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NOTE ON ARTICLE 1(1) OF THE 2016 PRELIMINARY DRAFT CONVENTION AND THE TERM "CIVIL OR COMMERCIAL MATTERS"

drawn up by the co-Rapporteurs of the draft Convention and the Permanent Bureau

Preliminary Document No 4 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments

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I. Introduction

1. Article 1(1) of the 2016 preliminary draft Convention states:

> "This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters."

2. The purpose of this Note is to analyse the concept of *"civil or commercial matters"* used in Article 1(1). The Note is organised as follows. Section II provides some preliminary remarks. Section III analyses the meaning of those terms in the 2005 Choice of Court Convention and in other Hague instruments. Section IV analyses other possible sources that assist in understanding the scope of this concept. Finally, Section V draws some conclusions. An annex is included, providing summaries of the position of the Court of Justice of the European Union on this issue (Annex I). Two further annexes are included, providing summaries of the position of national courts on this issue with respect to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ("the 1965 Service Convention") and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("the 1970 Evidence Convention") (Annexes II and III, respectively).

3. The sources and case law discussed in this Note predominantly derive from the European Union. Indeed, other than in the referred Hague Conventions, the concept of "civil or commercial matters" has been systematically used in EU civil procedural law and other European instruments, such as the 2007 Lugano Convention,[1] and such sources may prove instructive on how the concept may be interpreted.[2] This Note also draws information from texts adopted in the framework of the United Nations Commission on International Trade Law ("UNCITRAL") and the International Institute for the Unification of Private Law ("UNIDROIT").

II. Preliminary remarks

4. For the purpose of Article 1(1) of the 2016 preliminary draft Convention, the interpretation of "civil or commercial matters" should be based on two premises:

- The concept of "civil or commercial matters" must have an autonomous meaning.
- The characterisation of a dispute as being civil or commercial must be determined by the nature of the claim and not necessarily by (i) the nature of the court; (ii) or the mere fact that a State is a party to the proceedings.

(a) Autonomous meaning

5. The concept of "civil or commercial matters", like other legal concepts used in the 2016 preliminary draft Convention, must be interpreted **autonomously**, *i.e.*, by reference to the objectives of the Convention, not by reference to national law. This ensures a uniform interpretation and application of the future Convention in all Contracting States. This principle is expressly stated in the Hartley / Dogauchi Report.[3] A similar clarification should be included in the Explanatory Report of the future Convention.

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[1] Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, concluded at Lugano(OJ 2007 L 339), replacing the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded at Lugano(OJ 1988 L 319).

[2] Other regional instruments on recognition and enforcement of judgments do not appear to confine to the term "civil or commercial matters" their substantive scope of application. See, for instance, the Conventions concluded in the framework of the Organization of American States (OAS) on recognition and enforcement of judgments (and arbitral awards): *e.g.*, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979 Montevideo Convention) at Art. 1; or the Conventions or Protocols concluded in the framework of MERCOSUR: *e.g.*, Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters (Las Leñas Protocol) at Art. 1; or the Conventions or Protocols concluded in the framework of the Gulf Cooperation Council: *e.g.*, Protocol on the Enforcement of Court Judgements, Letters of Rogatory and Judicial Notices in the Gulf Cooperation Council Arab countries (GCC Protocol) at Art. 1.

[3] T. Hartley and M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010 [hereinafter, the "Hartley / Dogauchi Report"], para. 49 ("Like other concepts used in the

(b) The nature of the court

6. During the First meeting of the Special Commission on the Judgments Project it was agreed that the Explanatory Report of the future Convention should expressly clarify that the Convention applies **whatever the nature of the court**, *i.e.*, irrespective of whether the (civil / commercial) action is brought before a civil, criminal, administrative or labour court.[4] For example, the Convention applies to civil claims for compensation for victims of crime given by criminal courts (when the joinder of both actions is possible under the procedural law of the State of origin).

(c) The nature of the parties

7. As clarified by Article 2(4) of the 2016 preliminary draft Convention, a judgment is not excluded from the scope of this Convention **by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings**. Thus, insofar as the nature of the dispute qualifies as civil or commercial, a State, or an international organisation, being a party to the proceedings in the State of origin does not in itself preclude the Convention being applied. Naturally, the Convention does not affect privileges and immunities of States or international organisations (Art. 2(5) of the 2016 preliminary draft Convention).

8. In addition, the characterisation of an action does not change by the mere fact that the claim is transferred to another person, be it by assignment, by succession or that the obligation is assumed by another person. That is, if a private body were to transfer a claim to a State, government or government agency, such as when a private entity subjugates its right to a claim under a governmental insurance scheme, its characterisation as a civil or commercial claim would not be precluded.

(d) Exclusions from scope

9. Certain matters that would otherwise qualify as civil or commercial matters are nevertheless excluded from the scope of the 2016 preliminary draft Convention under Article 2. The list of excluded matters in Article 2(1) of the 2016 preliminary draft Convention is similar to the list of excluded matters under Article 2(2) of the 2005 Choice of Court Convention. There are, however, some excluded matters in the 2005 Choice of Court Convention which are not listed under Article 2(1) of the 2016 preliminary draft Convention.[5] Anti-trust / competition is one of these.

10. During the First meeting of the Special Commission on the Judgments Project, the extent to which the future Convention should apply to anti-trust / competition was discussed. The Chair identified the need for further work on anti-trust / competition issues, which are at the crossroads of private and regulatory enforcement.[6] This Note thus considers the application of

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Convention, 'civil or commercial matters' has an autonomous meaning: it does not entail a reference to national law or other instruments")*;* see also "Preliminary Draft Convention adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013 [hereinafter, the "Nygh / Pocar Report"], p. 216.

[4] See also Nygh / Pocar Report, para. 23 and also para. 27, which states: "It should be noted that the scope of the preliminary draft Convention is defined in terms of 'matters' not 'courts'. Consequently, the characterisation of the matter as civil or commercial should depend on the nature of the claim and not necessarily on the character of the court in which the action was brought, be it civil, commercial, penal or administrative.".

[5] Such as: claims for personal injury brought by or on behalf of natural persons; tort or delict claims for damage to tangible property that do not arise from a contractual relationship; rights in rem in immovable property, and tenancies of immovable property; the validity of intellectual property rights other than copyright and related rights; infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract. Conversely, defamation is excluded from the 2016 preliminary draft Convention, but is not expressly excluded in the 2005 Choice of Court Convention possibly because it is not frequent for defamation cases to be subject to a choice of court clause.

[6] See "Aide mémoire of the Chair of the Special Commission", Special Commission on the Judgments Project (1-9 June 2016), para. 26(c) ("There was a consensus that further work is needed to clarify which matters of that kind should appropriately be included within the scope of the draft Convention") and "Minutes No 9",

the general parameters set out below on "civil or commercial matters" to anti-trust / competition actions in paragraph 43.

11. In conclusion, the substantive scope of application of the 2016 preliminary draft Convention is determined by the nature of the dispute (civil or commercial matters, autonomously defined and not expressly excluded), whatever the nature of the court or the conditions of the parties (private body or a State / governmental body).

III. Hague Conventions

(a) The 2005 Choice of Court Convention

12. The 2005 Choice of Court Convention also uses the concept "civil or commercial matters" (Art. 1(1) *in fine*). [7] The Hartley / Dogauchi Report offers some guidance on the meaning of this concept:

- The use of those terms is "**primarily intended to exclude public law and criminal law**".[8]
- Unlike the 2016 preliminary draft Convention, the 2005 Choice of Court Convention does not expressly exclude "revenue, customs or administrative matters". As explained in the Hartley / Dogauchi Report: "[…] the preliminary draft Convention 1999 contained a further provision expressly stating that the Convention would not apply to revenue, customs or administrative matters. **This provision was not included in later drafts because it was thought to be unnecessary: it was considered obvious that such matters could not be civil or commercial**".[9]
- When discussing the application of the Convention to States, the Hartley / Dogauchi Report appears to oppose "civil or commercial matters" to sovereign acts: "[…] as a general rule, one can say that **if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter. If, on the other hand, it is exercising governmental powers that are not enjoyed by ordinary citizens, the case will probably not be civil or commercial**".[10]
- Finally, the difference between "civil" and "commercial" matters is aimed at encompassing those legal systems where "…**'civil' and 'commercial' are regarded as separate and mutually exclusive categories. The use of both terms is helpful for those legal systems. It does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings**".[11]

13. In conclusion, in the 2005 Choice of Court Convention, the concept of "civil or commercial matters" is used as opposed to public and criminal law, where the State is exercising governmental powers that are not enjoyed by ordinary citizens.

(b) The 1999 preliminary draft Convention and the Nygh / Pocar Report

14. The Nygh / Pocar Report considered in detail the scope of the 1999 preliminary draft Convention. In the negotiations that followed through 2001, no substantive work on the topic was added. Because the Nygh / Pocar Report considered the concept of "civil or commercial matters" in the context of Article 1 of the 1999 preliminary draft Convention in an almost identical form to the 2016 preliminary draft Convention, it remains the most informative source pertaining to the earlier phase of the Judgments Project for the purposes of this Note. Specifically, the Nygh / Pocar Report is instructive in interpreting the relationship between

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Special Commission on the Judgments Project (1-9 June 2016), paras 22-44. These two documents are available through the Secure Portal of the Hague Conference at < www.hcch.net >.

[7] This concept was discussed in earlier phases of the negotiations. See, for example, A. Schulz, "Report on the work of the Informal Working Group on the Judgments Project, in particular on the preliminary text achieved at its Third meeting – 25–28 March 2003", Prel. Doc. No 22 of June 2003, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, p. 77.

[8] Hartley / Dogauchi Report, para. 49; see also Nygh / Pocar Report, p. 217.

[9] *Ibid.*, note 71.

[10] *Ibid.,* para. 85.

[11] *Ibid.*, para. 49; see also Nygh / Pocar Report, pp. 217 and 219.

Article 1(1) ("civil or commercial matters") and Article 2(4) ("Governments") and 2(5) ("Immunities") of the 2016 preliminary draft Convention as these respective provisions are almost identical to the corresponding provisions of the 1999 preliminary draft Convention.

15. According to the Nygh / Pocar Report, Article 1(3) of the 1999 preliminary draft Convention (which corresponds to Art. 2(4) of the 2016 preliminary draft Convention)

"[…] further clarifies the meaning of 'civil and commercial matters'. The characterisation of the claim cannot be made to depend merely on whether a government, a governmental agency or any other person acting for the State is a party. One delegation […] in Working Document No 286 stated as its understanding that the Convention will apply to disputes involving government parties, if the dispute contains the following core criteria:

- **the conduct upon which the claim is based is conduct in which a private person can engage;**
- **the injury alleged is injury which can be sustained by a private person;**
- **the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.**

Although the exact limits can never be exhaustively defined, we agree that these are the core criteria for determining whether a dispute involving government parties falls within the scope of 'civil and commercial matters'".

[…]

Conversely, actions which are brought by or against governmental bodies which seek to enforce compliance or to prevent non-compliance with public regulations, as opposed to obligations arising from a contractual relationship or other obligations imposed by the general law of tort or delict, are obviously not within the scope of 'civil and commercial matters'."[12]

16. Furthermore, the addition of a rule on immunities of States and other governmental bodies is explained as follows:

"Concerns were expressed in the Special Commission that paragraph 3 could be interpreted as affecting any claims to governmental immunities or privileges which might be asserted under national or international law. This was certainly not the intention behind paragraph 3 which only excludes the relevance of the governmental status of one of the parties for the purposes of characterisation of a claim as "civil and commercial". For additional assurance, paragraph 4 makes this explicit. Although not specifically referred to it is also obvious that entitlements to diplomatic and consular immunity under the relevant international Conventions are not affected by the preliminary draft Convention."[13]

17. In conclusion, the three criteria outlined in the Nygh / Pocar Report (above in bold) should be considered in determining whether a party is acting in exercise of private (civil or commercial) or public powers.

(c) Other Hague instruments

(i) 1965 Service Convention and 1970 Evidence Convention

18. The term "civil or commercial matters", which determines the scope of the subject-matter of the 1965 Service Convention and 1970 Evidence Convention, respectively, are not defined in the text of the corresponding Convention.[14] As underscored in the Explanatory Report of the

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[12] Nygh / Pocar Report, paras 43-45, p. 221 (highlights added).
[13] *Ibid.*, para. 46, pp. 221 and 223.
[14] See Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Service Convention* [hereinafter, the "Service Handbook"], 4th ed., The Hague, 2016, paras 56 *et seq*.

1965 Service Convention: "the term 'civil or commercial matters' [...] raises difficulties, particularly in common law countries, where it does not have a specific meaning".[15]

19. The **Special Commission meeting of April 1989** on the operation of the Hague Conventions *of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and *of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* adopted the following **conclusions** as to the scope of both the Service and Evidence Conventions as to their subject matter, as outlined in the Conclusion & Recommendation No 26:[16]

> "a The Commission considered it desirable that the words "civil or commercial matters" be interpreted in an **autonomous manner**[17] without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.
>
> b In the "grey area" between private and public law, [...] it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept." (For relevant case law see also *infra*, Annexes II and III.)[18]
>
> "c In contrast, other matters considered by most of the States to fall within **public law**, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.
>
> d However, nothing prevents Contracting States from applying the Conventions in their **mutual relations to matters of public law**, though not necessarily in an identical manner for both Conventions."

20. Similarly, the **2003, 2009, and 2014 Special Commissions** encouraged a liberal and autonomous interpretation of the concept "civil or commercial matters". In particular, in the Conclusions and Recommendations of the Special Commission of 2009[19] it was usefully observed that "the expression 'civil or commercial matters' did not appear to have caused many difficulties in the past five years". Indeed, a review of recent case law addressing "civil or commercial matters" in this context indicate that Contracting States have largely followed the recommendations of the above Special Commissions.[20] A selection of this case law is included in the summaries at Annexes II and III.

21. Moreover, an important aspect of the interpretation of the term, central to recent Special Commission discussions, is the recommendation that the term should not only be interpreted

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[15] Translation by the Permanent Bureau. See V. Taborda Ferreira, "Rapport explicatif sur la Convention Notification de 1965", in *Actes et documents de la Dixième session (1964)*, Tome III, *Notification*, The Hague, Imprimerie Nationale, 1965, p. 366.

[16] "Report on the work of the Special Commission of April 1989 on the operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters", drawn up by the Permanent Bureau, available on the Hague Conference website at < www.hcch.net > under "Service Section", p. 7 (highlights added).

[17] It is worth noting that this notion of "autonomous" interpretation is not unique to the 1965 Service and 1970 Evidence Conventions, respectively: in fact, it is a long-standing principle of treaty interpretation under the 1969 Vienna Convention on the law of the treaties (Art. 31).

[18] For intellectual property cases, however, the distinction between matters that fall within the definition of "civil or commercial" for the purposes of the 1965 Service Convention and those that do not appears to be less clear-cut. For instance, in 2016, in the context of a litigation before the National Court Administration of the Republic of Korea over the validity of a patent registration, the Appellate Court (*Oberlandesgericht*) of Düsseldorf denied a request for service under the 1965 Service Convention on the ground that the validity of the registration of a patent does not fall within the scope of "civil or commercial matters" under the 1965 Service Convention (OLG Düsseldorf 21.04.2016, 934E1-11 .206-16). Conversely, courts in other Contracting States such as Canada, China (the People's Republic of), Italy, Japan, the United Kingdom, the United States of America and even a court in Berlin served the document per the request of the Korean Court with respect to the same alleged patent infringement.

[19] "Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions (2 to 12 February 2009)", C&R No 13 [hereinafter, "C&R of the 2009 SC"], available on the Hague Conference website at < www.hcch.net > under "Service Section".

[20] Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Evidence Convention* [hereinafter, the "Evidence Handbook"], 3rd ed., The Hague, 2016, para. 52.

"liberally and in an autonomous manner" but also consistently applied across both Conventions.[21]

22. The 2009[22] and 2014[23] Special Commissions have provided the following additional guidance to assist States in determining the scope of the term "civil or commercial matters": in determining whether a matter is "civil or commercial", **the focus should be on the substantive nature of the cause of action rather than on the entity making the request**. The focus should therefore not be on the nature of the relief sought (*e.g.*, actions where punitive damages are sought), the identity of the parties (*e.g.*, actions where a government agency is a party), or the identity of the judicial authority before which proceedings are commenced (or contemplated) (*e.g.*, actions before a bankruptcy court). The focus on the nature of the cause of action underscores the importance of specifying the nature of the proceedings in the Letter of Request when Chapter I is used to take evidence (as required by Art. 3(1)(c)).[24]

23. Moreover, as reported in paragraph 113 of the Summary of Responses to the Questionnaire of May 2008[25], difficulties in categorisation arise more in theory than in practice, with successive Special Commissions noting that the practice amongst all State Parties has been to move towards a wider interpretation of "civil or commercial matters".

24. In conclusion, in the 1965 Service Convention and in the 1970 Evidence Convention, the term "civil or commercial matters" is used to draw a distinction between the area of "private" and "public" law. It should be interpreted consistently across both Conventions in an autonomous and liberal manner. Moreover, in determining whether a matter is "civil or commercial" the focus should be on the substantive nature of the cause of action rather than on the entity making the request.

IV. Other relevant sources

(a) European Union law

25. In addition to those Hague instruments addressed above, the concept of "civil or commercial matters" is one steeped in European Union tradition, beginning with the 1968 Brussels Convention,[26] and now crystallised in the Brussels I *bis* Regulation,[27] which has recast the Brussels I Regulation.[28]

26. Similarly, the 2007 Lugano Convention,[29] whose Article 1(1) is modelled on Article 1(1) of the Brussels I Regulation, regulates the recognition and enforcement of judgments in civil and commercial between the European Union (including Denmark), Iceland, Norway and Switzerland.

27. Article 1(1) of the 2016 preliminary draft Convention adopts a similar wording to Article 1(1) of the Brussels I *bis* Regulation.[30]

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[21] See "Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014)", C&R No 40 [hereinafter, "C&R of the 2014 SC"], available on the Hague Conference website at < www.hcch.net > under "Service Section". However, some Contracting States tend to construe these identical terms more strictly in the application of the Evidence Convention than with regard to the Service Convention.

[22] See, *e.g.*, C&R No 14 of the 2009 SC discussed in paras 67 *et seq*. of the Service Handbook.

[23] See, *e.g.*, C&R Nos 40 and 41 of the 2014 SC discussed in paras 67 *et seq*. of the Service Handbook.

[24] Evidence Handbook, para. 50(c) (citations omitted).

[25] "Summary of Responses to the Questionnaire of May 2008 relating to the Evidence Convention, with analytical comments (Summary and Analysis Document)", drawn up by the Permanent Bureau, Prel. Doc. No 12 of January 2009 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions, available on the Hague Conference website at < www.hcch.net > under "Evidence Section".

[26] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded at Brussels(OJ 1972 L 299), which applied to the relationships between EU Member States.

[27] Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), entered into force 1 January 2015 (OJ 2012 L 351).

[28] Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12).

[29] See *supra*, note 1.

[30] The Brussels I-bis Regulation has added a reference to "[…] the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)". Furthermore, according to Recital 10: "The scope of this

28. Article 1(1) of the Brussels I *bis* Regulation provides that:

> "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters."

(i) History

29. The original version of Article 1(1) of the 1968 Brussels Convention only included the reference to "civil and commercial matters". The second sentence ("It shall not extend, in particular, to revenue, customs or administrative matters.") was added by the 1978 Accession Convention[31], entered into force between the original Member States of the Community and Denmark, Ireland and the United Kingdom.

30. The Explanatory Report to the 1978 Accession Convention[32] explains the rationale behind the addition of that sentence. In the original version, the concept of "civil and commercial matters" was used as opposed to "public law". The Report explains that:

> "The distinction between civil and commercial matters on the one hand and matters of public law on the other is well recognized in the legal systems of the original Member States and is, in spite of some important differences, on the whole arrived at on the basis of similar criteria."[33]

However:

> "In the United Kingdom and Ireland the distinction commonly made in the original EEC States between private law and public law is hardly known."[34] In the United Kingdom and Ireland, the expression "civil law" is "[...] used mainly as the opposite of criminal law. Except in this limited sense, no distinction is made between 'private' and 'public' law which is in any way comparable to that made in the legal systems of the original Member States, where it is of fundamental importance. Constitutional law, administrative law and tax law are all included in civil law [...]."[35]

31. To address this difference, a new sentence was added to the original text clarifying that the Convention did not extend, in particular, to revenue, customs or administrative matters. The intention behind this addition was to draw a distinction between (i) **"private-law matters"**, referred to as "civil and commercial matters", on the one hand, and (ii) **"public or criminal law" where the State is acting in its "sovereign capacity"**, on the other[36]

(ii) Judicial interpretation on "civil or commercial matters"

32. The Court of Justice of the European Union has dealt with the concept of "civil and commercial matters" in several cases. A list of cases is included in Annex I to this Note, with a reference to the subject matter and the conclusion of the Court.

Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations [...]".

[31] Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (signed on 9 October 1978 – 78/884/EEC).

[32] Report by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [hereinafter, the "Schlosser Report"], OJ 1979 C 59/03.

[33] *Ibid.*, para. 23.

[34] *Ibid*.

[35] *Ibid.*, para. 24.

[36] *Ibid.*, paras 25-28. See also the Report by Professors D. Evrigenis and K.D. Kerameus on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, para. 28 (OJ 1986 C 298/01).

33. The Court's case law on this issue may be summarised as comprising four ideas:

- The concept of "civil or commercial matters" is an independent concept that must be interpreted **autonomously**, and not by reference to national law.
- That scope is essentially defined by **"the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof"**.[37] This implies that in order to establish whether proceedings relate to civil and commercial matters, it is necessary **to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the action brought**.[38]
- If both parties to the proceedings are private persons, the matter will, in principle,[39] be of a civil or commercial law nature, even if the dispute has its origin in an act of the State.[40]
- If one party is a public authority, the key element in excluding the application of the Brussels I Regulation is whether the public authority acted (or omitted to act) **"in the exercise of its public powers"**.[41] The Court has used different formulations to refer to "public powers":[42]
  - "[…] exceptional powers by comparison with the rules applicable to relationships between persons governed by private law";
  - "[…] powers going beyond those existing under the rules applicable to relationships between private individuals"; and
  - "[…] powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals".

34. A typical manifestation of those powers is the capacity to enforce and execute a claim without going through the general courts.[43] Also, **claims for compensation or damages arising from an act in exercise of public powers are public law matters**.[44]

35. In conclusion: The main purpose of the reference to "civil and commercial matters" in the Brussels I Regulation is to distinguish between (i) civil law matters (where the Regulation applies), and (ii) public law matters (where it does not). To characterise a dispute as related to "civil and commercial matters", it must be determined whether the dispute derives from a situation where a party (the State or a governmental body) was acting **with powers and duties that are functionally different to those of a private person**.

(b) Other international instruments

36. Both UNCITRAL and UNIDROIT have developed instruments that also concern civil or commercial matters. Certain of these instruments take a different approach in defining the scope of their application, but remain, notwithstanding these differences, instructive for the purposes of this Note.

37. First, Article 1(3) of the UNCITRAL *Convention on Contracts for the International Sale of Goods* ("CISG") provides that "neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention", with an almost identical counterpart in Article 2(3) of the *Convention on Agency in the International Sale of Goods*. The Explanatory Report on that latter Convention states, at paragraph 32, that "the effect of the provision is to follow a modern

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[37] *E.g.*, C-645/11, at 32.
[38] *E.g.*, C-49/12, at 35; C-302/13, at 26; C-102/15, at 35.
[39] In exceptional cases, a private corporation may exercise public power if attributed with this power by the State.
[40] *E.g.*, an expropriation, see C-420/07.
[41] *E.g.*, C-266/01, at 22; C-292/05, at 31; C-645/11, at 33; C-302/13, at 30; or C-226/13 at 50.
[42] See, *e.g.*, C-167/00, at 30; C- 420/07, at 44; C-302/13 at 30.
[43] See, *e.g.*, C-49/12, at 39. This criterion is useful to qualify *contrats administratifs* as civil matter or not. These contracts are excluded from the scope of the Regulation insofar as the relevant State is in a position to enforce contractual obligations under such contracts by way of administrative enforcement proceedings without the need for a court action.
[44] See, *e.g.*, C-814/79, at 13-15; C-292/05, at 41; C-102/15, at 40.

tendency of disregarding the distinction drawn in a number of legal systems between contracts of a civil character and those of a commercial character depending on the nature of the transaction considered or the character of the parties."[45]

38. Second, the Preamble of the 2010 UNIDROIT Principles of International Commercial Contracts provides, at 2, that:

> "The restriction to 'commercial' contracts is in no way intended to take over the distinction traditionally made in some legal systems between 'civil' and 'commercial' parties and / or transactions… the idea is rather that of excluding from the scope of the Principles so-called 'consumer transactions' […].
>
> The Principles do not provide any express definition, but the assumption is that the concept of 'commercial' contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply of exchange of goods or services, but also other types of economic transactions, such as investment and / or concession agreements, contracts for professional services, etc."

39. These examples, taken from the work of other international organisations active in the field of dispute settlement, make it plain that the distinction between a civil or commercial matter as understood in a particular legal system is not determinative for the interpretation of international instruments that should be understood in the broadest possible sense (*cfr*. "liberal" approach recommended for the 1965 Service and 1970 Evidence Conventions).

V. Conclusions

(a) Article 1(1) of the 2016 preliminary draft Convention: "civil or commercial matters"

40. From the above analysis, the following conclusions may be drawn (which may be included in the Explanatory Report):

- The concept of "civil or commercial matters" must be interpreted autonomously, and not by reference to national law. In this respect, the Special Commission on the Judgments Project may wish to consider whether, similarly to what was observed by the Special Commission in the context of the 1965 Service and 1970 Evidence Conventions,[46] the interpretation of this term should be applied consistently across the 1965 Service and 1970 Evidence Conventions, the 2005 Choice of Court Convention and the future Convention on the recognition and enforcement of judgments.
- The characterisation of a dispute as related to civil or commercial matters is determined by the nature of the dispute, whatever the nature of the court or the conditions of the parties (private or a State body).
- "Civil or commercial matters" is used as opposed to "public or criminal law" where the State is acting in its sovereign capacity ("*iure imperii*").
- To establish whether proceedings relate to civil or commercial matters, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the rules governing the action brought. If one of the parties acted "in the exercise of its public powers", the dispute does not qualify as "civil or commercial".
- The exercise of "sovereign or public powers" in turn implies "exceptional powers by comparison with the rules applicable to relationships between persons governed by private law". In particular, the Nygh / Pocar Report lays down three core criteria to determine if a party is not acting in the exercise of public powers:

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[45] Explanatory Report on the Convention on agency in the international sale of goods, by Mr Malcolm Evans, Deputy Secretary-General of UNIDROIT, available at < http://www.unidroit.org/english/conventions/1983agency/explanatoryreports/agency-explanatoryreport-e.pdf >.

[46] See also *supra*, paras 20 and 23.

- the conduct upon which the claim is based is conduct in which a private person can engage;
- the injury alleged is injury which can be sustained by a private person;
- the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.

(b) Applicability of the 2016 preliminary draft Convention to anti-trust / competition matters

41. The 2016 preliminary draft Convention does not exclude anti-trust / competition matters from its scope. As a result, judgments on these matters are dealt with under the Convention *insofar as* the dispute qualifies as civil or commercial. The application of the criteria set out above (para. 42) to anti-trust / competition matters would lead to the following distinction:

- The 2016 preliminary draft Convention would be applicable in the following situations:

  An action filed by private parties, *e.g.*, an action on private damages, would be included within the scope of the Convention.

  An action filed by public authorities acting on behalf of private parties (*e.g.*, consumers), without special powers or privileges, would fall within the scope of the Convention.

  With regard to these two types of actions, Article 7(1)(c) (public policy) or Article 9 (damages) may be invoked to refuse recognition or enforcement of a decision which goes beyond a mere compensation of private losses. Article 7(1)(c) may be invoked, for instance, when the decision aims at regulating the market concerned rather than or alongside compensating harm (*e.g.*, an order on the defendant to sell its patents to a competitor). Article 9 of the Convention may be invoked to refuse recognition or enforcement of the decision insofar as the damages awarded go beyond compensation for actual loss or harm suffered.

- The 2016 preliminary draft Convention would not be applicable in the following situations:

  An action filed by public authorities (*e.g.*, competition authorities) in the exercise of their public powers does not qualify as "civil or commercial" and is therefore excluded from the scope of the Convention; likewise, an action to set aside a decision of such bodies does not fall within the scope of the Convention.

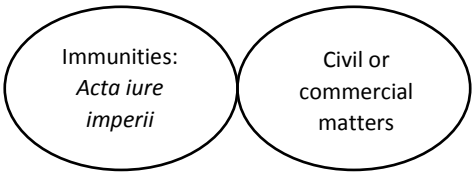
  If a competition authority itself awards damages to a private party (which seems possible in some jurisdictions), such an authority would in principle not qualify as a "court" under Article 3(1)(b) and thus its decision does not benefit from the Convention.

(c) Article 1(1) and Article 2(4)-(5) of the 2016 preliminary draft Convention

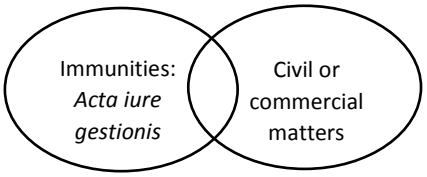
42. The relationship between Article 1(1) and Article 2(4) and (5) of the 2016 preliminary draft Convention may be summarised as follows:

- The material scope of application of the 2016 preliminary draft Convention ("civil or commercial matters") must be defined in an autonomous way. Conversely, the scope of the immunities of States and governmental bodies is not defined by the 2016 preliminary draft Convention, but by other instruments and general principles of public international law. According to Article 2(5), the 2016 preliminary draft Convention does not prejudice the application of these rules.
- In principle, there is no overlap between those two bodies of rules, insofar as the immunity of States and governmental bodies is usually linked to acts or omissions in the exercise of State authority (*acta iure imperii*). Article 2(5) of the 2016 preliminary draft Convention has no practical consequences and only has a clarifying role. In these cases, the acts or omissions are outside the material scope of application of the 2016 preliminary draft Convention and this instrument simply does not apply: acts or omissions by States exercising their sovereign authority are not "civil or commercial matters". Accordingly, even if the State renounces its

immunity and submits itself to the jurisdiction of the court of a foreign State, the 2016 preliminary draft Convention will not apply.[47]



- The solution may be different in exceptional cases where the immunities of the States and governmental bodies, according to the relevant rules, encompass acts or omissions that may qualify as "civil or commercial matters" under the 2016 preliminary draft Convention. This may be the case, for example, if the immunity encompasses a tort claim against a State or a governmental body (a diplomatic agent) deriving from *acta iure gestionis* (the commercial acts of the government of a State). In these cases, Article 2(5) of the 2016 preliminary draft Convention does have practical relevance. Accordingly, if the beneficiary renounces its immunity and submits itself to the jurisdiction of the court of a foreign State, the 2016 preliminary draft Convention will apply to the resulting judgment. Conversely, if the beneficiary did not renounce its immunity and a judgment is given against it, the recognition of such a judgment could be refused under either Article 2(5) or the public policy exception (Art. 7(1)(c)).



[47] See "Minutes No 8", Special Commission on the Judgments Project (1-9 June 2016), para. 59, available through the Secure Portal of the Hague Conference at < www.hcch.net >.

A N N E X E S

ANNEX I: Selected CJEU case law on the concept "civil and commercial matters"

Within scope	**Outside of** scope
1. State-school teacher liability. An action for damages brought before a criminal court against a teacher in a State school who, during a school trip, caused injury to a pupil through a culpable and unlawful breach of duty of care. *"In the majority of the legal systems of the Member States the conduct of a teacher in a State school, in his function as a person in charge of pupils during a school trip, does not constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals."* This is so even where cover is provided under a social insurance scheme governed by public law (C-172/91). **2. Private consumers´ organisation actions.** An action brought by a private consumers´ organisation concerning the prohibition on traders' using unfair terms in their contracts with consumers. "*Not only is a consumer protection organisation … a private body, but in addition, …, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts*". (C-167/00). **3. Action under a right of recourse based on payment of allowances by way of social assistance.** An action under a right of recourse under which a public body seeks recovery from a private person of sums paid by it by way of social assistance to the divorced spouse and the child of that person qualifies as civil or commercial matters *"provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. …Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded*	**1. Eurocontrol charges.** A dispute that *"…concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive….This applies in particular where the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users, as is the position in the present case where the body in question unilaterally fixed the place of performance of the obligation at its registered office and selected the national courts with jurisdiction to adjudicate upon the performance of the obligation"* (C-29/76). **2. Agent responsible for policing public waterways.** Actions brought by the agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of the administering agent in the exercise of its public authority (C-814/79). **3. Action for compensation against a Contracting State on account of acts perpetrated by its armed forces.** *"Operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy. It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated"* (C-292/05). **4. An action for recovery of sums having its origin in the repayment of a fine imposed in competition law proceedings.** An action for recovery of sums (not due on the ground of unjust enrichment) by which the competition authority of a Member State seeks to obtain the repayment of interest that it paid to a

as being brought in 'civil matters'." (C-271/00; C-433/01). **4. Action based on a guarantee contract between the State and an insurance company.** An action by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals (C-266/01). **5. A claim against a third party that bought a property unlawfully taken by a Government.** Defendants claim to have purchased the land in 2002 in good faith from a third party, the latter having himself acquired it from the authorities of the Turkish Republic of Northern Cyprus. *"The action is between individuals, and its object is to obtain damages for unlawfully taking possession of land, the delivery up of that land, its restoration to its original state and the cessation of any other unlawful intervention. That action is brought not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals"* (C-420/07). **6. Penalty payment orders in a patent infringement dispute.** Even if the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons, the object of which … is based on an allegation of patent infringement. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute (C-406/09). *"Thus, as regards the enforcement in a Member State of an order to pay a fine, which has been imposed by a court of another Member State, for the purpose of ensuring compliance with a prohibition laid down in a judgment given in that Member State in civil and commercial matters, the Court has stated that the nature of that right of enforcement depends on the nature of the subjective right, for infringement of which enforcement was ordered"* (C-4/14).	company domiciled in another Member State following the decision of the administrative courts of the first Member State to reduce the fine which had been imposed on that company by the competition authority after the Supreme Court set aside that decision and reinstated the initial amount of that fine. *"An action for recovery of sums not due on the ground of unjust enrichment, such as that at issue in the main proceedings, which has its origin in the repayment of a fine imposed in competition law proceedings does not fall within 'civil and commercial matters' within the meaning of Article 1 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters".* (C-102/15).

7. Claim by Tax Authorities based on fraud. A claim by a public authority against private persons or companies for the payment of damages which the Tax authorities of a Member State have incurred as a result of tax fraud. *"So far as the legal basis of the Commissioners' claim is concerned, their action… is based not on United Kingdom VAT law, but on Sunico's alleged involvement in a conspiracy to defraud, which comes under the law of tort of that Member State."* (C-49/12). **8. Claim for compensation in respect of damage resulting from alleged infringements of European Union competition law.** *"The action brought by … seeks legal redress for damage relating to an alleged infringement of competition law. Thus, it comes within the law relating to tort, delict or quasi-delict… Therefore, an action such as that at issue in the main proceedings, the subject-matter of which is legal redress for damage resulting from the infringement of rules of competition law, is civil and commercial in nature"* (C-302/13). **9. Public debt**. In the context of the Service Regulation, the CJEU has also concluded that the concept of civil and commercial matters includes *"judicial proceedings for compensation for disturbance of ownership and property rights, contractual performance and damages, .., brought by private persons who are holders of State bonds against the issuing State.. issue of bonds does not necessarily presuppose the exercise of powers falling outside the scope of the ordinary legal rules applicable to relationships between individuals."* (C-226/13, C-245/13, C-247/13 and C-578/13).	

ANNEX II: Selected case law on the concept "civil or commercial matters" under the 1965 Service Convention

Within scope	**Outside of** scope
1. **Punitive damages**. In *Siemens A.G. v. Bavarian Ministry of Justice*, 27 November 1980, No 9 VA 4/80, the Higher Regional Court of Munich (Germany) rejected the argument that proceedings were not civil or commercial in nature on account of the fact that they involved a counterclaim for punitive damages. (An English translation of the decision is reproduced in (1981)20 *I.L.M.*, p. 1025). 2. **Punitive damages**. The Appellate Court (*Oberlandesgericht*) of Munich (Germany) rejected the position adopted by the Central Authority and held that a claim for "punitive" damages was indeed a civil matter (OLG Munchen, 9 May 1989, published in part in RIW 1989, p. 483; annotation IPRax 1990, p. 157 (Sturner/Stadler). (An English translation by B. Ristau of the entire decision has been published in I.L.M. 1989, p. 1570). 3. **Punitive damages.** The Appellate Court (*Oberlandesgericht*) of Munich (Germany) held in 1992 that an action brought before a United States court for "punitive damages" is within the scope of the Service Convention's subject-matter, even though the amounts claimed are exorbitant, in its opinion. The disputed merit of the claim cannot serve as an appropriate criterion to distinguish civil matters from those that are matters for criminal law, insofar as claims in damages brought in the United States are frequently not quantified (OLG Munchen, 15 July 1992, IPRax 1993, p. 309). 4. **Enforcement instrument.** The Cantonal Court of Fribourg held that an enforcement instrument is a judicial document for the purposes of the 1965 Service Convention in any event where the prosecution relates to a receivable under private law. (Cantonal Court of Fribourg, 10 February 1999). It seems, however, that this decision is based more on the precedents of the Federal Supreme Court of Switzerland, which considers that prosecution for debts and bankruptcy, based on civil claims, is within the concept of civil or commercial matters, than on a genuinely autonomous interpretation of the Convention. 5. **Enforcement instrument and bankruptcy.** The Supreme Court of the Netherlands (*Hoge Raad*) reached the same	1. **Insurance premiums that are part of the mandatory social medical insurance**. In Prozess {T 7}, K 18/04, order of 18 July 2006, the Swiss Federal Insurance Tribunal (*Tribunal federal des assurances*) held that claims regarding insurance premiums that are part of the mandatory social medical insurance are considered to be within the scope of public law and are not "civil or commercial matters". The Court reasoned that this type of insurance is financed, like taxes, by global contributions and, therefore, the Service Convention does not apply.

conclusion as the Cantonal Court of Fribourg and held that bankruptcy law was a matter within the scope of the Convention's subject matter. The Advocate-General's conclusion, to which the grounds for that ruling expressly refer, is based on an autonomous interpretation of the Convention. (HR 15 June 2000, *NJ* 2000, p. 642).	

ANNEX III: Selected case law on the concept "civil or commercial matters" under the 1970 Evidence Convention

Within scope	**Outside of** scope
1. **Bankruptcy.** In the case of *Arcalon and Ramar v. US Bankruptcy Court for the Southern District of California*, the Supreme Court of the Netherlands (*Hoge Raad*) held that a request for evidence issued by a California bankruptcy court was within the ambit of "civil or commercial matters" for the purposes of the Convention. According to the Supreme Court, the Convention's objective and scope justify an extensive construction of Article 1 (HR 21 February 1986, NJ 1987, p. 149; RvdW 1986, p. 50; English translation at I.L.M. 1989, p. 1578).This case is also mentioned in the Service Handbook, para. 60. 2. **Bankruptcy.** In *Pickles v. Gratzon* (2002) 55 NSWLR 533, the Supreme Court of New South Wales (Australia) ordered the execution of a Letter of Request issued in bankruptcy proceedings. 3. **Bankruptcy.** In Switzerland, the Federal Supreme Court has accepted that "civil or commercial matters" include proceedings in relation to debts and bankruptcy when the claims are of a civil nature: see Federal Office of Justice, *Guidelines on International Judicial Assistance in Civil* Matters, 3rd ed., Berne, January 2013, available online at http://www.rhf.admin.ch pp. 4-5. 4. **Inheritance taxes**. In its ruling in *Re State of Norway's Application*, the House of Lords (United Kingdom) had to consider whether a request for evidence, in a case presented as a civil action but involving a claim for inheritance taxes asserted by the State of Norway against the estate of a deceased person, was a "civil or commercial matter". The House of Lords held that a cumulative system of characterisation should be applied, *i.e.*, the nature of the issue determined according to the law of both the requesting and the requested States. In that case, the action for recovery of taxes was regarded as a civil or commercial matter in both Norway and the United Kingdom. Accordingly, the request for the taking of evidence lay within the scope of the Evidence Convention's subject matter (House of Lords, 16 February 1989, All E.R. 1989, p. 745; I.L.M. 1989, p. 693). 5. **Proceedings brought for breach of anti-trust laws.** In *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.* [1978] 1 All ER 434, the House of Lords (United Kingdom)	

agreed that proceedings brought by Westinghouse in Illinois for breach of US anti-trust laws were civil proceedings. 6. **Trademark infringement and unfair competition proceedings.** In *Re the Matter of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970* [2008] SASC 51 (29 February 2008), the Supreme Court of South Australia (Australia) agreed to order the execution of a Letter of Request issued in trademark infringement and unfair competition proceedings instituted in the US state of California. 7. **Punitive damages.** In *Sykes v. Richardson* (2007) 70 NSWLR 66, the Supreme Court of New South Wales (Australia) agreed to order the execution of a Letter of Request "[d]espite the punitive nature of the treble damages sought". The court agreed to execute a Letter of Request issued by a US court in a civil action arising out of an alleged conspiracy to manipulate the copper futures market in violation of US antitrust legislation. The Court did, however, admit that the issue was not easy to resolve, particularly given that, if established, the violations could also entail criminal prosecution. 8. **Punitive damages**. In *Siemens A.G. v. Bavarian Ministry of Justice*, 27 November 1980, No 9 VA 4/80, the Higher Regional Court of Munich (Germany) rejected the argument that proceedings were not civil or commercial in nature on account of the fact that they involved a counterclaim for punitive damages. (An English translation of the decision is reproduced in (1981)20 *I.L.M.*, p. 1025). Similarly, see also OLG Dusseldorf, 22 July 2007, No I-3 VA 9/03, and OLG Frankfurt am Main, 8 February 2010, No 20 VA 15/09.	