

Council on General Affairs and Policy of the Conference – March 2019

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 26 of January 2019
Title	Procedural steps of a Diplomatic Session leading to the adoption of a new HCCH Convention – prepared for the 2019 (22 nd) Diplomatic Session leading to the HCCH Judgments Convention	
Author	Permanent Bureau	
Agenda item	Item III.1	
Mandate(s)	C&R Nos 3-5, in particular No 4, of the 2018 Council on General Affairs and Policy C&R Nos 5-7, in particular No 5, of the 2017 Council on General Affairs and Policy C&R Nos 11-14, in particular No 12, of the 2016 Council on General Affairs and Policy	
Objective	To identify and clarify the effects of the procedural steps taken during a Diplomatic Session (DS) leading to the adoption of a new HCCH Convention in advance of the 2019 DS (the 22 nd in the history of the HCCH) which will lead to the adoption of the HCCH Judgments Convention.	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/>	
Annexes	n.a.	
Related documents	n.a.	

I. Introduction and background

1. The purpose of this document is to identify and clarify the effects of the procedural steps taken during a Diplomatic Session (DS) leading to the adoption of a new HCCH Convention (or Protocol). The document is being prepared for the 2019 DS (the 22nd in the history of the HCCH) which will lead to the adoption of the HCCH Judgments Convention.

2. While the Statute of the HCCH and, to a limited extent, the Rules of Procedure (RoP)¹ provide some basis for the procedural steps to be taken at a DS, this basis is by no means detailed or comprehensive. Usages thus play an important role. These usages, however, have evolved and changed over time.² Against this background, it seems important, ahead of the 2019 DS (*i.e.*, 12 years after the previous one), to take stock of current usages and to reflect how the existing rules, complemented by usages, will determine the procedural steps leading to the adoption of the HCCH Judgments Convention.

II. The steps

3. The main procedural steps leading to the adoption of a Convention (as applied to the future Judgments Convention) may be summarised as follows:

- i) *Opening* of the DS (Plenary) by the Chair of the Netherlands Standing Government Committee on Private International Law (Prof. Paul Vlas, Art. 4(5) of the Statute; Art. 5A(1)(a) of the RoP);
- ii) Election of one or more *Vice-Chairs of the DS* (tbd) as well as the *Chair of the Commission* of the Session mandated to finalise the draft Judgments Convention (envisaged Chair: David Goddard), all upon the proposal of the Chair of the DS (Art. 5A(1)(b) RoP); as there is only one Convention to adopt (and the Council on General Affairs and Policy (CGAP) is not expected to meet during the DS, see below ix), the Commission does not need to be numbered, it will simply be “the Commission of the Diplomatic Session”;

¹ The RoP of the HCCH are currently being revised. The new version of the RoP, however, will not be adopted before the DS 2019; the current plan is to submit it for approval to CGAP in 2020. This said, at this stage, it is still possible that the new *Observers Policy*, which eventually will form part of the RoP, will be submitted in advance, as a separate document, for approval to CGAP in 2019 so that, if approved, it will provide a formal basis for the policy to be adopted in relation to observers at the DS 2019. Also, at the beginning of its deliberations, a DS formally approves the applicable RoP. For practical reasons, the DS may decide not to strictly follow the RoP (*e.g.*, see 19th and 20th DSs, which decided not to have full second and / or third readings; for the 19th DS, see Minutes No 18 of Commission III, pp. 547-548 and Minutes No 2 of the Plenary Session, p. 560 (in *Proceedings of the Nineteenth Session (2002)*, Tome II, *Securities*, Koninklijke Brill NV, 2008); for the 20th DS, see Minutes No 24 of Commission II, p. 733 and Minutes No 2 of the Plenary Session, p. 758 (in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Intersentia / Antwerp-Oxford Portland, 2010)).

² The evolution of usages may be illustrated in relation to what establishes the *date* of a Convention. Until the Securities Convention (which was finalised during the 19th DS held in December 2002), the date of a Convention was determined by the date of the first signature of the Convention, even when the signature occurred months or years after the DS; for example, while the DS leading to the Securities Convention ended on 13 December 2002, the Convention was first signed on 5 July 2006, giving the Convention its date. Also, under that system, a Convention remained a *draft* Convention until the date of the first signature. This system was abandoned with the adoption of the Choice of Court Convention (at the 20th DS held in June 2005). This Convention bears the date of the last day of the DS that led to its adoption (30 June 2005), though it was first signed on 1 April 2009 (following a first accession to the Convention on 26 September 2007). Likewise, the *Protocol on the Law Applicable to Maintenance Obligations* bears the date of 23 November 2007 (*i.e.*, the last day of the 21st DS) although the Protocol was first signed on 8 April 2010. One may note that the 2007 Child Support Convention also bears the date of 23 November 2007, but it was also first signed on that date.

- iii) The Chair and Vice-Chairs of the DS, and the Chair of the Commission, shall, together with the *Rapporteurs* and the Chair of the Drafting Committee, constitute the *Bureau* of the DS (Art. 5A(2)(a) RoP);
- iv) The work of the Commission will include *first and second readings* (under the current RoP; see in particular Art. 16 of the RoP, which deals with the reconsideration of proposals and which, under current practice, applies to the second reading, it being understood that in all circumstances, *consensus* remains the guiding principle); with the completion of the second reading, the work of the Commission ends; the result of the Commission's work is (still) a *draft* Convention;
- v) The DS then meets (again) *in Plenary* (either immediately following the Commission or the next day, as the case may be), and proceeds with the third reading (current RoP apply, incl. Art. 16 mentioned above); the result of the third reading is *an agreement on the final text of the Convention*; this agreed Convention text is subject only to *toilettage* and/or formatting;
- vi) On the last day of the DS (in this case, 2 July 2019), the Plenary meets for the closing ceremony of the DS which includes in particular:
 - o a short *reading* of the final Convention text (Preamble – key Articles – final Article), which may have undergone some (overnight) *toilettage* or formatting; this reading is ceremonial in nature and has no legal effect;
 - o the *signing of the Final Act* (FA); all participating *Members* of the HCCH may sign the FA (and amongst all Members' delegations, each member of the delegation may sign the FA); signing the FA does not amount to signing the Convention – these are two completely separate matters (see below viii); by signing the FA, delegates (merely) express their agreement that the text reproduced in the FA is indeed the result of the negotiations;³ the signing of the FA records the *adoption* of the Convention;
 - o if *toilettage* is to remain possible even after the signing of the FA, it must be recorded expressly in the minutes of the DS; while such *toilettage* and reformatting has indeed taken place in the past, this practice is to be avoided as much as possible;
 - o observers may attend the closing ceremony, but will not be invited to sign the FA;⁴
 - o against the above background, it is suggested that the text of the FA read as follows:

“The undersigned, Delegates of [list of Members represented], convened at The Hague from 18 June to 2 July 2019, at the invitation of the Government of the Netherlands, in the Twenty-Second Session of the Hague Conference on Private International Law. [¶] Following the deliberations laid down in the record of the meetings, they have adopted - [¶] The following Convention - [¶] ...”
- vii) Based on the most recent practice, the date of the signing of the FA determines the date of the Convention, the title of which would thus be *HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (“*HCCH Judgments Convention*”);

³ The FA of the 21st DS reflects this agreement by stating that “[t]he undersigned [delegates,] [f]ollowing the deliberations laid down in the records of the meetings, [...] have adopted – [the following Convention]”, in *Proceedings of the Twenty-First Session (2007)* (forthcoming),.

⁴ Practice in this regard varies: at the 19th (Securities) and 21st (Child Support) DSs, observer States signed the FA; at the 20th DS (Choice of Court) no observer State signed the FA. See, however, Minutes of the closing ceremony, p. 30, Tome I of the 20th DS, which seem to suggest that no observer State actually attended the closing ceremony.

- viii) If a State / REIO wants to sign (and / or ratify, accede, approve etc.) the actual Convention, it may do so after the FA has been signed, provided the official has the full powers to do so (same as if that person signed, ratified, etc. say two years later at the MFA);
- ix) At this stage, it is not envisaged that CGAP meets during the 2019 DS; the only purpose of the DS is to adopt the Judgments Convention, and there is no other business to be discussed; if, however, there is new work for the PB to be added to the work programme as a result of the DS, CGAP may meet to approve the proposed addition to the work programme of the HCCH. Note, however, that “[d]uring Diplomatic Sessions, the Council on General Affairs and Policy shall sit as the Session’s Commission on General Affairs and Policy”.⁵

4. With the closing of the meeting, the 22nd DS of the HCCH ends (and the 23rd DS starts).

III. Proposal

5. The PB invites CGAP to take note of the proposed procedural steps (or to suggest amendments) so as to provide the 2019 DS with a clear framework for the adoption of the HCCH Judgments Convention. In addition to adopting the actual RoP at the beginning of its deliberations, the DS could separately also endorse the above description of the nature and effects of the procedural steps.

⁵ Art. 5A, I., 1.c of the RoP. For example, the 19th DS (Securities) also adopted decisions on (amongst others) the work programme of the HCCH, having regard to the deliberations of its First Commission (which had met in June 2001 and April 2002). The 20th Session (Choice of Court) also adopted amendments of the Statute of the HCCH. By contrast, the 21st DS only adopted *Recommendations* on further work relating to the Child Support Convention, which then had to be submitted to, and approved, by CGAP.