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Special Commission
on international jurisdiction
and the effects of foreign judgments
in civil and commercial matters

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DOCUMENT SUBMITTED BY THE CO-REPORTERS ON THE UNIFORM INTERPRETATION OF THE PROPOSED CONVENTION ON THE JURISDICTION, RECOGNITION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

INTRODUCTORY REMARKS

It is obvious from discussions both within and without the Special Commission that the question of ensuring a uniform interpretation of the proposed Convention could be of the utmost importance.[1] Without such uniformity, the risk of divergent national applications will increase and the hoped for advantages of certainty and predictability will be lost. At the same time one must be aware of the difficulty in co-ordinating any international machinery for interpretation with the prerogatives of national courts and the risks of imposing further expenses and delay through providing additional means of appeal or review of decisions. This Paper presents a number of proposals. They are not necessarily mutually exclusive.

A An international court or tribunal

As the Secretary-General has reminded us, under a 1931 Protocol which may still be in force in several States the Permanent Court of International Justice was given jurisdiction to interpret Hague Conventions. That Protocol was never invoked, but the International Court of Justice in the *Boll* case (*Case Concerning the Application of the Convention* of *1902 Governing the Guardianship of Infants: Netherlands v Sweden* [1958] ICJ Reports 55), had the occasion to consider the application of the 1902 Convention on a special reference by the two States involved.

Although it may be possible for States to agree to refer a dispute concerning the interpretation or application of a Hague Convention to the ICJ, it is clearly not a practical proposition. Rather what would be needed, is an agreement empowering the ICJ to give *preliminary rulings* on matters of interpretation of the future Convention *at the request of national courts*. The idea, in general, of enabling the ICJ to give preliminary rulings at the request of national courts, which may require an amendment to the Court's Statute, has been under discussion for some time, but so far without concrete results.

[1] See, Preliminary Document No 8, para. 89.

The creation of a specialised tribunal to deal with Hague Conventions generally, or the Jurisdiction and Recognition of Judgments Convention in particular, cannot at this stage be regarded as a feasible, or acceptable, option. There would probably be no point in creating such a special tribunal unless it were to deal with more private law treaties, possibly including those of international organisations other than the Hague Conference. This proposal is therefore simply raised in order to dismiss it.

B The Panel of Experts

A proposal was made in Preliminary Document No 7, para. 200, for a Panel of Experts which would give interpretative rulings at the request of a court in a State Party to the Convention. The scheme as outlined in that paragraph would invite State Parties to each nominate two experts to constitute a list from which the Panel would be drawn. After a question had been referred to it by the court in question, the Permanent Bureau, or any other chosen entity, would activate a panel of three experts. Other than stating that it would be by reference to "predetermined rules", the proposal did not specify how and by whom the constitution of the ad hoc panel was to be determined. The panel would meet at The Hague or elsewhere and deliver its determination within a reasonable time.

Before raising several points on the proposal - and there are obviously many more comments that one could make - we would like to underscore the strong policy underpinnings for the idea of interpretative rulings at the request of national courts. The goal is a flexible mechanism which gives guidance in achieving predictable results, at very low cost to the courts and the parties. Of course, the Convention by itself will already achieve such a result. The experience with the Brussels Convention, however, shows the importance of an interpretative mechanism for the practical operation of the Convention. Our Convention, which is intended to be of world-wide application, will be even more in need of interpretative rulings, even if they were not to be binding upon the requesting courts and parties. None of the other suggestions which follow (C-F) could even remotely hope to achieve the results which an interpretative ruling through a panel of experts could achieve. We therefore strongly recommend that this question be given full consideration by the Special Commission at some point during its deliberations (but not necessarily at the November Special Commission). We realise that it is quite possible that we may not reach agreement on a detailed proposal during the negotiations on the Convention, but we think it possible to achieve agreement on the basic principles, include a rule in the Convention, and leave the details of procedural rules to a subsequent Special Commission meeting to be held after the Nineteenth Session.

The following points, among others, could be made about this proposal:

1. The decision to refer would be optional (as would be the resulting opinion, see *infra* 4). The procedure could be initiated by a common agreement by the parties to the dispute or by the court before which the issue arose.

2. The method of selecting experts for the panel would be crucial. One method might be to follow United Nations practice in relation to bodies such as the International Tribunal on the Law of the Sea, and have States Parties elect a smaller panel, say 10, with suitable representations of regional and legal traditions for a fixed, and perhaps non-renewable term of say, 5 years whose members could sit as panels of 3 in rotation with perhaps a representative or nominee of the State whose court made the reference being included ad hoc. The point of the proposal is to ensure impartiality and high competence, both theoretically and practically in the field of jurisdiction and enforcement of judgments, of the experts.

3. Another method might be to have a broader list of experts kept at the Permanent Bureau, or any other chosen entity, from which an ad hoc panel of three members could be selected by common agreement of the parties involved, and, failing such an agreement, by the institution to be designated in the Rules of Procedure. Here one might draw an analogy with the ICSID or WTO proceedings, bearing in mind, however, (see also point 5 *infra*) that the task of the panel members would be quite different from that of arbitrators. That task would be to give advice on points of law only, and it is precisely for that reason that the procedure can be relatively short and the costs low. Indeed, being appointed a panelist should be considered as a matter of honour rather than a source of income.

4. The other important question would be the binding force, if any, of the opinion of the ad hoc panel. Presumably, the court seeking the advice would gladly receive it and apply it. But would other courts before whom the same issue arose do the same? To give the determinations of the panel binding effect did not, from the tenor of the discussions held in the Special Commission, appear to be an acceptable proposition. But if it is to be advisory only, much will depend on the standing of the experts on the panel and the persuasiveness of their opinions. Presumably, there should only be one opinion of the panel and dissents should not be disclosed.

5. Time would clearly be of the essence and oral arguments should be limited or avoided. Obviously, the reference would only be on a point of law and even "mixed issues" such as whether a given person is habitually resident in a particular country at a point of time, should be avoided. But even written submissions with a right of reply will take time, although time could be saved if the panel could receive documents and briefs on line and perhaps even meet with the parties on line. There may be greater difficulties if the language of the referring court is neither French or English and the material has to be translated. The composition of the panel will have to take into account language skills in order to avoid translations as much as possible.

C Conventional duty to strive for uniformity

Article 16 of the Hague Sales Contracts Convention 1986 provides:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

This type of provision is found in many other international Conventions, such as Article 7.1 of the 1980 Vienna Convention on Contracts for the International Sale of Goods. It is probably fair to say that this provision does not add much to the general obligation to interpret international conventions in a consistent and uniform manner. This obligation has been accepted by Anglo-Commonwealth courts since 1932: see *Stag Line Ltd v. Foscolo, Mango & Co. Ltd* [1932] AC 328 at 350 per Lord Macmillan. However, it may have some educational use. A more specific and useful provision is found in Article 1 of the Second Protocol to the Lugano Convention:

> The courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention.

D Exchange of information about court decisions and writing of jurists

The clauses suggested in Proposition C would have little significance unless courts had access to decisions and writings on the subject in other States. To a great extent the Permanent Bureau fulfills that function. It publishes bibliographies and collects decisions on Conventions. The series *Les nouvelles conventions de la Haye*, previously edited by Dr Sumampouw and now by Dr Schmidt of the Asser Institute, has been very useful. However, it is not comprehensive: it has correspondents in only a few countries and even then cannot hope to cover all decisional law there. Until now it has been published in French only and is therefore not accessible to all users.

To be effective, the system of collecting and reporting would have to be better organized and more comprehensive. Again Article 2 of the Lugano Protocol offers some guidance. It provides for the transmission to a central body of decisions of courts of final instance and judgments of special importance. The central body is charged with the classification of the decisions and the drawing-up and publication of translations and abstracts.

A somewhat similar system is operated by UNCITRAL in respect of its Conventions. It disseminates information on case law relating to Conventions and Model Laws that have emanated from the work of the Commission (Case Law on UNCITRAL Texts (CLOUT). The Secretariat publishes in the six languages of the United Nations abstracts of decisions and makes available against reimbursement of copying expenses, the original decisions on the basis of which the abstracts were prepared. The abstracts for CLOUT are prepared by National Correspondents designated by their governments. CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

The system may offer a useful tool, but does not provide a complete answer. The UNCITRAL model puts fewer burdens on the central body/ secretariat which in our case would be the Permanent Bureau. At the same time one may query how effective the scheme is, as much depends on the enthusiasm of the National Correspondent. Thus in CLOUT Canadian decisions on the UNCITRAL Model Arbitration Law are well represented, but many other States which have enacted the Model Law appear to be missing.

Another method whereby relevant decisions and opinions can be brought to the attention of courts in important litigation affecting the interpretation of the Convention is through the Permanent Bureau bringing to the attention of the court the relevant decisions and writings and presenting an argument why a particular interpretation should be preferred. The Bureau has done this on two occasions, before the German Bundesverfassungsgerichtshof and the Australian High Court.[2] National procedures may have to be revised. In Australia, for instance, the High Court seemed undecided whether it should treat the brief as "evidence" which required a permission it was reluctant to give, or as part of the submissions of the Commonwealth of Australia which had intervened in the proceedings. In the end it adopted the latter course with some misgivings, but no reference appears in any of the opinions delivered to the submissions made! Only one justice, Kirby J., appears to have been influenced by them in forming his views.

[2]De L. v Director-General , NSW Dept of Community Services (1996) 139 ALR417.

E Periodic review of the Convention

In respect of the more recent Hague Conventions, the practice has been established of periodically convening Special Commissions to consider the operation of the Convention. Thus, so far, three such Commissions have been held to review the operation of the 1980 Child Abduction Convention (1989. 1993 and 1997). Although those reviews are not confined to issues of interpretation, the problem of divergent interpretations is raised and questionnaires are designed to draw them out. The procedure received recognition in the Inter-country Adoption Convention 1993 in Article 42 which provides:

> The Secretary-General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.

The same clause appears as Article 56 of the Child Protection Convention 1996. No doubt the words "and interpretation by national courts" or similar could be added to such a text in our Convention.

However, it is one thing to call a Special Commission, but it is quite different to do something about it once serious divergences in interpretation develop. A consensus in a Special Commission may bring a recalcitrant court into line, but equally, it may not.

The Second Protocol to the Lugano Convention in Articles 3 and 4 may offer a model. It provides for a Standing Committee consisting of experts from each signatory State. That Committee is specifically charged with the duty of examining the case law collected under Article 2 and making recommendations for a revision of the Convention. This clearly would not involve a determination on the merits or demerits of individual decisions, but on weaknesses or ambiguities emerging from the interpretation of the Convention.

An even more direct method of proceeding is suggested by Article 30 of the Access to Justice Convention 1980. Admittedly that provision is limited to the revision of forms annexed to the Convention, but its principle could be extended. Thus the Special Commission to review the Convention could be authorised not only to make recommendations, but, subject to proper notice being given of the proposals, adopt amendments of the Convention by majority which would come into force for all Contracting States, unless a State notified the depositary of a reservation with respect to the amendment.

F A Standing Committee of Experts to review the operation of the Convention

This proposal combines some of the elements of Proposals B and E. As in Proposal B, there would be a standing body, composed of experts, rather than national delegates, appointed by States for a specific term of , say, five years. Membership would rotate, so as to ensure continuity. But, as in Proposal E, it would only be concerned with the interpretation of the Convention as a whole, and not with the review of individual cases. Hence, delay or expense to individual parties would be avoided.

This Standing Committee would meet at least once a year to review on its own motion the case law developed in national courts and to consider other issues of interpretation of the Convention referred to it by the Permanent Bureau, States parties or national authorities, if so authorised. It would not pronounce on matters falling within the procedure leading to the decision of individual cases. In situations where divergencies of interpretation have arisen or ambiguities are drawn to its attention, the Standing Committee could offer its recommendations or opinions on the interpretation of the Convention. Like the Lugano Panel of Experts, it could make recommendations for a revision of the Convention which would require the convening of a Special Commission to consider them, if the Secretary-General saw fit to do so. But its main function would be to give advice on the interpretation of the Convention.

Unless incorporated into a Protocol agreed to by States Parties, those recommendations and opinions on the interpretation of the Convention would not be binding on national courts, although it may be useful to insert an Article which would allow, but not direct, national courts to take such recommendations and

opinions into consideration. The weight given by national courts to such opinions will, of course, depend very much on the level of experts appointed.

Attach copy of Second Protocol Lugano
Attach copy of Article 30 Access to Justice Convention