mean that it takes a longer time for the maintenance creditor to get her money. On the other hand, in the difficult cases that go to appeal the Article 24 system has the advantages over the Article 23 procedure that there is only one appeal and that during that appeal the enforcement of the decision will only be stayed in exceptional circumstances. It is as a result of these advantages and the need to find consensus in the negotiations that all States involved in the negotiations were happy to accept that States could make a declaration utilising the Article 24 procedure as an alternative to the Article 23 procedure.

Applicable Law Protocol

The Applicable Law Protocol had no need for declarations to accommodate differences of policy between negotiating States because many Members of the Conference decided that they did not wish to be a party to the Protocol and therefore left it to the EU and a few other States to negotiate the Protocol. Thus the only declarations that are permitted are technical declarations on (a) the extent of REIO competence if an REIO is involved in consenting to be bound by the Protocol; and (b) the extent of the application of the Protocol to different territorial units in a non-unified legal system, eg China.  

III RELATIONSHIP BETWEEN A TREATY AND OTHER INTERNATIONAL INSTRUMENTS

The issue of the relationship between the Choice of Court Convention and other international instruments required a high level of attention over a protracted period from the negotiators. Eventually this work resulted in Article 26. The examples provided in the explanatory report help to make the application of Article 26 much clearer. It is a little surprising that Brand and Herrup do not comment on the risk that an EC court will fail to comply with Article 26(6)(a) at the jurisdiction stage and will apply a rule of the Brussels I Regulation in a case where one of the parties is resident in a Contracting State that is a party to the Convention – even if that party is also resident in an EC Member State. This failure could then be

76 See Articles 24(3), 26(1) and 28. The explanatory report supra n 58 at para. 213 says that the Article on declarations utilises ‘traditional solutions’ that call for no particular comments. Paras. 207 and 211 give brief comments on the substantive Articles that allow for declarations.
77 See paras. 265-310, supra n 20.
78 Supra n 21 at 165-173.
compounded at the recognition and enforcement stage because all the other EC Member States have to give priority to the Brussels I Regulation rules of enforcement rather than the Convention rules due to Article 26(6)(b). So to twist the facts given in the examples in the explanatory report we can illustrate the effect of this risk arising.

An insurance company that was incorporated in Mexico but has its principal place of business in Portugal enters into a contract of commercial insurance with X, a company resident only in France. The contract contains a choice of court clause specifying the New York courts because the parties wanted a neutral and expert forum. The contract is covered by the prohibition on choice of court agreements in Article 13 of the Brussels I Regulation. X sues the insurance company in France relying on Article 9 of Brussels I. Article 26(6)(a) of the Convention should not apply because one of the parties is resident (see Article 4(2) of the Convention) in a Contracting State that is not a Member State of the European Community (Mexico). However, the French court makes a mistake in the application of the Convention, overlooking the fact that it is enough that the defendant is incorporated in Mexico to be resident there for the purposes of the Convention. X wins the case and tries to secure enforcement of the French judgment in Portugal. In the meantime the insurance company has successfully won its claim against X in the New York courts after X obtained a judgment against the insurance company in France. The Portuguese court is obliged to recognise the French judgment by virtue of Article 26(6)(b) of the Convention giving priority to the Brussels I rules on recognition and enforcement even though the French jurisdiction only arose because of its erroneous application of the Convention. If Article 26(6)(b) did not exist then the Portuguese courts would have had to recognise the New York judgment because none of the grounds for non-recognition of that judgment provided for in Article 9 of the Convention would have been applicable.

One has to hope that the courts in the EU will respect Article 26(6)(a) of the Convention. Brand and Herrup’s reluctance to criticise Article 26(6)(b) may stem from an acceptance that an REIO should be treated by analogy like a Federal State. If in the US a judgment in a particular state fails to comply with the Hague Convention, would the full faith and credit rule mean that it has to be recognised and enforced in all the other states in the United States? Certainly such recognition and enforcement is possible even when it

79 Supra n 20 at paras. 309 and 310.
conflicts with a judgment given in a Contracting State designated in an exclusive choice of court agreement because of the discretionary provision in Article 9(f) of the Convention.

Article 51 of the Maintenance Convention has a simple and wise provision on the relationship between the Convention and future instruments. It permits States to enter into Treaties, reciprocity arrangements and uniform laws as long as ‘such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention.’ Article 51(4) keeps the same proviso for REIO (Regional Economic Integration Organisations) Instruments except that REIO rules on recognition and enforcement of decisions as between Member States of the REIO take complete priority over the Hague Convention. The EU negotiators insisted on this in order to enable the abolition of the *exequatur* under the EC Maintenance Regulation.

It is worth noting that the EU can create simpler recognition and enforcement rules which affect non-EU parties unilaterally whereas the same can be done by other Contracting States agreeing between themselves to do so under Article 52(1)(a) and (b). In both cases these rules can affect the rights of parties from Contracting States not party to the REIO or the agreement. So there is consent to the principle that two or more States can simplify recognition and enforcement of maintenance decisions between themselves.

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80 Emphasis added.
81 REIO is a term of art in the Hague Conference, see Article 3(2) of the Statute of the Hague Conference on Private International Law permitting REIO’s to become Members of the Hague Conference available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=29> (accessed 18 December 2008). Article 3(2) states: ‘To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.’ The European Union may be the only REIO in the world at the moment which meets the three conditions specified in the Hague Statute, ie constituted solely by sovereign States, transfer of competence from its Member States to the REIO in a range of private international law matters and the ability of the REIO to take binding decisions on those matters. Given that the EU is constituted solely by sovereign States and that the Treaty of Amsterdam gave the EC the power in Title IV of the EC Treaty to make binding legislation in all areas of private international law the EC easily met the REIO definition. The EC was the primary driver for the amendment of the Hague Statute to allow it to join the Hague Conference and after the new Statute came into force on 1 January 2007 it was accepted into membership on 3 April 2007. Since 1 December 2009 and the entry into force of the Treaty of Lisbon the European Community has become the European Union and the power to make binding legislation in all areas of private international law is now contained in Chapter 3 of Title V of the Treaty on the Proper Functioning of the European Union, see OJ 2008 C115 and the other information available online at http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en (last accessed on 8 January 2010).

82 See *supra* n2 at 539 and Paul Beaumont and Emma Johnston, “Abolition of Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights” (2010/2) *IPRax* ??
regardless of the consequence on creditors and debtors from other Contracting States. It is a pity that this was done without addressing negative declarations but the risk is small given maintenance debtors do not get free legal aid and are rarely going to engage in such tactics. Only relatively wealthy people might do so. Article 52(2) allows unilateral simplification of recognition and enforcement rules but does contain some safeguards for the rights of the parties to be notified and heard. This should protect creditors against the worst effects of a negative declaration that was granted without his or her involvement.

IV ADOPTION OF TREATIES BY CONSENSUS

The use of ‘consensus’ for the adoption of Treaties “began to gain ground in the 1970s, and is now often incorporated in rules of procedure.”83 This idea is relatively new in The Hague84 having been introduced in practice in the 1990s in the latter stages of the failed Judgments Convention85, in the Hague Securities Convention86 and in the Choice of Court Convention.87 The reasons for such a shift to consensus from

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83 A. Aust, supra n 5 at 87.
84 Although not in other international organisations, such as the WTO. See Trade Negotiations Committee “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations” Article IX ‘Decision Making’ Marrakesh, 15 April 1994 in 33 International Legal Materials (1994) 1140 at 1148.
85 The full text of this story will appear in the Proceedings of the Twentieth Session of the Hague Conference on Private International Law. The Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Hague Conference (see Proceedings of the Nineteenth Session, Volume 1 (Koninklijke Brill NV, 2008) at pp.79-83) show that there was still unease with the text of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 30 October 1999 (the Judgments Convention) produced by the Fifth Special Commission on the Recognition and Enforcement of Judgments in Civil and Commercial Matters that was held from 25-30 October 1999. The compromise proposal on 12 May 2000, proposed by Denmark and the UK and unanimously accepted, that kept the process moving forward, was to agree that a two part Diplomatic Session would be held in 2001(possibly going into 2002). The methodology of restricting voting was novel and the agreement was as follows: ‘The first session would seek to achieve consensus on certain issues and binding decisions would only be taken to the extent that such consensus or near consensus was being reached.’ (at p.81). However, to show that the consensus principle had not yet been fully accepted the compromise went on to contain a threat of majority voting at the second session: ‘The second session would proceed in the normal way for Diplomatic Sessions.’ (at p.81). The first part of the Diplomatic Session took place in June 2001 but it became clear at that meeting that consensus did not exist on a large number of issues in the text and this was reflected in extensive use of square brackets. This problem was examined by the Permanent Bureau in, Some Reflections on the Present State of Negotiations on the Judgments Project in the context of the Future Work programme of the Conference, Prel Doc No. 16 of February 2002 in Proceedings of the Nineteenth Session at pp.429-435. Commission I on General Affairs and Policy held on 22-24 April 2002 agreed that the Secretariat should convene ‘an informal working group’ to review whether a core of the Judgments Project could be salvaged mentioning inter alia ‘choice of court agreements’ (see Proceedings of the Nineteenth Session at p.213). It was this informal working group that started the process that led to the Choice of Court Convention that was negotiated on a consensus basis throughout.
majority voting can be debated but include the fact that developed countries fear being outvoted and developing countries fear simply having a text delivered to them without any input. Bartels rather cynically describes ‘consensus’ as the least bad alternative.\textsuperscript{88} It was given mandatory status in The Hague by the revisions to the Statute of the Hague Conference that entered into force in January 2007 and require all the Hague’s negotiating bodies to operate on the basis of consensus ‘to the furthest extent possible’.\textsuperscript{89} The story of the introduction of the phrase ‘to the furthest extent possible’ is an interesting one. It was added at a very late stage in the negotiations at the Diplomatic Session on the new Hague Statute. The European Community was in a relatively weak position in those negotiations. It was very anxious to secure the amendment to the Statute that would permit REIO’s to become Members of the Hague Conference. It was therefore in the position of a supplicant asking other States to change the Statute for its benefit. Given the large voting power of the EC it was clear that the key objective for many other States in the Conference was to limit the power of that bloc vote. Therefore the goal for many was to establish consensus as the basis for Treaty negotiation in The Hague Conference. This concept was contained in the draft amendments to the Statute that emerged from the Secretary General’s expert group that was charged with preparing the ground for the revision of the Statute. However, at the eleventh hour in the Diplomatic Session certain States insisted on the addition of the words ‘to the furthest extent possible’ in Article 8(2) of the Statute and in Article 1A of the Rules of Procedure. It was not at all clear that the key States who negotiated the compromise understood the effect of the change. If one interprets Article 8(2) of the Statute on its own it seems clear that the introduction of the words ‘to the furthest extent possible’ weakens the obligation to arrive at consensus that would have been created by the earlier proposal that simply stated that ‘The Sessions, Council and Special Commissions shall operate on the basis of consensus.’ The earlier text appeared to create a legal obligation to reach decisions by consensus and if consensus could not be found in the decision making organs of the

\textsuperscript{87} See supra n 88.


\textsuperscript{89} See supra n 83 for the online link to the Statute. Article 8(2) of the Statute provides that: ‘The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.’ The need to achieve consensus may have the effect of increasing the number of declarations and reservations provided for in Hague Conventions, see Borras, supra n 55 at 126 and 139. Certainly Choice of Court and Maintenance, as we have seen above, utilised reservations and declarations to a significant degree to achieve consensus.
Hague Conference on a new Treaty text then no Treaty would be adopted. The new text, however, seems to imply that if the relevant bodies do their utmost to achieve consensus but fail to achieve it then some other decision making method is available. One can search the revised Statute in vain for any fallback procedure when consensus cannot be achieved. However, Article 12 of the Statute does provide that:

“The usages of the Conference shall continue to be observed on all points, unless contrary to the present Statute or to the Regulations.”

Those usages are contained in the Conference’s Rules of Procedure which were amended at the same time as the Statute was amended. The key change was to insert Article 1A into the previous Rules of Procedure that provided for simple majority voting. Those key articles are as follows:

“Rules of Procedure

**Quorum**
*Article 1*
For both plenary and commission meetings, delegations of the majority of the States participating at the Diplomatic Session shall constitute a quorum. This provision shall be applied *mutatis mutandis* to meetings of the Council on General Affairs and Policy and of Special Commissions.

*Article 1A*
To the furthest extent possible, all decisions shall be taken by consensus. If exceptionally it is not possible to attain consensus, decisions shall be taken by vote in accordance with the following rules.

**Voting rights**
*Article 2*
Each delegation shall have one vote. A delegation may not represent and vote for another delegation. A Member Organisation may exercise on matters within its competence, in any meetings of the Conference in which it is entitled to participate, a number of votes equal to the number of its Member States which have transferred competence to the Member Organisation in respect of the matter in question, and which are entitled to vote in and have registered for such meetings. Whenever the Member Organisation exercises its right to vote, its Member States shall not exercise theirs, and conversely.

** Majority required**
*Article 3*
Decisions of the Conference shall be made by a majority of the votes cast by delegations present at the time of the vote; abstentions shall not be counted as votes.”

The change made to the Rules of Procedure near the end of the negotiations on the revision of the Statute was to add in the words “to the furthest extent possible” at the beginning of Article 1A of the Rules of Procedure. As can be seen from the rest of Article 1A without those words the revisers of the Statute had obviously intended that voting would be used in exceptional cases when it proves impossible to attain consensus. In other words they had taken the interpretation of Article 12 of the Statute that the proposed Rules of Procedure allowing for voting in exceptional cases where consensus is not possible would be a ‘usage’ of the Conference that was not ‘contrary’ to the terms of the then proposed Article 8(2) of the Statute that contained no limit on the blunt requirement to operate on the basis of consensus.

Thus, a proper reading of the travaux préparatoires of the Statute and the Rules of Procedure reveals that the effect of adding ‘to the furthest extent possible’ in both the Statute and the Rules of Procedure was to strengthen the obligation to try to arrive at consensus before resorting to the exceptional use of majority voting.

An interesting question is whether one could arrive at the correct interpretation of the effect of these words, “to the furthest extent possible” in Article 8(2) of the Statute by applying Article 31 of the Vienna Convention?

Surely the revised Rules of Procedure of the Hague Conference is an “agreement relating to the treaty” which was made between all the parties in connection with the conclusion of the treaty” in terms of Article 31(2)(a). If so then the revised Rules of Procedure are part of the “context” that must be taken into account when interpreting the Statute. The revised Rules of Procedure were certainly negotiated with the revised Statute and were part of a package agreed by the Diplomatic Session in 2005.

One of the constructive features of the negotiations on the new Hague Maintenance treaties was States not blocking consensus on dossiers they were not engaged with, ie the many States who did not intend to ratify the Applicable Law Protocol, including most of the common law world, let those States who were interested in doing so negotiate the agreement those States wanted. Even on the main Convention some

90 The Hague Statute is a “treaty” within the definition provided by Art 2(a) of the Vienna Convention as it is an “international agreement concluded between States in written form and governed by international law”.

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States (eg Russia) showed an unexpected degree of flexibility because they recognised they had no immediate interest in ratification and wanted to allow those with such an interest to craft a workable agreement provided they could envisage their country being able to adjust to the Convention model in the medium to long term. One advantage of the consensus principle in Hague negotiations should be a strong commitment to ratification of the resultant treaties. One problem in the old Hague regime was the possibility that Conventions were put together on the basis of shifting simple majorities on individual articles of the Convention and that the Convention therefore contained a number of provisions that did not command consensus support. The new Hague model requires patience but it has already been demonstrated that it is workable. Consensus does not have to lead to the lowest common denominator. If a very strong player will walk away from the negotiations unless a level is reached that is significantly above the lowest common denominator it forces the other negotiators to choose between a deal or no deal. This happened in the Maintenance Convention negotiations and in the end individual EU Member States did not want to block the Commission and their fellow EU Member States from doing the deal they wanted to do with the US so they accepted free legal aid for child support cases and strong duties on Central Authorities to make the administrative and legal cooperation under the Convention work.

Whilst the Revised Statute and Rules of Procedure clearly allow for voting in exceptional cases, voting has been avoided in the two Conventions, Protocol and Statute studied in this lecture. Everyone

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91 The Hague Succession Convention of 1989 has only been ratified by The Netherlands. One factor in low ratifications may be that some controversial provisions were adopted by very small majorities. See eg the discussion in the explanatory report on the Convention by Professor Waters on Article 9(2) at para. 98, Article 15 at para. 113, and Article 16 at para. 116, available at http://www.hcch.net/upload/expl32e.pdf (last accessed on 8 January 2010). To be fair the report points out that the final text of the draft Convention was adopted with no contrary votes and only one abstention, see para. 10, and the sting is taken out of the close vote on Article 9(2) on an aspect of agreements as to succession by allowing a reservation in relation to all such agreements under Article 24(1)(a). Another reason for the non-ratification of the Convention may be that the text and the explanatory report are not entirely clear on the key question of whether the applicable law under the Convention applies to the clawback of lifetime gifts to donees who do not have a right to inherit anything from the deceased – the applicable law clearly does apply to lifetime gifts made to those who do have a right to inherit something from the deceased (known as collation in Scotland and Hotchpot in England and Wales) – see Article 1(2)(d) and Article 7(2)(c) as discussed in paras. 46 and 78 of the explanatory report. The fact that such clawback of lifetime gifts to donees who do not inherit under the deceased’s estate does fall within the applicable law under the European Union Commission’s proposal for a Succession Regulation (Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 final) in Article 19(2)(j) and recital 9, was the primary reason why the UK did not opt in to those negotiations and one of the reasons why Ireland did not do so (announcements of the non-opt in to the negotiations were made at a meeting of the Committee of Civil Law by Ireland and the UK on 4 January 2010 and had been made by Jack Straw to the House of Commons on 16 December 2009 http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091216/wmstext/91216m0003.htm#09121667000241 (last accessed on 8 January 2010).

92 See P. Beaumont, supra n 2 at 516-519.
concerned was determined to make consensus work and to avoid voting. It is to be hoped that continued
determined efforts to use consensus to “the furthest extent possible” will mean that in practice the provision
for voting will become a dead letter. As consensus is not the same as unanimity States do not have to grant
their support to a controversial provision in the text they just have to be willing to live with it.93 One cannot
describe it as an abstention because there is no voting. Instead it covers a situation where a State that has
objected to a particular provision chooses to remain silent when the chair of the plenary session asks if
members would block consensus on the provision.94 However, it may be in everyone’s interests to have the
threat of voting available in an extreme case where one or two States are blocking consensus unreasonably
(eg not being content with a declaration option).95 States who gain a lot from the negotiating power that a
consensus system provides (notably China, Russia and USA in the Hague Conference) will be wary of
reducing that power by creating a precedent for the first use of voting in The Hague Conference since the
revision of the Statute. Thus they will use the threat of blocking consensus as far as they can to achieve their
negotiating objectives without behaving in such an unreasonable way that other States press for a vote. It is
this desire to protect the ‘consensus’ principle from being departed from by voting that is the best defence
against one or more States blocking consensus unreasonably.

93 See A. Aust, supra n 5 at 87.
94 When the revised Statute was adopted by the Diplomatic Session in June 2005 the Argentinian delegation objected
strongly to a particular provision for a long time but late in the night the Chair, Monique Jametti-Greiner, was able to
ask whether any Member State was prepared to block consensus on that provision and the Argentinian delegation’s
silence was enough to allow her to rule that the provision was adopted by consensus.
95 A Aust, supra n 5 at 87.