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RÉSUMÉ DES RÉPONSES AU QUESTIONNAIRE DE MAI 2008 PORTANT SUR LA CONVENTION PREUVES, AVEC COMMENTAIRES ANALYTIQUES (RÉSUMÉ ET ANALYSE)

établi par le Bureau Permanent

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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

Document préliminaire No 12 de janvier 2009
à l'intention de la Commission spéciale de février 2009 sur le fonctionnement pratique des Conventions de La Haye Apostille, Notification, Preuves et Accès à la justice

Preliminary Document 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

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States and REIO* [45]

1. Albania
2. Argentina
3. Australia
4. Bahamas
5. Brazil
6. Canada
7. China (Hong Kong Special Administrative Region)
8. Croatia
9. Czech Republic
10. Denmark
11. Ecuador
12. Estonia
13. European Community
14. Finland
15. France
16. Germany
17. Georgia
18. Greece
19. Guatemala
20. Iceland
21. Italy
22. Japan
23. Korea
24. Latvia
25. Lithuania
26. Luxembourg
27. Malaysia
28. Mexico
29. Moldova
30. Monaco
31. New Zealand
32. Norway
33. Paraguay
34. Poland
35. Romania
36. Singapore
37. Slovakia
38. South Africa
39. Spain
40. Sweden
41. Switzerland
42. Trinidad and Tobago
43. Turkey
44. Ukraine
45. United Kingdom

Non-Contracting States and REIO* [17]

1. Albania
2. Bahamas
3. Brazil
4. Canada
5. Croatia
6. Ecuador
7. European Community
8. Georgia
9. Guatemala
10. Iceland
11. Japan
12. Korea
13. Malaysia
14. Moldova
15. Paraguay
16. New Zealand
17. Trinidad and Tobago

Contracting States [28]

1. Argentina
2. Australia
3. China (Hong Kong Special Administrative Region)
4. Czech Republic
5. Denmark
6. Estonia
7. Finland
8. France
9. Germany
10. Greece
11. Italy
12. Latvia
13. Lithuania
14. Luxembourg
15. Mexico
16. Monaco
17. Norway
18. Poland
19. Romania
20. Singapore
21. Slovakia
22. South Africa
23. Spain
24. Sweden
25. Switzerland
26. Turkey
27. Ukraine
28. United Kingdom

* Regional Economic Integration Organisation.

Introduction

1. In May 2008 the Permanent Bureau of the Hague Conference on Private International Law issued a Questionnaire to Member States and State Parties to the Hague Evidence Convention,[1] in preparation for the Special Commission on the practical operation of the Hague Evidence (and Service, Apostille and Access to Justice) Convention to be held in February 2009. This document synthesises and analyses the responses received by the Permanent Bureau before 1 December 2008.[2]

2. The Questionnaire was designed to assist the Permanent Bureau in defining key issues that need to be addressed by the Special Commission. The responses to the Questionnaire will also assist the Permanent Bureau in drafting parts of a possible new edition of the Practical Handbook on the Operation of the Evidence Convention and / or a possible Guide to Good Practice in relation to specific issues arising from the operation of the Evidence Convention (*e.g.,* the use of video-link technology under the Convention).[3] Finally, the responses will assist the Permanent Bureau in its ongoing monitoring of the practical operation of the Evidence Convention and in completing and updating the information provided on the HCCH website (and with a view to possibly creating an "Evidence Section" similar to the current "Service" and "Apostille" Sections).

3. The Permanent Bureau is very grateful to the 44 States (16 non-Contracting States,[4] and 28 Contracting States[5]) and the European Community that responded to the Questionnaire. Each response was clearly the result of a great deal of careful research and deliberation. Together, the responses provide a snapshot of the operation of the Convention in a level of international detail that has never been assembled before, and could not otherwise be assembled. This information will be of great assistance to the Special Commission in its deliberations, and to all other persons interested in the practical operation of the Convention.

Methodology

4. This document follows the structure of the Questionnaire, and seeks to summarise and, where relevant, comment upon the answers of the responding States. This process of summarisation requires, in large measure, the counting of responses provided by States. This process of counting raises some methodological issues which are dealt with in this section.

5. First, not all responding States responded to each and every question included in the Questionnaire. To accommodate this fact, the discussion of each question refers to the number of responding States that responded to that particular question. The reader will note that the number of responding States varies, therefore, between questions.

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[1] "Questionnaire of May 2008 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters* (Evidence Convention)", Prel. Doc. No 1 of May 2008, 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 (hereafter "the Questionnaire").

[2] This document reflects responses received before 1 December 2008. Since that time, other States have provided responses which it has not been possible to include in this document. The responses of individual States are available on the HCCH website. All responses, including those received after 1 December 2008, have also been collated into a single "Synopsis Document" that is also available on the website as "Synopsis of responses to the Questionnaire of May 2008 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)", Prel. Doc. No 8 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.

[3] The practical and legal questions relating to the use of video-link under the Evidence Convention are further considered by the Permanent Bureau in "The taking of evidence by video-link under the Hague Evidence Convention", Prel. Doc. No 6 of December 2008, 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.

[4] Albania, Brazil, Canada, Croatia, Ecuador, Georgia, Guatemala, Iceland, Japan, Korea, Malaysia, Moldova, New Zealand, Paraguay, Bahamas, Trinidad and Tobago.

[5] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Switzerland, Sweden, Turkey, Ukraine, United Kingdom.

6. Secondly, a number of States often responded to certain questions to the effect that it was not possible for them to provide a response. As it is of little analytical assistance to refer, for each question, to the particular States that were unable to provide an answer, these responses are only reflected in this document where it is relevant to do so. However, where a State has provided such an answer, the State is counted amongst the number of responding States. For this reason, the number of responding States does not always tally with the total number of States that are listed as having provided particular responses to a question. The States that provided a positive answer are always mentioned expressly in the footnote.

7. Thirdly, some States provided multi-faceted answers to questions that it was relevant to count as falling into more than one category of response. For this additional reason, the total number of responding States does not always tally with the total number of States referred to as providing particular answers. Any confusion can be remedied by consulting the footnotes.

Executive Summary

1. Number of Responses

8. The Permanent Bureau received responses from 44 States and the European Community by 1 December 2008. Of these responding States, 28 States[6] were States Parties to the Convention, amounting to 60% of the total number of Contracting States. In addition, 16 non-Contracting States[7] also responded to the Questionnaire.

2. Responding Non-Contracting States

9. A majority of the 16 responding non-Contracting States advised that they are actively considering acceding to the Evidence Convention, and two States – Croatia and Iceland – advised that they are in the process of accession. Iceland subsequently deposited its instrument of accession on 10 November 2008.

10. Six non-Contracting States advised that they are not considering joining the Convention. Reasons given by non-Contracting States for not having joined the Convention include the availability of other bilateral and multilateral agreements, the limited number of cross-border cases, and domestic legal obstacles.

3. Responses of Contracting States

11. The responses of the Contracting States indicate that the Convention is operating relatively smoothly and efficiently, although a number of responding States pointed to delays in the operation of the Convention in some States Parties. States Parties continue to demonstrate a willingness to co-operate to solve practical and legal problems as and when they arise, and also to embrace the use of modern technology under the Convention.

a) Statistics

12. The statistics provided by responding States do not permit many firm conclusions to be drawn, however it is possible to say with some confidence that the Convention appears to be widely used, with, at very least, over 1500 uses of Chapter I, and 2500 uses of Chapter II, in 2007. Further, the procedures of Chapter I are relatively efficient and effective, with most requests being executed within 6 months. However, some requests take up to a year to be executed, which does not appear to conform to the requirement that a Letter of Request must be executed "expeditiously" (Art. 9(3)).

13. Most of the results are more encouraging. The statistics suggest that only 5% of requests are returned unexecuted, and it is good to note that a significant number of Letters of Request are reported to have been executed within less than two months, and even more in less than four months. Finally, it is possible to conclude that a clear majority of requests under Chapter I seek oral evidence. The next most sought category of evidence is documentary evidence.

b) High Overall Satisfaction with the Convention

14. The high use of the Convention is reflected in a high level of overall satisfaction with the Convention. A vast majority of the responding States described their appreciation of the Convention as either "excellent" or "good". Only four States described the Convention as "satisfactory", and no State described it as "unsatisfactory". However, as already mentioned, a number of responding States pointed to delays in the operation of the Convention in some States Parties.

c) Suggested Areas of Improvement

15. States made a number of suggestions for the further improvement of the Convention, including the preparation of a new version of a Practical Handbook, the further use of modern technology, and the swifter execution of Letters of Request by

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[6] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Switzerland, Sweden, Turkey, Ukraine, United Kingdom.

[7] Albania, Brazil, Canada, Croatia, Ecuador, Georgia, Guatemala, Iceland, Japan, Korea, Malaysia, Moldova, New Zealand, Paraguay, Bahamas, Trinidad and Tobago.

some States Parties. The Permanent Bureau notes that a number of responding States referred to the possibility of implementing time limits within which a Letter of Request ought to be executed, and considers that this might be an issue that the Special Commission may wish to discuss.

d) Mandatory / Non-Mandatory Nature of the Convention

16. A difference remains between States Parties on the question whether the Convention is mandatory or non-mandatory. All of the States that consider the Convention to be non-mandatory, it should be noted, advised that their courts take into consideration questions of comity when determining whether to take evidence abroad by methods not provided for under the Convention.

17. In order to assist the Special Commission in its consideration of this issue, the Permanent Bureau has prepared a document that outlines the arguments in favour and against the question whether the Convention is mandatory or non-mandatory.[8]

e) Blocking Statutes

18. A number of States provided information on "blocking statutes" or similar domestic legislation. The responses suggest that the use of such legislation is very rare.

f) Scope of the Convention – "civil or commercial"

19. The interpretation of the expression "civil or commercial" has not given rise to any issues in the vast majority of responding States. Moreover, where such issues have arisen, the responses make clear that most States Parties have followed the recommendations of successive Special Commissions and have taken a broad and liberal interpretation of the scope of these words. There now appears to be broad support for view that the following matters fall within the scope of the Convention:

- insurance
- consumer protection
- bankruptcy and insolvency proceedings in general
- reorganisation under bankruptcy laws
- employment
- anti-trust and competition.

20. Opinion is divided as to whether taxation matters fall within the scope of the Convention. There is also broad support for the view that proceedings in respect of Proceeds of Crime do not fall within the scope of the Convention.

g) Scope of the Convention – proceedings "commenced or contemplated"

21. The interpretation of the expression "commenced or contemplated" in Article 1(2) has not given rise to many issues. Responding States identified a diversity of domestic legal concepts that may correspond to "contemplated" proceedings; although some responding States advised that their domestic law knew of no such concept. A number of States appeared to support the view that the notion of "contemplated" proceedings included procedures instituted to obtain evidence where there was a danger that evidence would be lost that would be useful in proceedings that had not yet been instituted.

22. Almost all responding States agreed that the expression "commenced" should be given a uniform interpretation across Articles 1(2), 15 and 16.

h) Arbitration proceedings

23. There were very few reports of requests for evidence to be used in Arbitration proceedings.

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[8] See "The mandatory / non-mandatory character of the Evidence Convention", Prel. Doc. No 10 of December 2008, 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.

i) Taking of Evidence by Video-Link

24. A large majority of responding States agree that there are no obstacles to the taking of video-link evidence under either Chapter I or Chapter II of the Convention. Moreover a clear majority of States considered that new issues arising from modern technology could be solved by the preparation of a Guide to Good Practice for the use of video-link technology under the Convention. A minority of States advised that they considered that an additional Protocol to the Convention would be desirable.

25. The responses also indicated that a small number of requests for evidence by video-link have already been made under Chapter I the Convention and, in some cases, successfully executed. Similarly, video-link evidence appears to have been successfully taken under Chapter II of the Convention on at least one occasion.

26. Responding States also provided information about the technical capabilities of their courtrooms, from which it would appear that courts in almost all responding States are equipped with computers, that most responding States make audio-recording equipment available in their courtrooms, and that most responding States offer video-conferencing facilities in at least some courtrooms.

27. In order to assist the Special Commission in its consideration of this issue, the Permanent Bureau has prepared a Preliminary Document that addresses the practical and legal issues arising from the taking of evidence by video-link under the Convention.[9]

j) Operational Issues for Chapter I

28. The responses provided a wealth of information about the day-to-day operation of the Convention.

29. *Letters of Request*. The responses indicate that most Central Authorities provide assistance to foreign judicial authorities in the preparation of Letters of Request. A smaller number of Central Authorities also provide similar assistance to parties and their representatives.

30. A Letter of Request is usually forwarded by a judicial officer, but in some States the letter is forwarded by the Central Authority. Almost all States advised that they accept Letters of Request forwarded by private courier; but only a minority would accept a Letter of Request forwarded by email or fax, and many of these States also require the original to be forwarded also.

31. *The Model Form*. Less than half of the responding States advised that they use the Model Form recommended by the 1970 Special Commission. This is of some concern to the Permanent Bureau, and it is proposed that this issue be discussed at the special Commission.

32. *Challenges to Letters of Request*. Responding States provided a diversity of information relating to the bases upon which a Letter of Request can be challenged. In most States it is possible to challenge the sending of a Letter of Request, where the State is the Requesting State; and to challenge the execution of a Letter of Request, where the State is Receiving State. Many States, however, do not allow a party to challenge the Letter of Request in both the Requesting and Requested State.

33. *Execution of the Letter of Request.* States also provided a great deal of information relating to the execution of a Letter of Request, which may be summarised as follows:

- In almost all responding States, Letters of Request are executed by a judicial officer.
- In most responding States:
  - the execution of a Letter of Request is conducted in public;

[9] Prel. Doc. No 6, *op. cit.* note 3.

  - a witness is not provided in advance with a copy of the questions or matters to be addressed;
  - a witness is administered with an oath;
  - a witness may be subject to further examination and recall (although this usually requires a second Letter of Request to be sent);
  - a witness who does not attend court may be subject to coercive measures or criminal sanctions, in addition to a fine;
  - documents produced by the witness are not required to be authenticated;
  - documents that are to be presented to the witness must be included with the Letter of Request;
  - interpreters must be court certified;
  - the testimony of witnesses is transcribed by court staff or the judge; and
  - the final transcript is delivered to the requesting authority.
- Slightly less than half of responding States are willing to blue-pencil a Letter of Request.

34. *Parties and Judicial Personnel Present at the Execution.* In most States, the judicial officer executing the request is responsible for informing the requesting authority of the time and place of the execution of the Letter of Request. Some States send this information by formal channels, and others use informal channels. Most States – as Requesting or Requested State – do not have specific remedies in place, however, should this information not be passed on.

35. In most States, representatives of the parties are allowed to ask follow-up questions of the witness.

36. *Privilege.* Few States reported the invocation of privilege by witnesses, but it appears that in the cases where privilege was asserted the procedures of the Convention worked smoothly.

37. *Translation Requirements.* A clear majority of States advised that they consider that the translation requirements of Article 4(1) also apply to any documents attached to the Letter of Request.

38. *Costs*. Many responding States advised that they did not pass on any costs under the Convention. Some States advised that they seek reimbursement under Articles 4(3) and 14(2), and that this system works smoothly.

39. *Requests for e-Discovery*. Requests for e-Discovery are rare, but are becoming a reality. Some such requests have been successfully executed.

40. *Requests for Evidence to be Taken According to a Special Procedure*. Such requests are not very common under the Convention, but are certainly not a rarity. Procedures identified as "special" by responding States include blood tests,[10] requests that hearings be video-taped, requests that a verbatim transcript be provided, and requests that evidence be taken according to common law procedure including cross-examination.

k) Article 23 Declarations

41. Responding States provided useful information concerning the circumstances in which they would accept or reject a request for pre-trial discovery. Many States, however, continue to retain broad Article 23 declarations (despite Conclusion and Recommendation No 34 of the 2003 Special Commission).

[10] The Permanent Bureau notes that many States Parties would not regard the taking of a blood sample as a "special" procedure; a view supported by the statistical information provided by responding States (see Figures 3 and 4, below).

42. Many States advised that they would execute a request for the taking of oral evidence even if it was accompanied by a request for discovery that is too broad.

l) Reservations under Chapter I I

43. A number of States provided reasons why they have placed reservations on the use of methods under Chapter II. These reasons generally relate to concern that proper procedures be followed.

Preliminary draft Conclusions and Recommendations

44. In the course of this document, the Permanent Bureau proposes a number of preliminary draft Conclusions and Recommendations for consideration by the Special Commission. For ease, these preliminary draft Conclusions and Recommendations are here collected.[11]

A. "The Special Commission notes that the Evidence Convention is operating relatively smoothly and effectively, although a number of States Parties pointed to delays in the operation of the Convention in some States Parties."

B. "The Special Commission considers that the requirement in Article 9(3) of the Convention that a Letter of Request must be executed "expeditiously" requires that a Letter of Request will, in the general case:

- be executed within four months if the request is for the taking of oral evidence only; and
- be executed within six months for all other requests."

C. "The Special Commission recommends that Central Authorities adopt the following timelines and actions upon receipt of a Letter of Request:

- a letter of acknowledgement of receipt of the Letter of Request should be sent immediately by email to the requesting authority, providing an indication of the time within which the Letter of Request will be executed;
- within one month, a status report is to be sent to the requesting authority by email, providing details of the date, time and place of the execution of the Letter of Request;
- if the request is not executed within the time specified in [the previous recommendation], a letter of explanation must be sent by email to the requesting authority, setting out the reasons why the Letter of Request was not executed, and providing details of the date, time and place of the execution of the Letter of Request."

D. "The Special Commission reaffirms the Recommendations and Conclusions of the 1989 and 2003 Special Commissions that the expression "civil or commercial" should be interpreted broadly, and according to an autonomous definition that is neither based exclusively on the law of the Requesting State nor the law of the Requested State, nor the law of both States. The Special Commission notes that there exists a strong consensus that the following categories of proceeding fall within the scope of the Convention: Insurance, Consumer Protection, Bankruptcy or Insolvency Proceedings in General, Reorganisation under Bankruptcy Laws, Employment, Antitrust and Competition."

E. "The Special Commission further notes that nothing prevents two States from applying the Convention to matters that other States would not necessarily regard as falling within the Convention's scope, but which the two States themselves consider fall within the Convention's scope."

F. "The Special Commission notes that the expression 'commenced and contemplated' includes proceedings for the taking of evidence before main proceedings have been instituted, and where there is a danger that evidence may be lost."

G. "The Special Commission notes that many Central Authorities provide informal assistance to judicial authorities to ensure that a Letter of Request conforms to the requirements of the State of Destination. The Special Commission encourages this practice, and also urges States Parties also to provide such assistance to parties and their representatives."

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[11] Other preliminary draft Conclusions and Recommendations relating specifically to the taking of evidence via video link may be found in Prel. Doc. No 6, *op. cit.* note 3.

H. "The Special Commission considers that the word 'commenced' should be given a uniform interpretation across Articles 1(2), 15 and 16."

I. "The Special Commission notes and encourages the practice of many States Parties to accept a Letter of Request that has been delivered by courier. The Special Commission also encourages States Parties to consider the possibility of accepting Letters of Request in electronic form."

J. "The Special Commission notes that requests for discovery relating to electronically stored information are likely to increase, and considers that such requests should be treated in the same manner as requests for hard copy documents."

K. "The Special Commission recalls and reiterates the Conclusions and Recommendations of the 2003 Special Commission and recommends that States which have made a general, non-particularised declaration under Article 23 revisit their declaration by considering an amendment adopting terms such as those contained in the UK declaration or in Article 16 of the Inter-American protocol."[12]

J. "The Special Commission notes and encourages the practice of many States Parties that, where request for the taking of oral evidence is accompanied by a request for pre-trial discovery that cannot be executed because it violates the State Party's Article 23 declaration, the request for the taking of oral evidence is executed rather than the entire request being rejected."

L. "The Special Commission notes and encourages the practice of many States Parties that, where request for the taking of oral evidence is accompanied by a request for pre-trial discovery that cannot be executed because it violates the State Party's Article 23 declaration, the request for the taking of oral evidence is executed rather than the entire request being rejected."

[12] Text available on the HCCH website at < www.hcch.net >.

Part One – General Information and Statistics

I. Non-Contracting States (Q. 1–3)

45. Responses were received from 16 non-Contracting States.[13] Non-Contracting States were asked three questions: why they were not Party to the Convention; whether they were party to any bilateral or regional agreements that provided for the taking of evidence abroad, and whether they were currently studying the Convention with a view to becoming a State Party.

A. Reasons why not a Party (Q. 1)

46. A number of reasons were given by non-Contracting States for their status as such (Q. 1). Four States[14] answered that the availability of possibilities under internal law, bilateral or regional agreements, treaties or instruments meant that there was no added value in becoming a Party to the Evidence Convention. Three States[15] advised that the question of becoming a party had never been considered in detail. Albania considered that the number of cross-border cases that require evidence to be taken from abroad was limited and did not require a global framework, and Ecuador indicated that it did not have the resources presently to implement the Convention.

47. Two States[16] considered that there were legal obstacles to their joining the Convention. Canada advised that it is prevented from joining the Convention because no provision is made for federal States. The Republic of Korea specified that it was prevented from joining the Convention due to the lack of specified legislation for implementing the Convention, and its differences with the litigation process of common law States. The Republic of Korea also flagged as a problem the fact that pre-trial discovery of documents does not exist in its domestic process.[17]

48. Two States[18] advised that they are in the process of acceding to the Convention, and Guatemala advised that the text of the Convention is presently being analysed by the national competent authorities in order to join the Convention soon.

B. Other Agreements (Q. 2)

49. Almost all responding States advised that they were party to several bilateral or regional agreements, treaties or instruments that provided rules for the taking of evidence abroad (Q. 2).

50. Relevant regional agreements to which non-Contracting States indicated they were party to include:

- Hague Convention of 1 March 1954 on civil procedure;[19]
- Inter-American Convention on Taking Evidence Abroad (30 January 1975) and additional protocol (24 May 1984);[20]
- Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993);[21]
- MERCOSUR Protocol on International Judicial Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters 1992.[22]

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[13] Albania, Bahamas, Brazil, Canada, Croatia, Ecuador, Georgia, Guatemala, Iceland, Japan, Korea, Malaysia, Moldova, Paraguay, New Zealand, Trinidad and Tobago.
[14] Georgia, Japan, Moldova, Paraguay.
[15] Bahamas, Guatemala, Trinidad and Tobago.
[16] Canada, Korea.
[17] The Permanent Bureau respectfully differs from the views here expressed. First, specific legislation would ordinarily follow, rather than precede, the accession of a State to the Convention. Secondly, the very purpose of the Convention was to build a bridge between civil law and common law States, and the Convention is consequently well adapted to the procedures of both systems. Thirdly, Art. 23 provides a mechanism whereby States that do not recognise pre-trial discovery can declare that they will not execute such requests.
[18] Croatia, Iceland.
[19] Croatia, Moldova.
[20] Ecuador, Paraguay.
[21] Georgia, Moldova.
[22] Brazil.

51. Responding States also indicated that they were party to an (often large) number of bilateral agreements.[23]

52. Malaysia alone advised that it was not party to any agreements that provide rules for the taking of evidence abroad in civil and commercial matters. Malaysia did note, however, that its domestic legislation allows such requests to be received and acted upon.[24]

C. Consideration of Joining the Convention (Q. 3)

53. A majority of responding non-Contracting States are either in the process of accession, or are actively studying joining the Convention (Q. 3). Of the 16 responding non-Contracting States, two States[25] advised that they are currently in the process of ratification, and eight States[26] indicated that they are actively Studying the Convention with a view to becoming a State Party in the future. Six States[27] advised that they were not considering joining the Convention.

54. The Permanent Bureau notes that Iceland has subsequently deposited an instrument of accession on 10 November 2008.

II. Questions for Contracting States (Q. 4–14)

55. The Permanent Bureau received responses from 28 Contracting States.[28]

A. Contact details for Designated Authorities (Q. 4–5)

56. A number of Contracting States took the opportunity to update the contact information for their Authorities designated under the Convention. Those changes have been made to the HCCH website.[29]

B. Statistics (Q. 6–8)

57. Responding States provided a great deal of statistical data in response to the Permanent Bureau's Questionnaire.[30] This information, while sometimes partial and incomplete,[31] nevertheless provides a statistically significant sample of data relating the Convention's operation, and allows a number of conclusions to be drawn with confidence. For those who wish to delve deeper, tables of raw data are annexed to this document.

58. Overall, the responses and the statistics indicate that the Convention is in frequent use and that it works reasonably well in practice, although a number of responding States referred to delays in the execution of Letters of Request by some other States Parties.

Use of the Chapter I

59. In 2007 responding States reported 1574 incoming requests and 2549 outgoing requests. The disparity between the figures is caused by the fact that the data are

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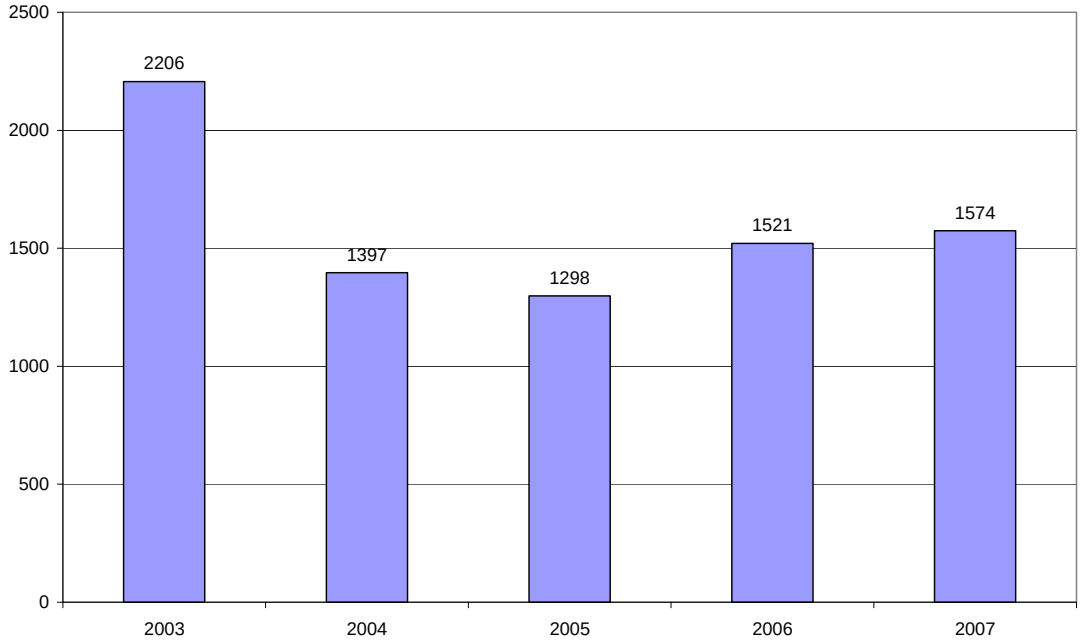
[23] These responses have not been incorporated into this analysis, but may be viewed by accessing the responses given by individual States.
[24] Order 66, *High Court Rules 1980* (PU(A)50/80) (Malaysia).
[25] Croatia, Iceland.
[26] Bahamas, Brazil, Georgia, Guatemala, Korea, Malaysia, New Zealand, Trinidad and Tobago. New Zealand advised that it has already taken steps towards becoming a Party, and Brazil advised that the matter was currently being considered by its Parliament. Guatemala has advised that the text of the Convention is being analysed by their national competent authorities, after which Guatemala will be prepared for the ratification of the Convention.
[27] Albania, Canada, Ecuador, Japan, Moldova, Paraguay.
[28] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.
[29] This information is available on the HCCH website at < www.hcch.net > under "Conventions", then "No 14" and "Authorities".
[30] The raw data has been collected into an electronic spreadsheet that may be requested.
[31] It should firstly be noted that of the 26 Contracting States who responded to the Questionnaire, many States indicated that their statistics were incomplete or partially complete. Some States were unable to provide any data of this character.

incomplete, and that not all States Parties responded to the Questionnaire. Responding States provided similar data for the years 2003–2006.

60. The Permanent Bureau considers that the data of incoming requests is likely to be the most reliable, as this data is generally kept by Central Authorities. In many States, outgoing requests are sent directly by a judicial authority,[32] and statistics are more difficult to centralise. Moreover, and perhaps for this reason, more responding States provided data of incoming requests than of outgoing requests. The data for incoming requests provides, therefore, a reliable minimum of the number of Letters of Request sent in each year. In reality, of course, the total number of Letters of Request will be much higher than these figures reflect as it is necessary to take into account Letters of Request sent by States Parties that did not provide statistics.

Figure 1: Number of Incoming Requests under Chapter I

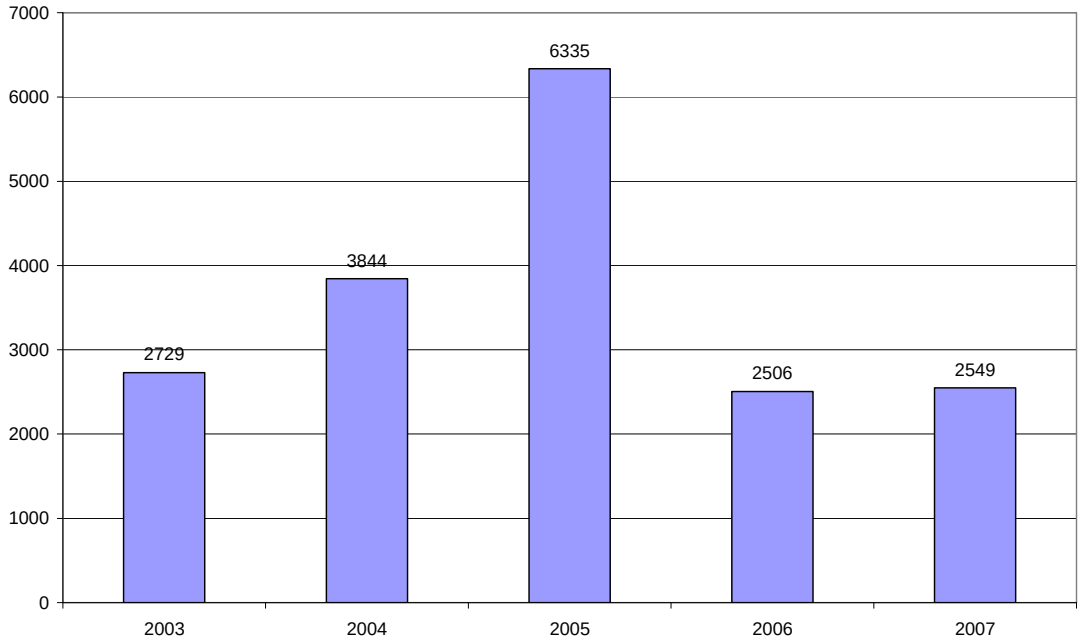


61. It should also be noted that the total number of incoming requests fell between 2003 and 2005. This was likely due to the European Council Regulation (EC) No 1206/2001 of 28 May 2001 being increasingly applied by European States rather than the Evidence Convention. It is also to be noted the number of requests under the Evidence Convention has steadily increased since 2005, suggesting that non-European States are increasing their use of the Convention. One might expect this statistical trend to continue.

62. Fewer responding States provided statistics of the total number of outgoing Letters of Request. Those figures are, however, higher than the number of incoming Letters of Request, due to the very high figures provided by one responding State.[33]

[32] See responses to Q. 38 below.
[33] Turkey.

Figure 2. Total Number of Outgoing Requests under Chapter I



Types of Requests issued under Chapter I

63. The data show that the principal use to which the Convention is put is to secure oral evidence from a witness, or to secure documentary evidence. Many other uses, however, were recorded, including: bank records, blood tests, responses to interrogatories, inspection of real and personal property, medical information, information concerning a person's income, and paternity tests.

64. The following graphs set out the breakdown of incoming and outgoing requests in 2007 into categories of request. As is evident from Figures 3 and 4, the breakdown between incoming and outgoing request is roughly similar, suggesting that these results represent a relatively statistically significant sample from which at least some conclusions may be confidently drawn: that oral evidence is clearly the principal use of the Convention, followed by requests for documentary evidence.

Figure 3: Nature of evidence sought by incoming requests in 2007

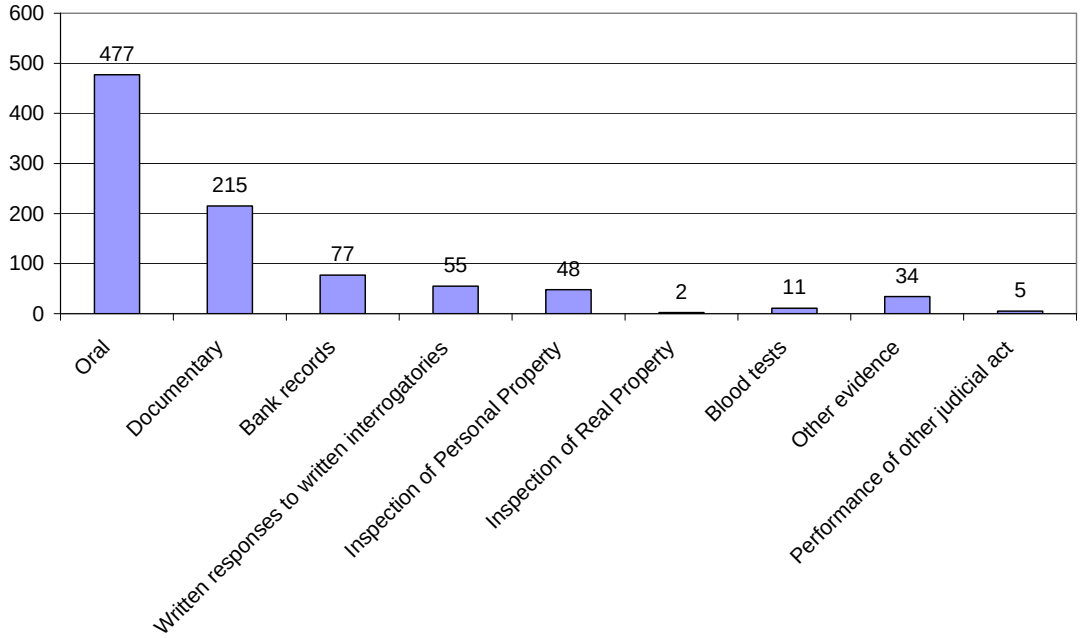
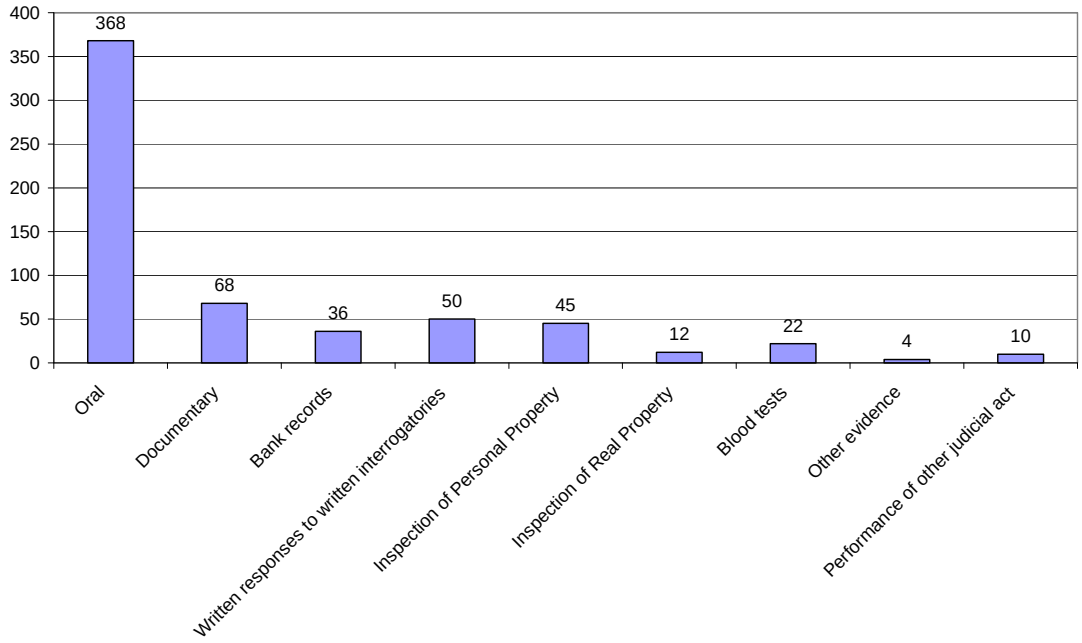


Figure 4: Nature of evidence sought by outgoing requests in 2007



Time taken for Request to be Executed

65. Responding States also provided information relating to the speed with which incoming and outgoing Letters of Request were executed in 2007. It is difficult, however, to draw any solid conclusions from the figures that have been provided. In the case of incoming and outgoing requests, one State[34] provided significantly larger numbers than other responding States, resulting in the figures being somewhat overwhelmed by that State's response. It may, however, be possible to conclude that, among responding States, Letters of Request are usually executed within six months. Some requests, however, can take as long as a year.

66. The statistics for incoming requests in 2007 suggest that only around 5% of Letters of Request were returned unexecuted, and that 63% of Letters of Request are executed within six months. It is encouraging to note, however, that responding States reported that 129 Letters of Request were executed within 2 months, and a further 166 were executed within four months.

67. The figures for outgoing requests tell a more encouraging story: 5% of Letters of Request were returned unexecuted, and 80% were executed within 6 months.

68. Figures 5 and 6 provide a more detailed breakdown.

[34] Spain.

Figure 5: Average time taken to execute incoming requests in 2007

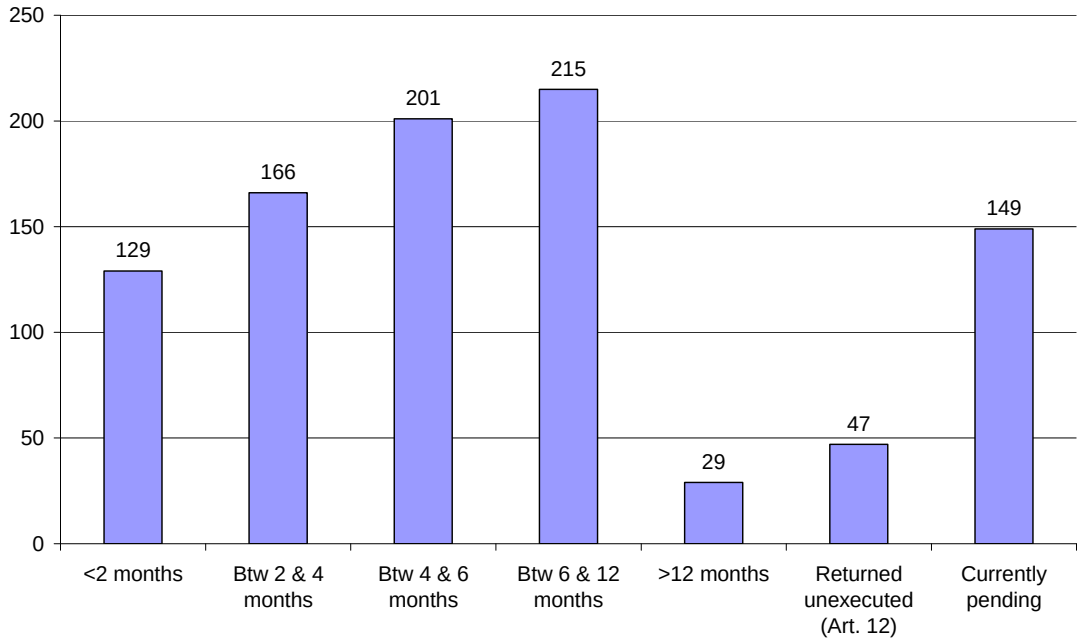
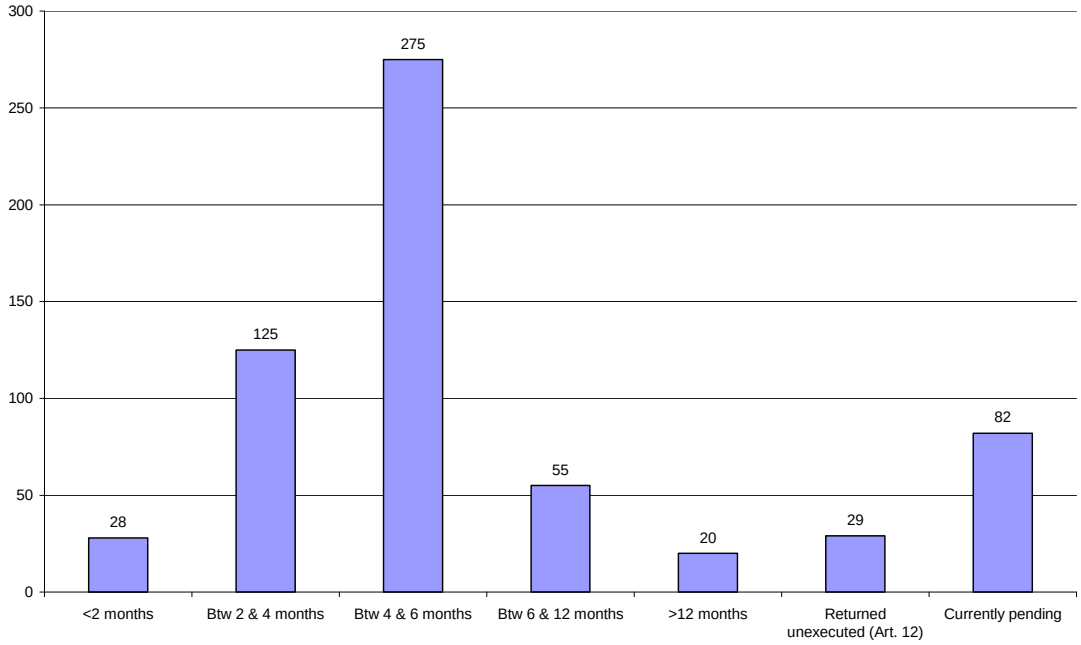


Figure 6: Average time taken to execute outgoing requests in 2007



Chapter II

69. The Statistics provided under Chapter II were extremely limited. Only 11 States provided responses and four of those were to indicate they had no Chapter II requests.[35] Other States responses were incomplete.

70. However, from the data it would appear that evidence was taken under Chapter II on at least 2580 occasions in 2007, suggesting that the use of Chapter II is at least as common as Chapter I.

[35] Finland, Latvia, Estonia, Lithuania

71. The data suggest that in most Chapter II cases oral evidence was sought, although there were a few cases of expert witnesses and documentary evidence.

72. One further conclusion that can be drawn from the data is that many of the uses of Chapter II were reported by only two States, Mexico and Poland. Many States did not keep data on Chapter II usage. This may suggest that Chapter II usage is, in fact, very high, and that Chapter II is used more often than Chapter I. It might also be further remarked that both Poland and Mexico have issued reservations to the use of most of Chapter II, meaning that in the reported cases the evidence must have been taken by a diplomatic officer or consular official.

In sum,

- the statistics provided by responding States do not permit many conclusions to be drawn, however it is possible to say with some confidence that:
  - the Convention appears to be widely used, with, at the very least, over 1500 uses of Chapter I, and 2500 uses of Chapter II, in 2007;
  - the procedures of Chapter I are relatively efficient and effective: most requests being executed within 6 months, almost all requests being returned within a year, and only 5% of requests being returned unexecuted;
  - a significant number of Letters of Request are executed within less than 2 months, and even more in less than 4 months;
  - a clear majority of requests under Chapter I seek oral evidence. The next most popular category of evidence is documentary evidence.

Conclusion

73. The Permanent Bureau notes that a number of responding States suggested that the Convention would benefit from the implementation of time-limits within which a Letter of Request must be executed.[36] The Permanent Bureau invites States Parties to discuss this possibility at the Special Commission, and notes that the statistics given above may be an appropriate starting point for such a discussion.

74. The Permanent Bureau considers that, in light of responding States comments, it may be desirable for the Special Commission to give consideration to the obligation under Article 9(3) that a Letter of Request be executed “expeditiously”. In the Permanent Bureau’s view, based upon the foregoing statistics together with its own experience, this obligation ought to entail that a letter of request is executed in four months, where oral evidence is sought, and six months for all other requests.

75. The Permanent Bureau also considers that there would be considerable benefits were States Parties to adopt a practice of providing a status update within one month of the receipt of a Letter of Request to advise the requesting authority of the envisaged timeline for the execution of the request.

76. Having regard to the foregoing, the Permanent Bureau therefore proposes the following preliminary draft Conclusions and Recommendations for consideration by the Special Commission:

> “The Special Commission notes that the Evidence Convention is operating relatively smoothly and effectively, although a number of States Parties pointed to delays in the operation of the Convention in some States Parties.
>
> The Special Commission considers that the requirement in Article 9(3) of the Convention that a Letter of Request must be executed “expeditiously” requires that a Letter of Request will, in the general case:

[36] See discussion relating to Q. 9 below.

- o be executed within four months if the request is for the taking of oral evidence only; and
- o be executed within six months for all other requests.

The Special Commission recommends that Central Authorities adopt the following timelines and actions upon receipt of a Letter of Request:

- o a letter of acknowledgement of receipt of the Letter of Request should be sent immediately by email to the requesting authority, providing an indication of the time within which the Letter of Request will be executed;
- o within one month, a status report is to be sent to the requesting authority by email, providing details of the date, time and place of the execution of the Letter of Request;
- o if the request is not executed within the time specified in [the previous recommendation], a letter of explanation must be sent by email to the requesting authority, setting out the reasons why the Letter of Request was not executed, and providing details of the date, time and place of the execution of the Letter of Request."

C. General Appreciation of the Convention (Q. 9)

77. The Convention enjoys a good level of appreciation amongst States Parties (Q. 9). Of the 26 responding States, one State[37] described the Convention as "excellent", 20 States[38] described the Convention as "Good", and five States[39] described it as "satisfactory". No States described the Convention as "unsatisfactory".

78. The responding States offered a number of general comments about their appreciation of the Convention, and suggested improvements. Those comments and solutions may be categorised as follows.

79. *Practical Handbook.* Several States indicated that a Practical Handbook would be of assistance.[40]

80. *Actions of Receiving States.* Several States[41] advised that the operation of the Convention could be improved if Letters of Request were executed more quickly by requested States. One solution that was proposed was to introduce time limits for execution. The proposed preliminary draft Conclusions and Recommendations in the previous section are directed to this problem.

81. *Interpretation of the Convention.* Some States drew attention to the problems that arise due to differing interpretations of the Convention. States noted that some States refuse to execute requests for certain types of evidence such as testimony of expert witnesses, medical histories, or details of a person's address.[42] It was also suggested that the Convention should allow for requests for details of a person's address.[43] Switzerland noted the difficulty of distinguishing between civil and criminal matters, and also drew attention to the question of whether rules applicable under Chapter I ought to be applicable by analogy to Chapter II (such as rules on language and fees).

82. *Letters of Request.* Some States noted that Letters of Requests were sometimes received that were inadequate or did not supply all necessary information.[44] China (Hong Kong SAR) suggested that this could be remedied by the creation of a database of the laws and practices of receiving States. Other States suggested that standard or multilingual forms should be used.[45]

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[37] Ukraine.
[38] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, Mexico, Norway, Poland, Romania, Slovakia, Sweden, Switzerland, Turkey.
[39] Denmark, Latvia, South Africa, Spain, United Kingdom.
[40] Estonia, Latvia, Poland, Slovakia, Switzerland.
[41] Czech Republic, Estonia, Finland, Germany, Mexico, Poland, Romania, Slovakia, Sweden, Switzerland.
[42] Argentina, Czech Republic, Slovakia, Turkey.
[43] Czech Republic, Slovakia, and Turkey.
[44] Australia, China (Hong Kong SAR), Switzerland.
[45] Italy, France, Germany. The issue of Model Forms is also addressed below at para. 168.

83. *Modern Technology.* Estonia suggested that the use of modern technology (such as electronically posted letters) could significantly improve the effectiveness of dealing with requests. Australia noted that confusion existed whether evidence could be taken under the Convention by video-link.

84. *Fees.* Switzerland noted that fees can be difficult to collect, as no advance fee is required under the Convention.

D. Case law and reference work (Q. 10–14)

85. The Permanent Bureau is pleased to note that a number of State Parties provided details of guides or practical information that has been produced for the assistance of judicial authorities when sending or executing a Letter of Request under the Evidence Convention (Q. 10). Similarly, the Permanent Bureau is grateful to those States Parties that provided information concerning the domestic legislation pursuant to which the Evidence Convention is implemented (Q. 13).[46]

86. The following States also provided copies of decisions rendered since 2003 in relation to the Evidence Convention (Q. 11).

Australia

87. Australia referred to four decisions. In *Re the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters*,[47] the Supreme Court of South Australia considered whether to execute a Letter of Request relating to US trademark and unfair competition proceedings. The Court noted that a Letter of Request should be viewed "benevolently", and that it is the Court's duty to assist foreign courts where it can. The Court held that the Request should be executed, as the subject matters upon which the parties were to be examined were clearly defined, and the testimony sought would be relevant to the disputes at trial. The Court also granted leave for the issue of a subpoena to order the production of certain documents, and ordered that the execution of the Letter of Request be recorded by video-tape.

88. In Re application of her Majesty's Attorney General in and for the State of New South Wales under ss 32 and 33 of the Evidence on Commission Act 1995,[48] the Supreme Court of New South Wales considered Letter of Request from a Swedish court seeking evidence to determine whether a person was the father of a child. The request sought the taking of blood and buccal samples from the putative father. The Court was satisfied that the evidence before the Swedish court presently established that the defendant was the most likely person to be the child's father, and the Court accordingly ordered that the tests be made.

89. In *Sykes v. Richardson*,[49] the Supreme Court of New South Wales considered a Letter of Request relating to antitrust proceedings in the United States. The Court rejected the contention that such proceedings were not "civil or commercial", despite the possibility that punitive damages may be awarded.

90. In *British American Tobacco Australia Services Ltd v. Eubanks*,[50] the New South Wales Court of Appeal considered a Letter of Request relating to civil proceedings in the United States against certain tobacco companies, and seeking the examination of a former solicitor of one of the companies. The Court held that it was only entitled to accept a request that sought material to prove or disprove facts in the foreign proceeding, rather than material which may lead to the discovery of evidence. The evidence sought was held to be of the former category. The Court also held that it was

[46] These documents may be viewed by accessing the original responses of individual States.
[47] [2008] SASC 51.
[48] [2007] NSWSC 1501.
[49] [2007] NSWSC 418.
[50] [2004] 60 NSWLR 483; [2004] NSWCA 158.

not necessary to show that the evidence was relevant and admissible in the foreign proceedings; a general determination of apparent relevance is all that is required.

China (Hong Kong SAR)

91. China (Hong Kong SAR) referred to two cases. In *Prediwave Corporation v. New World TMT Limited*; *Modern Office Technology Ltd v. New World TMT Ltd*,[51] a Letter of Request from the United States seeking the disclosure of certain categories of banking documents was challenged on four grounds: that it was in truth a request for pre-trial discovery and a "fishing expedition"; that the documents were not relevant to the US proceeding; that banking secrecy should prevent the disclosure of the documents; and that the categories of documents sought were too broad. The Hong Kong Court of Appeal rejected the first three contentions, and partially accepted the fourth. First, the Court rejected the contention that the disclosure sought was for pre-trial discovery. Instead, the Court gave great weight to the opinion of the US requesting judge that the documents were necessary for the suit, and related directly thereto. Secondly, the Court also rejected the contention that the evidence sought was not relevant to the US case as it had been pleaded in the United States, noting instead that the relevance of evidence was a procedural matter and therefore governed by the law of the forum. In this regard, the Court followed the approach of the English High Court in *First American Corp v. Sheik Zayed Al-Nahyan*,[52] which held that "in all but the clearest cases" the court should accept the statement contained in a Letter of Request that the evidence sought is relevant and admissible evidence for the foreign proceedings. Thirdly, the Court rejected the contention that banking confidentiality should prevent the disclosure of the documents, noting that confidentiality is not sufficient to outweigh the public interest of assisting the foreign court. Finally, the Court accepted the submission that the request, seeking records relating to all accounts held by the defendant was too broad. The Court modified the order made by the judge at first instance, and held that only records related to the particular bank account number mentioned in the US suit should be disclosed.

92. China (Hong Kong SAR) also referred to the first instance proceedings, from which the appeal lay.[53]

93. In *Miscellaneous Proceedings No 1367 of 2007*,[54] the Hong Kong High Court was asked by Letter of Request to compel the oral testimony of a Mr Chan in relation to US trademark violation proceedings. Mr Chan opposed the order on three grounds: that the Letter of Request was for pre-trial discovery; that what was sought was a "fishing expedition", and that the Letter of Request was vague, uncertain and oppressive. All three grounds were rejected, and the oral examination was ordered. First, the court held that the Letter of Request was not for pre-trial discovery, noting that, while it could perhaps have been better drafted, it was clear that the substance and effect of the Letter of Request was to obtain the evidence of Chan for use at trial which, in the view of the requesting judge, is both material and necessary to establishing the facts alleged in the US proceedings. Secondly, the court rejected that the Letter of Request was a speculative "fishing expedition", giving weight to the trial judge's view that the evidence was material and necessary. Thirdly, the trial judge held that the six topics upon which

[51] A single judgement was rendered for both cases: [2006] HKCA 392; CACV000292/2006, 17 October 2006.
[52] [1998] 4 All ER 439.
[53] (Hong Kong High Court, Deputy Judge Chan, 18 August 2006).
[54] (Hong Kong High Court, Sakhrani J, 12 October 2007).

Chan was asked to be examined upon were not vague; but rather were sufficiently certain.

Germany

94. Germany referred to two cases, but was unable to provide a summary thereof. The first case related to pre-trial discovery of documents for civil proceedings in a US court and for the submission of documents.[55] The second case related to a Letter of Request from a US court for pre-trial discovery, in which the witness contested the approval of the Letter of Request.[56]

Switzerland

95. A decision of the Ticino First Civil Appeal Chamber dated 2 February 2007 held that a bank was not required to respond in writing to questions on its relationship with specific customers, because the procedural law of Canton Ticino does not make provision for demands for written responses. Rather, the judge must decide whether to order the responsible employee to produce certain documents.

96. A decision of the Second Civil Appeal Chamber in Canton Freiburg dated 26 May 2003 related to a Letter of Request seeking the examination of the holder of a bank account, together with information about the bank account. The Court held that these acts were typically recorded by the relevant Swiss authorities in the inventory of goods in Switzerland of the insolvent person. Furthermore, the court held that the execution of the Letter of Request would require the Court to recognise the foreign bankruptcy, which falls outside the power of the Court. The request was therefore refused. The Court further noted that when interpreting the expression "civil or commercial matters", the Court considered it necessary to take into account the interpretation given to this expression by other legal systems, especially Anglo-Saxon systems where all proceedings are civil that are not criminal in character or that do not involve an extraterritorial exercise of sovereignty. The cause of action therefore fell within this expression.

97. In an Appeal of the Federal Court dated 6 June 2006,[57] the Court considered a Letter of Request relating to US divorce proceedings, seeking the production of specially designated bank documents concerning a third party not involved in the proceedings. The Court held that it could not decide the substantive matter because of procedural reasons, but recalled that a request, if accepted, must be executed according to the law of the requested State, in this case the procedural Law of the Canton of Zurich, according to which the judge must balance the interest of professional secrecy against a possible obligation to testify.

98. The Swiss Response also referred to a decision of the Lucerne Court dated 21 March 2006 ordering the execution of a Letter of Request, and to three Federal appeals, in which:

- the Court recalled that the right of a spouse to request information about the assets of the other spouse overrides banking secrecy;[58]
- the appeal was held inadmissible for procedural reasons;[59] and
- the Court recalled that the Swiss reservation under Article 23 does not exclude the lifting of the banking secrecy at a "pre-trial discovery" stage; in the present case, the cantonal authority weighed the interests involved and the appellant did not

[55] OLG Cella, 6 July 2007 (16 VA 5/07), available in [2008] *IPRax* 350-352; see also comment by R. Stürner and T. Müller "*Actuelle Entwicklungstendenzen im deutsch-amerikanishen Rechtshilfeverkehr*" in [2008] *IPRax* 339-343.

[56] OLG Frankfurt 20th Civil Senate, 26 March 2008. Noted in JMBI NW 2007, 67-68.

[57] Decision available (in German) at < http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.06.2006_5P.257/2005 > (last consulted 1 December 2008).

[58] *Arrêt* 5P.423/2006 du 12 février 2007 du Tribunal fédéral.

[59] *Arrêt* 4A.33/2007 du 27 septembre 2007 du Tribunal fédéral.

establish that this was done in a manner that was untenable, so as to allow the appeal court to overturn the decision.[60]

Lists of Books and Articles (Q. 12)

99. Furthermore, many States parties forwarded lists of articles and books concerning the Evidence Convention (Q. 12). Reference to these books and articles will be made available in the bibliography section of the HCCH website.

References to Bilateral and Multilateral Treaties and Conventions (Q. 14)

100. Finally, many States forwarded references to bilateral treaties and other international instruments to which they are a party and that provide rules for the taking of evidence abroad (Q. 14). Relevant regional agreements[61] to which States indicated they were party to include:

- Hague Convention on civil procedure (1 March 1954);[62]
- Nordic Agreement on Mutual Legal Assistance and Taking of Evidence (26 April 1974)[63]
- Inter-American Convention on Taking Evidence Abroad (30 January 1975) and additional protocol (24 May 1984);[64]
- Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993);
- MERCOSUR Protocol on International Judicial Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters (27 June 1992);[65]
- Council regulation (EC) No 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil and commercial matters (28 May 2001).[66]

Part Two – Substantive Issues (Q. 15–33)

I. Mandatory or non-Mandatory Character of the Evidence Convention and "Blocking Statutes" (Q. 15–16)

A. Mandatory or Non-Mandatory (Q. 15)

101. The Permanent Bureau has prepared a preliminary document that defines and discusses the question whether the Convention is mandatory or non-mandatory.[67] Opinion was divided on the question whether the Convention is mandatory or non-mandatory (Q. 15). Eight States[68] advised that they considered the Convention to be non-mandatory, while five States[69] and the European Community[70] advised that they consider the Convention to be mandatory.

102. For those States that considered the Convention to be non-mandatory, an additional question was asked whether a court may order evidence to be taken in another State Party by methods outside the Convention *even if the State in which the evidence is to be taken would consider that such actions violate its sovereignty, trade activities or secrecy policies*. These considerations (which in some jurisdictions are

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[60] *Arrêt* 4A.399/2007 du 4 décembre 2007 du Tribunal fédéral.
[61] Bilateral Conventions are not considered in this analysis. Lists of bilateral treaties provided by Responding States may be observed by viewing the individual responses of States.
[62] Norway, Turkey.
[63] Denmark, Finland, Iceland, Norway, Sweden.
[64] Argentina, Spain.
[65] Argentina.
[66] European Union States.
[67] Prel. Doc. No 10, *op. cit.* note 8.
[68] Australia, China (Hong Kong SAR), Denmark, Greece, Lithuania, Mexico, Singapore, South Africa.
[69] Argentina, Monaco, Switzerland, Turkey, Ukraine.
[70] The following responding States followed the position of the European Community: Czech Republic, Estonia, France, Germany, Luxembourg, Poland, Romania, Slovakia, Spain, Sweden.

generally referred to as *comity issues*[71]) assume particular significance if and when the State where the evidence is to be taken has implemented legislation which in effect proscribes the taking of certain types of evidence in its territory by methods outside the Convention (see the comments and questions below under the heading "B. Blocking statutes").

103. All States that took the view that the Convention is non-mandatory advised that, when deciding whether to take evidence abroad outside of the Convention, the interests of foreign States was taken into account (Q. 15(a)).

B. Blocking Statutes (Q. 16)

104. A number of States have taken steps to limit the circumstances in which evidence may be taken within their territory for foreign proceedings. Many such laws appear calculated to force foreign evidence takers to use *only* the methods set out in the Evidence Convention. Other such laws operate by preventing the taking of evidence in circumstances in which a State would be entitled to refuse a request for evidence under the Convention (*e.g.*, on the ground that the taking of evidence would violate the State's sovereignty).

105. The most direct method by which a State can prevent evidence from being taken within its territory for the purpose of foreign proceedings is by passing a law prohibiting persons, in certain circumstances, from giving evidence to foreign courts. Laws of this character have come to be known as "blocking" statutes.[72]

106. Seven States,[73] and the European Community, advised that such laws were in place. A majority of States indicated that they had no such laws.[74] Switzerland responded that it had no blocking statutes as such, but that some Swiss laws may nevertheless place limits upon the taking of evidence.

107. The laws referred to cover a variety of cases. Australia referred to two statutes, the first of which authorises the Attorney-General to prohibit a document or thing from being produced on the grounds that it is desirable to do so for the purpose of protecting Australia's security;[75] the second statute grants the Attorney-General a similar power of prohibition, to be exercised where the national interest is concerned, the foreign court has assumed jurisdiction in a manner inconsistent with international law or comity, or the foreign authority has acted contrary to international law or comity.[76] The French law[77] prohibits the taking of all evidence within French territory other than through channels of judicial co-operation. The European Community laws protect against the extraterritorial application of certain listed laws,[78] and protect the movement of personal data.[79] Lithuania referred to a law preventing its courts from assisting in the taking of evidence

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[71] The term "comity" is not known or used in all jurisdictions; it refers to the courtesy among political entities or courts, involving especially mutual recognition of legislative, executive and judicial acts.

[72] This expression is almost universally employed in the literature. See, *e.g.*, A. Lowe, *Extraterritorial Jurisdiction* (1983) xviii; D. McClean, *International Judicial Assistance* (2002) 120; A. Lowenfeld, *International Litigation and Arbitration* (2002) 773; *Restatement (Third) of Foreign Relations Law* (1987) §442 reporters' note 4.

[73] Australia, France, Lithuania, Luxembourg, Mexico, Sweden, United Kingdom.

[74] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Greece, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Ukraine, United Kingdom.

[75] *Foreign Evidence Act* 1994 (Cth), s 42.

[76] *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth), s 7.

[77] Law number 68-678 of 26 July 1968.

[78] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third State, and actions based thereon or resulting therefrom.

[79] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such a data.

contrary to the public order or independence of Lithuania.[80] The Mexican law prevents access to classified information.[81] Switzerland referred to laws protecting the territorial sovereignty of Switzerland (including the prohibition of any person doing acts on behalf of a foreign government or party without authorisation),[82] and also laws protecting (but not in an absolute way) certain categories of information such as banking secrecy,[83] trade secrets, private personal information,[84] and the protection of sources. The United Kingdom referred to two pieces of legislation, the first of which[85] provides that a person cannot be compelled to give evidence if his doing so would prejudice the security of the United Kingdom, and that a Letter of Request cannot be executed against the Crown; and the second of which[86] prohibits giving effect to a request issued by or on behalf of a court or tribunal of an overseas State if it is shown that the request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. The United Kingdom advised that the purpose of the second enactment was to counter any extra-territorial assertions of sovereignty by third States, particularly in the context of penal anti-trust proceedings.

108. Several States advised that they did not have blocking statutes but referred to laws protecting secrecy or State interests.[87]

109. These laws appear to be rarely used. France and Lithuania were not aware of any cases in which the taking of foreign evidence was blocked. Switzerland noted that statistics were not kept on this topic, but referred to several cases in which banking secrecy laws were applied, and one case in which the taking of evidence under the Convention was approved.

110. France noted that in one case in 2007 its courts had taken measures against a lawyer for providing information tending to constitute evidence to a foreign court. The person was fined 10,000 Euros. This appears to be the first occasion on which this law has been used to bring a criminal proceeding against a person taking evidence using procedures outside the Convention.

111. Australia, Lithuania and Switzerland advised that they were not aware of any such measures having been taken.

In sum,

- blocking statutes are reasonably common, but far from universal;
- where they do exist, such Statutes are rarely used.

II. Scope of the Evidence Convention (Q. 17–23)

A. "Civil or commercial matters" (Q. 17–18)

112. The Convention is applicable in "civil or commercial matters".[88] This formulation, which determines the scope of the Convention's subject matter, is not defined in the Convention. The same terms are contained in several other Hague Conventions, in particular the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereafter the "Service Convention").[89]

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[80] Lithuanian Code of Civil Procedure Art. 802.
[81] Federal Law of Transparency and Access to Government Public Information.
[82] Swiss Penal Code, Arts 271, 273.
[83] Swiss Banking Act, Art. 47 and Chapter 4. Switzerland also outlined the operation of specific legislation in certain Cantons of Switzerland.
[84] Swiss Penal Code, Art. 321.
[85] *Evidence (Proceedings in Other Jurisdictions) Act* 1975, ss 3(3), 9(4).
[86] *Protection of Trading Interests Act* 1980, s 4.
[87] Czech Republic, Norway, Singapore.
[88] Art. 1.
[89] The same term is used in other international instruments including, importantly, Art. 1(1) of European Regulation (EC) 44/2001 [2001] OJ L12/1 (and the predecessor Brussels Convention of 1968). It is unlikely, however, that the jurisprudence that has emerged concerning the scope of these instruments is of assistance to determining the scope of the Evidence and Service Conventions, due to the fact that many matters are expressly excluded from the Regulation's scope: Art. 1(2). The expression is also used in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Art. 1.

113. A difference in view exists between civil law States and common law States as to the precise scope of this expression. In general, common law States consider that the expression "civil matters" connotes all matters not criminal in character. Civil law States, by contrast, consider that, alongside the categories of "civil or commercial" and "criminal" matters, a third category of "public matters" also exists, which is fundamentally different in character to "civil or commercial" matters.[90] A question arises, therefore, whether matters falling within this third category also fall within the scope of the Convention. Some civil law States take the view that they do not. A further layer of difficulty is added due to the fact that there is a considerable divergence of view between civil law States themselves as to which matters are public, and which matters are civil or commercial.[91]

114. Experience has shown, however, that these difficulties arise more in theory than in practice. As successive Special Commissions have noted, the practice amongst all States Parties has been to move towards a wider interpretation of Article 1, meaning that such difficulties are still less likely to arise in the future. The 2003 Special Commission unanimously urged for a broad and liberal interpretation of the phrase "civil or commercial matters" and reaffirmed the Conclusions adopted at the 1989 Special Commission[92] which considered it desirable that the words "civil or commercial matters" should be interpreted autonomously and that, where a "grey area" existed between private and public law, the Convention's scope should be interpreted liberally, and with a view to including, rather than excluding, matters. In particular, the 1989 Special Commission urged that matters such as bankruptcy, insurance and employment law should be seen as falling within the scope of the Convention.[93]

115. The responses to the Questionnaire confirm that few problems arise in practice. Of the 26 responding States, 20 States[94] indicated that the interpretation of the expression "civil or commercial" has not given rise to any issues since 2003, and six States[95] advised that issues had arisen (Q. 17).

116. Of the States that indicated that the interpretation of the expression "civil or commercial" had given rise to issues, Australia noted that a recent case had considered whether an anti-trust suit including a claim for punitive damages fell within the scope of the Convention; it was held that it did. France noted that it had received a request for assistance in a criminal matter concerning a customs investigation which was refused as being outside the scope of the Convention. Similarly, Slovakia noted that it had refused requests for evidence in administrative and penal matters. Spain noted that it had received a request for evidence in the area of Labour Law, which had been solved by speaking to the Competent Authority of the requesting State in order to clarify Spain's position. Mexico also advised that it had had difficulties with labour-law related requests.

117. It is encouraging to note, moreover, that even where issues have arisen in respect of the interpretation of the expression "civil or commercial", the recommendations of the 2003 Special Commission have been followed (Q. 17(a)(ii)), and the Convention's scope has been broadly interpreted. France, Slovakia and Switzerland all noted that these

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[90] See, *e.g.*, C. Szladits, "The Civil Law System" in R. David (ed) *International Encyclopedia of Comparative Law* Vol. II, Chapter 2, 15ff.
[91] *Ibid*.
[92] Conclusions and Recommendations Nos 69–72 of the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003).
[93] See "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", August 1989, para. 26(a), (b).
[94] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, Monaco, Norway, Poland, Romania, South Africa, Sweden, Turkey, Ukraine, United Kingdom.
[95] Australia, France, Mexico, Slovakia, Spain, Switzerland.

recommendations were followed where an issue arose. The Permanent Bureau welcomes this continued trend towards a broad interpretation of the scope of the Convention.

118. Furthermore, of the six States that reported issues with the expression "civil or commercial", four States[96] advised that discussions had occurred between Central Authorities regarding the interpretation of the expression (Q. 17(b)). Of the two remaining States, Switzerland noted that Cantonal authorities had advised that they had rejected requests in a number of clear cases in which discussion was not necessary, but also advised that the Federal Office of Justice (which is part of the Federal Department of Justice and Police) has the practice of explaining its view informally although no occasion for debate has yet arisen. Norway advised that should a requested State ever consider a Norwegian request to be outside the scope of the Convention, Norway would look to sending the request through diplomatic channels. Finally, and as is to be expected, States that did not report any issues arising from the expression "civil or commercial" also reported that no discussions concerning such issues had taken place.[97]

119. Many States also responded to the Permanent Bureau's specific questions whether particular types of matters fell within the Convention's scope (Q. 18), although some States[98] advised that no such advice could be given on the basis that insufficient information was available, or because the matter had not been conclusively determined.[99] The responses were as follows:

- **Bankruptcy or Insolvency in General.** Twenty-one States[100] considered that bankruptcy or insolvency matters fall within the scope of the Convention, and one State[101] considered that they did not.
- **Reorganisation under Bankruptcy Laws.** Nineteen States[102] considered that such matters fall within the scope of the Convention, and two States[103] considered that they did not. Switzerland advised that such proceedings would fall within the scope of the Convention so long as execution measures were not sought.
- **Insurance.** Twenty States[104] that responded advised that they consider insurance matters to fall within the scope of the Convention.
- **Social Security.** Ten States[105] advised that they consider social security matters fall within the scope of the Convention, and seven States[106] considered that they did not. China (Hong Kong SAR) noted that a case involving the defrauding of social security may give rise to criminal liability, in which case the proceeding would fall outside the Convention's scope. Switzerland noted that, while its Federal Tribunal has ruled that social security proceedings are civil in character, the laws of some Cantons hold the opposite.

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[96] Australia, France, Mexico, Spain.
[97] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Greece, Latvia, Lithuania, Monaco, Norway, Romania, South Africa, Ukraine, United Kingdom. Slovakia also advised that no such discussions had taken place.
[98] Denmark, Singapore.
[99] Denmark, Singapore, Sweden.
[100] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, South Africa, Spain, Switzerland, Turkey, Ukraine, United Kingdom.
[101] Slovakia.
[102] China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, South Africa, Spain, Switzerland, Ukraine, United Kingdom.
[103] Argentina, Slovakia.
[104] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Latvia, Lithuania, Mexico, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Spain, Switzerland, Turkey, United Kingdom.
[105] Argentina, China (Hong Kong SAR), France, Mexico, Norway, Poland, South Africa, Spain, Switzerland Ukraine.
[106] Czech Republic, Finland, Lithuania, Monaco, Romania, Slovakia, United Kingdom.

- **Employment.** Twenty States[107] advised that they consider employment proceedings do fall within the Convention's scope, while two States do not.[108]
- **Taxation.** Five States[109] advised that they consider that taxation matters fall within the scope of the Convention, while 12 States[110] consider that they do not. China (Hong Kong SAR) qualified its affirmative answer by noting that proceedings for tax fraud may be criminal in character, and therefore fall outside the scope of the Convention.
- **Anti-trust and Competition.** Thirteen States[111] advised that they consider such proceedings fall within the Convention's scope, while five States[112] advised that they do not. Four States[113] advised that such proceedings may sometimes fall within the Convention's scope, but it would depend upon the particular facts of the case.
- **Consumer Protection.** All 19 States[114] that responded to this question advised that they considered consumer protection proceedings to fall within the scope of the Convention. Latvia advised that such proceedings could either fall within the Convention's scope, or outside it, depending upon the circumstances.
- **Regulation and Oversight of Financial Markets and Stock Exchange**. Nine States[115] considered that such proceedings fall within the Scope of the Convention, while eight States[116] considered that they did not. Finland noted that criminal matters that arose from such proceedings would not fall within its scope.
- **Proceeds of Crime.** Four States[117] considered that proceedings seeking to recover the proceeds of crime would fall within the scope of the Convention, while 13 States considered they would not.[118] China (Hong Kong SAR) advised that procedures for confiscation would be criminal, while forfeiture proceedings would be civil.

120. A number of States made more general comments on the scope of the Convention. Argentina advised that its Central Authority had a wide criterion of interpretation, and that when analysing the admissibility of a Letter of Request, the Central Authority "reviews the competence of the judge who issues it".[119] Latvia advised that the following matters are "civil and commercial": property relations, family relations, status of natural

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[107] Argentina, China (Hong Kong SAR), Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Mexico, Norway, Poland, Romania, Slovakia, South Africa, Spain, Switzerland, Turkey, Ukraine, United Kingdom.
[108] Czech Republic, Monaco.
[109] Argentina, China (Hong Kong SAR), South Africa, Spain, Ukraine.
[110] Czech Republic, Finland, France, Lithuania, Mexico, Monaco, Norway, Poland, Romania, Slovakia, Switzerland, United Kingdom.
[111] Czech Republic, Estonia, Finland, France, Latvia, Lithuania, Luxembourg, Monaco, Norway, Poland, South Africa, Spain, Ukraine.
[112] Argentina, Mexico, Romania, Slovakia, United Kingdom.
[113] Latvia, Poland, Switzerland, United Kingdom.
[114] Argentina, Czech Republic, Estonia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Spain, Switzerland, Ukraine. Switzerland advised that all Cantons except one also take this view.
[115] China (Hong Kong SAR), Finland, Latvia, Lithuania, Monaco, South Africa, Spain, Turkey, Ukraine.
[116] Argentina, Czech Republic, France, Mexico, Poland, Romania, Slovakia, Switzerland. Switzerland noted, however, that a majority of its Cantons took the view that such proceedings did fall within the scope of the Convention.
[117] China (Hong Kong SAR), Poland, South Africa, Spain.
[118] Argentina, Australia, Czech Republic, Finland, France, Lithuania, Mexico, Monaco, Norway, Romania, Slovakia, Switzerland, Ukraine. Switzerland noted, however, that some Cantons consider such proceedings to fall within the scope of the Convention.
[119] The Permanent Bureau is not clear what is meant by this expression, but notes that it is not appropriate for the Receiving State to embark on a procedure that attempts to determine whether the judge in the requesting State has properly assumed jurisdiction.

and legal persons, agency relations, succession, contractual and non-contractual obligations.

121. Greece advised that the array of these matters is primarily examined by the primary judge and it follows the interpretation of the European Regulation (EC) 1206/2001.

122. Australia advised that enforcement actions in relation to many of these categories (for example, insurance fraud, social security fraud, breach of tax law and financial market regulation) could be pursued through both criminal and civil proceedings, depending on the circumstances. These categories may therefore be listed as falling within the "civil and commercial" description because in many cases they can be pursued through civil proceedings, not because they are always or even usually pursued in this way. Processes for mutual assistance in criminal matters, however, should be used to obtain evidence in proceeds of crime matters.

In sum,

- issues relating to the interpretation of the expression "civil or commercial" are more evident in theory than in practice;
- where such issues do arise, States Parties follow the recommendation of the 1989 Special Commission, and apply a broad interpretation of the words;
- moreover, where such issues arise, the Central Authorities of many States engage in discussions with requesting authorities in an effort to resolve such issues;
- there is a unanimous consensus that the following areas fall within the scope of the Convention: Insurance; Consumer Protection;
- there is a broad (although not unanimous) consensus that the following areas fall within the scope of the Convention: Bankruptcy or Insolvency Proceedings in General; Reorganisation under Bankruptcy Laws; Employment, Anti-trust and Competition;
- no consensus exists whether the following areas fall within the scope of the Convention: Social Security, Regulation and Oversight of Financial Markets and Stock Exchange;
- opinion is divided as to whether Taxation matters fall within the scope of the Convention;
- a broad (but not unanimous) consensus exists that Proceeds of Crime do not fall within the scope of the Convention:

Conclusions

123. Based upon the foregoing discussion, the Permanent Bureau suggests that the Special Commission consider adopting a Recommendation and Conclusion in the following terms:

> "The Special Commission reaffirms the Recommendations and Conclusions of the 1989 and 2003 Special Commissions that the expression 'civil or commercial' should to be interpreted broadly, and according to an autonomous definition that is neither based exclusively on the law of the Requesting State nor the law of the Requested State, nor the law of both States. The Special Commission notes that there exists a strong consensus that the following categories of proceeding fall within the scope of the Convention: Insurance, Consumer Protection, Bankruptcy or Insolvency Proceedings in General, Reorganisation under Bankruptcy Laws, Employment, Antitrust and Competition.
>
> The Special Commission further notes that nothing prevents two States from applying the Convention to matters that other States would not necessarily regard as falling within the Convention's scope, but which the two States themselves consider fall within the Convention's scope."

B. Interpretation of terms "commenced or contemplated" (Art. 1(2)) and "commenced" (Arts 15(1) and 16(1)) (Q. 19–22)

124. Australia was the only State to advise that this expression had been considered by its courts. Australia considered that "contemplated" proceedings referred to proceedings that may not have actually been instituted at the time of execution of the Letter of Request.

125. A number of States however, provided information concerning how the notion of "contemplated" proceedings would be understood within their domestic law (Q. 19). Seven States observed that the taking of evidence for "contemplated" proceedings was permitted under procedures of domestic law in circumstances where there was a legitimate reason for taking the evidence, or where there was a danger that the evidence may be lost.[120] Germany considered that the expression "contemplated judicial proceedings" should be understood in a broad sense, and should include the case where there exists a cause for legal proceedings because the parties are in deep dispute over a state of affairs. The Czech Republic and Ukraine advised that, under their domestic law, there were no proceedings that could be regarded as contemplated; Slovakia noted the same, but also stated that it has under domestic law provisions for safeguarding evidence before a court is seized. Lithuania considered that a "commenced" proceeding is a prospective judicial procedure that has not been commenced by the procedural action of a judge, but is considered possible, provided the applicant complies with the requirements set out by the judge. Romania advised that regard should be had to the substance of the process, and that the matter should not merely be treated as a procedural issue. Switzerland noted that a proceeding would be considered to be "commenced" when the first act necessary to commence the proceedings is taken.

126. The expression "commenced and contemplated" has not given rise to many difficulties in practice (Q. 20). Of the 26 responding States, 25 States[121] advised that no difficulties had arisen interpreting the expression "commenced or contemplated". China (Hong Kong SAR) referred to a 1994 case in which the issue arose. Australia advised that clarification was required in connection with an incoming request on one occasion.

127. All of the 20 responding States[122] advised that no difficulties had arisen in respect of the word "commenced" in Articles 15 and 16 (Q. 21).

128. Twenty-one responding States[123] agreed that the word "commenced" should have a uniform interpretation across Articles 1(2), 15 and 16 (Q. 22). However Turkey responded that there should not be a uniform interpretation, but rather it should be left to the parties' disposal. Mexico advised that there had been no problem regarding this matter, but responded that the word should not be uniformly interpreted.

In sum,

- the expression "commenced and contemplated" has received very little judicial consideration, and has given rise to very few difficulties in practice;
- the concept of a "contemplated" proceeding is associated with a diverse range of domestic legal concepts, although it is unknown to some domestic legal systems;
- a significant number of States consider that "contemplated" proceedings include proceedings to take evidence where there is a danger that the evidence would be lost;
- almost all States agree that the word "commenced" should be given a uniform interpretation across Articles 1(2), 15, and 16.

Conclusions

129. Based upon the foregoing analysis, the Permanent Bureau proposes the following preliminary draft Conclusions and Recommendations for consideration by the Special Commission:

> "The Special Commission notes that the expression "commenced and contemplated" includes proceedings for the taking of evidence before main proceedings have been instituted, and where there is a danger that evidence may be lost."

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[120] Estonia, France, Latvia, Monaco, Norway, Poland, Switzerland.
[121] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Sweden, Switzerland, Spain, Turkey, Ukraine, United Kingdom.
[122] Australia, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom.
[123] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Monaco, Poland, Slovakia, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom.

"The Special Commission considers that the word "commenced" should be given a uniform interpretation across Articles 1(2), 15 and 16."

130. The Permanent Bureau also invites States Parties to give consideration to the question whether the procedures of the Evidence Convention can be used by a court to seek the assistance of a court of a foreign State Party to require a person to disclose their assets held in that State Party, including in a situation where the information is sought to assess whether or not to execute a foreign judgement in the requested State The Permanent Bureau considers that it is arguable that such a request would properly fall within the scope of the Convention.

C. Arbitration Proceedings (Q. 23)

131. The 2003 Special Commission noted that, in some instances, and in accordance with the internal law of some States, the Evidence Convention has been made available for use in arbitration proceedings.[124] The Special Commission stressed however that a request for the taking of evidence under the Evidence Convention in the context of arbitration proceedings would have to be presented by the relevant judicial authority of the State where those proceedings were taking place.

132. Two States[125] reported that they had received or forwarded a request for evidence in Arbitration proceedings (Q. 23). Switzerland advised that no problems were encountered and the request was forwarded. Twenty-three States[126] responded that no such requests had been received. Estonia advised that, under Estonian law, an arbitral tribunal may request the assistance of a court to perform an attestation act, or conduct another court activity; in such cases the requested court may seek evidence abroad under the Evidence Convention.

III. Taking of Evidence by Video-Link (Q. 24–33)

133. The Conclusions and Recommendations adopted by the 2003 Special Commission expressed general support for the use of modern technologies under the Evidence Convention, including the taking of evidence by video-link,[127] to further facilitate the efficient operation of the Evidence Convention (Conclusions and Recommendations Nos 4 and 42).

134. The responses to the Questionnaire provide a substantial amount of data relating to the technical capacity of States Parties to provide for evidence by video-link. This data is likely to be of substantial use to the Special Commission for its considerations of video-link evidence under the Convention.

135. Due to the importance of this issue, the Permanent Bureau has also prepared a Preliminary Document dealing with the legal and practical issues that arise from the taking of evidence by video-link under the Convention.[128]

A. General Legal Framework (Q. 24)

136. Most States do not consider there to be any legal obstacles to the taking of evidence by video-link under the Convention (Q. 24). Of the 26 responding States, 23 States[129] considered that no problem existed under Chapter I of the Convention, and

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[124] Conclusion and Recommendation No 38.
[125] Singapore, Switzerland.
[126] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Slovakia, South Africa, Spain, Turkey, Ukraine, United Kingdom.
[127] The reference to video-link includes all videoconferencing and any other modes of visual technology connections (including webcams).
[128] Prel. Doc. No 6, *op. cit.* note 3.
[129] Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom.

17 States[130] considered there to be no obstacles under Chapter II of the Convention (fewer States responded in respect of Chapter II, corresponding to the fact that some States have made a reservation preventing the taking of evidence under this Chapter). By contrast, only one State – Monaco – considered that there were legal obstacles to the taking of evidence by video-link under Chapter I, and these problems arose because video-link evidence is not provided for by Monegasque legislation.

137. Two States considered that there were legal obstacles to the taking of evidence under Chapter II: Germany noted that it cannot be guaranteed that the person concerned will agree to give evidence by video-link; Romania did not explain its reason, but it could be perhaps inferred that the obstacle is Romania's reservation of Chapter II of the Convention.

138. Responding States provided useful information justifying the reason why they considered that there were no legal obstacles to the taking of evidence by video-link under Chapter I of the Convention. Nine States[131] advised that they considered that the language of the Convention was sufficiently flexible to accommodate the taking of such evidence. References were also made to specific Articles of the Convention said specifically to justify the taking of evidence by video-link. Five States[132] considered that video-link evidence could be justified as part of the right of presence given to parties and judicial authorities under Articles 7 and 8. Three States[133] advised that, in their view, video-link evidence was a "special method or procedure" that could be requested pursuant to Article 9(2).

139. Responding States also provided other remarks about the taking of evidence by video-link under Chapter I of the Convention: Finland advised that such co-operation is permissible under the Convention, but is fully based on domestic legislation. Germany considered that evidence by video-link could not be taken under the Convention unless the person giving evidence agreed to having the evidence so taken. Norway advised that the requested State was not required to carry out such a request. Switzerland advised that while parties and judicial officials may be present by video-conference under Chapter I of the Convention, it would not be possible for them to speak or otherwise participate in the proceedings under Chapter I; rather, such participation may only occur under Chapter II of the Convention.

140. Responding States generally made similar remarks in respect of the taking of evidence by video-link under Chapter II of the Convention. Three States[134] considered that such evidence may be taken under Article 19; although Latvia noted that other States' interpretations of Article 19 may affect this conclusion. Estonia considered that it would be necessary for such evidence to be permissible under the law of the State of Origin.

141. Responding States also provided useful information relating to the legality of video-link evidence under their domestic legislation. Five States[135] noted that the taking of evidence by this method was expressly permitted by their domestic law; and the Czech Republic advised that while no such provision was made this would not be an obstacle.

In sum,

- almost all Responding States Parties consider that there are no legal obstacles to the taking of evidence by video-link under the Convention under Chapter I and Chapter II.

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[130] Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Greece, Latvia, Lithuania, Mexico, Norway, Poland, Slovakia, South Africa, Spain, Switzerland, United Kingdom.
[131] China (Hong Kong SAR), Finland, France, Germany, Greece, Latvia, Spain, Switzerland (most Cantons), United Kingdom.
[132] Estonia, France, Lithuania, South Africa, Switzerland (some Cantons).
[133] France, Germany, Switzerland.
[134] Estonia, Latvia, South Africa.
[135] Latvia, Singapore, Slovakia (after October 2008), Turkey.

142. The Permanent Bureau has prepared a preliminary document considering the legal and practical issues concerning the use of video-link evidence under the Convention. This Preliminary Document also includes specific draft Conclusions and Recommendations on this subject matter.[136]

B. Chapter I – Incoming Letters of Request (Q. 25–26)

143. Requests for evidence by video-link are relatively rare, but are becoming more common (Q. 25). Of the 26 responding States, six States[137] advised that they had received requests since 2003 requiring the taking of evidence by video-link; and 20 States[138] advised that they have received no such requests. The number of such requests is small: the largest number given was four. The States from which such requests were received included Australia, China (Hong Kong SAR), Portugal and the United States. Three States[139] advised that these requests were executed; two States advised that they were not;[140] and France advised that the request had only very recently been received. Switzerland advised that a request was principally rejected due to a lack of infrastructure and appropriate technical means. Three States[141] noted that they had also received such requests under the relevant European Regulation.

144. Responding States provided useful information relating to the technology used to execute such requests. Australia noted that it used a broad range of technologies that depended upon the case in question, and that its courts had endorsed a broad definition of video-link. France advised that it presently uses an ISDN service connected through the telephone network with a minimum bandwidth of 256 kb/s. Norway advised that it possesses equipment allowing the sending of evidence by encrypted video-link. Singapore advised that a secure video-link on a private network is used. Spain advised that a web-cam connection is used over the internet. Two States[142] advised that no technical problems had arisen, while Spain advised that on some occasions technical problems arose due to the incompatibility of the video-systems used.

145. Four States[143] advised that no language barriers were encountered during the taking of evidence by video-link, while Spain advised that such barriers had arisen. Australia and France specified that professional accredited translators are used where required, and France and Spain advised that translators must be paid for by the parties or counsel. In Australia, France and Spain, simultaneous interpretation is not required, and in sequence interpretation is sufficient. In Australia and Spain, interpretation is only required in the requested State; but France requires interpretation in both States.

146. Many States provided useful information on the question whether an unwilling witness could be compelled to provide evidence by video-link (Q. 26). Seven States[144] advised that measures could be taken to compel, usually a fine.[145] Three States[146] advised that they would not execute a request if the witness is unwilling, and Germany and Romania advised that they would take evidence in a different way. Denmark advised that it would not be possible to compel a witness. Australia advised that Australian courts can compel a witness to give evidence by video-link under domestic legislation, but that Australia would not compel a person to appear via video-link in a foreign court; a standard Letter of Request would be required to obtain the evidence by compulsion.

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[136] Prel. Doc. No 6, *op. cit.* note 3.
[137] Australia, France, Norway, Singapore, Spain, Switzerland.
[138] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Slovakia, South Africa, Turkey, Ukraine, United Kingdom.
[139] Australia, Norway, Singapore.
[140] Spain, Switzerland.
[141] Finland, France, Greece.
[142] France, Norway.
[143] Australia, France, Norway, Singapore.
[144] Estonia, Finland, France, Lithuania, Mexico, Sweden, Switzerland (one Canton).
[145] Estonia, France (up to € 3000), Lithuania (up to 1000 litas).
[146] Spain, Romania, Switzerland (some Cantons).

In sum,

- requests under the Convention that evidence be taken by video-link are relatively rare, but are becoming a reality.
- a number of such requests have been successfully executed.

C. Outgoing Letters of Request (Q. 27)

147. Similar data arises in respect of outgoing Letters of Request (Q. 27). Of the 25 responding States, three States[147] reported that their judicial authorities had forwarded a Letter of Request for the taking of evidence by video-link abroad. Denmark noted that its Court Administration had received preliminary inquiries whether such a request would be possible under the Convention but, due to limited technical equipment, the inquiries were answered in the negative. Spain reported that 6 or 7 such requests were forwarded to South American States and the USA, but that the requests were not executed due to incompatibilities of the video systems in use.

148. The United Kingdom advised that its authorities had forwarded one such request to China (Hong Kong SAR), which was not executed, as it is still pending.

In sum,

- requests under the Convention that evidence be taken by video-link are relatively rare, but are becoming a reality.

D. Chapter II – Evidence Taken in Requested State (Q. 28–29)

149. Of the 22 responding States, only Switzerland responded that it had received a request for evidence to be taken by video-link under Chapter II of the Convention (Q. 28). Switzerland reported that the taking of such evidence has been authorised on three occasions for proceedings in Australia and the United States.

150. None of the responding States[148] reported any Chapter II cases that requested or required the use of modern technology which were ultimately not executed as a result of the witness not being willing to give evidence using such technology (Q. 29).

In sum,

- there are very few data on the use of video-link under Chapter II. It appears, however, that video-link evidence had been successfully taken under Chapter II on at least three occasions.

E. Chapter II – Evidence Sought in Another State (Q. 30–31)

151. Of the 22 responding States, only Spain reported that video-link evidence had been taken in another State under Chapter II (Q. 30). In answering this question, Spain referred to the details of its answers in respect of evidence taken under Chapter I.

152. None of the responding States[149] reported any cases that requested or required the use of modern technology which were ultimately not executed as a result of the witness not being willing to give evidence using such technology (Q. 31).

In sum,

- there are very few data on the use of video-link under Chapter II.

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[147] Australia, Spain, United Kingdom.
[148] Argentina, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Mexico, Poland, Romania, Slovakia, Sweden, Switzerland, Ukraine, United Kingdom.
[149] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Mexico, Monaco, Poland, Romania, Slovakia, Switzerland, United Kingdom.

F. General Questions Regarding the Use of Modern Technologies (Q. 32–33)

Capacity of Courtrooms to use Modern Technologies (Q. 32)

153. The vast majority of States reported that their courts are provided with internet access and audio recording equipment, and that video-conferencing facilities are available in at least some court rooms (Q. 32). Of the 24 responding States,

- 18 States[150] advised that their courts are equipped with computers with internet access. A further five States[151] did not refer to the presence of such technology, but provided answers suggesting that such technology is available.
- 13 States[152] advised that their courts are equipped with audio recording equipment;
- three States[153] advised that their courts are equipped with video-recording equipment;
- 15 States[154] advised that at least some of their courts are equipped with video-conferencing equipment; and a further five States[155] advised that they are trialling such technology or intend to introduce it in the near future.

In sum,

- almost all responding States advised that courts are equipped with computers with internet access;
- most responding States make audio-recording equipment available in their courts;
- most responding States offer video-conference facilities in at least some courts, and some responding States make video-conferencing facilities available in all courts. Several States have also indicated that they are trialling such technology, or intend to introduce it in the near future.

Modern Technology under the Convention (Q. 33)

154. Responding States were asked whether the use of modern technologies under the Convention should be encouraged, and also whether an additional protocol to the Convention was thought necessary, or whether a guide to good practice would be thought sufficient (Q. 33). Of the 21 responding States, 16 States[156] and the European Community indicated that a Guide to Good Practice would be sufficient. Lithuania advised that it considered that a Guide to Good Practice would be sufficient, but not necessary at all. Three States[157] considered that an additional protocol was necessary.

155. The European Community stressed the importance that it attached to the use of modern technologies in the process of taking evidence abroad, and noted that its activities include the promotion of such technologies – in particular video-conferencing and tele-conferencing – under the auspices of the 2001 Regulation.[158] The Community

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[150] Australia, Czech Republic, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Monaco, Norway, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom.

[151] China (Hong Kong SAR), France, Greece, and Singapore all referred to the availability to video-conferencing equipment, which suggests the presence of computers and internet access. Luxembourg advised that it is in the process of equipping its courts with the necessary technology.

[152] Australia, China (Hong Kong SAR), Czech Republic, Finland, Lithuania, Norway, Romania, Singapore, Slovakia, South Africa, Switzerland, Ukraine, United Kingdom.

[153] China (Hong Kong SAR), Switzerland, Ukraine.

[154] Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Lithuania, Norway, Singapore, Slovakia, Spain, Ukraine, United Kingdom.

[155] Denmark, Finland, Greece, Latvia, Luxembourg.

[156] Argentina, China (Hong Kong SAR), Czech Republic, France, Greece, Luxembourg, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland, United Kingdom.

[157] Australia, Mexico, Turkey.

[158] Council regulation (EC) No 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil and commercial matters (28 May 2001).

also noted that it is currently working to promote the use of such technologies under the banner of "e-justice", and suggested that the Community's experience in this area may be of assistance to Member States in the context of the implementation of the Convention. The Community advised that it supported the creation of a supplementary document that would encourage parties to the Convention to further utilise modern technology: while the Community would prefer to see a Guide to Good Practice implemented, it would be willing to consider an additional protocol if a majority of States Parties to the Convention took the view that it would be useful.

156. Switzerland advised that a Guide to Good Practice would be desirable, given that a protocol would require ratification and would make implementation more complicated. On the other hand, Switzerland noted that it is open to question whether a non-binding guide would be capable of meeting precise standards such as appear in Article 9 of the Second Additional Protocol of 8 November 2001 to the European Convention on Mutual Assistance in Criminal Matters.

157. Denmark noted that it was not aware of any use of video-conferencing in its own courts, and therefore did not consider that it could comment on the desirability of a protocol as against a Guide to Good Practice. Denmark did note, however, that it welcomed the introduction of further common rules and norms, so long as such work is co-ordinated with the European efforts underway in the "e-justice" initiative.

158. Monaco advised that is was desirable to encourage States to utilise modern technologies, but that it would also be desirable to do so in a way that ensured a large area of manoeuvre. Monaco also noted that the small number of requests that it receives could not justify the implementation of new legislation.

159. Australia considered that an additional protocol is necessary to provide an agreed approach to executing Letters of Request by video-link and to address the various private international law issues that may arise including:

- Which State's official should administer the oath to the witness;
- Which State's laws govern perjury by the witness;
- Which State may punish for contempt of court.

160. Australia also advised that it is considering drafting a written proposal that could be circulated to Members States ahead of the Special Commission meeting in February 2009.

161. Mexico advised that due to its strict rigid legal system, based upon the Napoleonic code, it would be necessary to consider an additional protocol, in order for Mexican authorities to be bound by a common legal framework.

162. Turkey advised that the matter was best resolved by means of a protocol, on the basis that the technology used by States Parties differs, and therefore a protocol would be capable of providing uniformity.

In sum, it appears that a clear majority of States favour a Guide to Good Practice, and a minority support an additional protocol.

163. Having regard to the view expressed by the clear majority of Responding States, the Permanent Bureau has prepared a preliminary document on the legal and practical questions arising from the use of video-link under the Evidence Convention.[159] In that document, the Permanent Bureau suggests a number of preliminary draft Conclusions and Recommendations for consideration by the Special Commission.

[159] Prel. Doc. No 6, *op. cit.* note 3.

Part Three – Other Operational Issues (Q. 34–77)

I. Chapter I – Letters of Request (Q. 34–75)

A. Preparation of Letter of Request (Q. 34–36)

164. The Central Authorities of most responding States are willing to provide assistance to foreign judicial authorities in preparing Letters of Request (Q. 34). Of the 26 responding States, 11 States[160] advised that they have provided such assistance in the past, and a further 11 States advised that they would provide such assistance if requested.[161] South Africa advised that it would provide such assistance in circumstances of reciprocity. Poland advised that it would not provide this form of assistance. Singapore advised that it had not provided such assistance in the past.

165. A slightly lower level of assistance, however, appears to be given to the parties to proceedings (Q. 35). Of the 24 responding States, 10 States[162] advised that they had provided assistance to parties. A further four States[163] advised that they would provide such assistance if called upon. Four States advised that they have not provided, and would not provide, such assistance.[164] Australia specified that it would only provide general advice concerning where to find the Model Form. Latvia advised that it would only provide parties with information if they required such information. South Africa noted that the Central Authority would ensure that the parties are provided with representation, either pro bono or contracted. Singapore advised that it had not provided such information in the past.

166. Different views were taken on the question whether a Letter of Request must include specific questions to be asked by the executing Authority (Q. 36). Of the 25 responding States, seven States[165] responded that specific questions are required; five States advised that specific questions are not required but are recommended;[166] and five States advised that a list of matters to be addressed suffices.[167] France and Sweden noted that no requirements were made by their law. China (Hong Kong SAR) and Singapore advised that, where the parties do not appoint representatives to ask questions, then a list of questions would be required. Germany advised that a list of questions is required under Article 3 *f)* of the Convention, and that a majority of its Central Authorities took the view that a list of matters to be addressed would not be sufficient. A large minority of German Central Authorities, however, advised that a list of matters to be addressed would suffice if it is not intended to seek disclosure by an adversary of facts supporting a case. Mexico advised that the request requires an "interrogatory plea".

In sum,

- most Central Authorities are willing to provide assistance to foreign judicial authorities in preparing Letters of Request;
- a smaller majority of Central Authorities are willing to provide such assistance to parties;
- practice differs on the issue whether a Letter of Request must include specific questions.

167. The Permanent Bureau welcomes the climate of mutual assistance that is evident from the responses, and encourages all States Parties to extend such assistance to

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[160] Australia, Denmark, France, Germany, Latvia, Mexico, Norway, Romania, Slovakia, Spain, Switzerland.
[161] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, Greece, Lithuania, Monaco, Sweden, Ukraine, United Kingdom.
[162] Argentina, Australia, Finland, France, Lithuania, Mexico, Norway, Spain, Switzerland, United Kingdom.
[163] Estonia (depending on the request), Greece, Monaco Romania.
[164] Czech Republic, Germany, Poland, Slovakia.
[165] Argentina, Greece, Monaco, South Africa, Spain, Switzerland, United Kingdom.
[166] Australia, Czech Republic, Lithuania, Slovakia, Ukraine.
[167] Australia, Latvia, Norway, Romania, Turkey.

judicial authorities and parties alike. In this regard, the Permanent Bureau proposes that the Special Commission adopt a resolution in the following terms:

> "The Special Commission notes that many Central Authorities provide informal assistance to judicial authorities to ensure that a Letter of Request conforms to the requirements of the State of Destination. The Special Commission encourages this practice, and also urges States Parties to provide such assistance to parties and their representatives."

B. Model Form (Q. 37)

168. Use of the Model Form recommended by the 1978 Special Commission and modified by the 1985 Special Commission appears to be mixed (Q. 37). Of the 26 responding States, 12 States[168] advised that they use the Model Form, and 14 States[169] advised that they do not.

169. Among the States that do not use the Model Form, Finland noted that the form is not handy to use, and often needs to be translated; and Germany noted that the form is only available in English.[170] Spain and Mexico advised that not all of their judicial authorities are aware of the Model Form. Denmark advised that on one occasion a request was forwarded following the guidelines, and using the form, of the European Community. Singapore and China (Hong Kong SAR) advised that they have their own forms. Ukraine advised that not all of its courts have access to the internet and the model form, but noted that the use of the Model Form was recommended under new guidelines that have been recently circulated.

In sum,

- less than half of the responding States use the Model Form.

170. This result is of some concern for the Permanent Bureau, and suggests that the issue of the Model Form needs to be addressed by the Special Commission. The Permanent Bureau notes the possibility of preparing multi-lingual standard forms that would be available on the Hague Conference website. These forms could be prepared as interactive pdf documents that can be filled out with a computer. Unilingual forms of this character are currently available on the Hague Conference website.[171]

171. The Permanent Bureau also invites States Parties to make suggestions as to how this problem could be remedied, including whether it is necessary to revise the Model Form.

C. Transmission of Letters of Request (Q. 38–40)

172. Practice differs amongst States as to which authority is responsible for sending a Letter of Request (Q. 38). Of the 27 responding States, 14 States[172] advised that Letters of Request are forwarded directly by the judicial authority to the foreign Central Authority, and 12 States[173] advised that this is not their practice. Switzerland advised that most Cantons send requests directly, but some do not.

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[168] Czech Republic, Estonia, France, Lithuania, Luxembourg, Poland, Romania, Slovakia, South Africa, Switzerland, Turkey, United Kingdom.
[169] Argentina, Australia, China (Hong Kong SAR), Denmark, Finland, Germany, Greece, Latvia, Mexico, Monaco, Norway, Singapore, Spain, Ukraine.
[170] The Permanent Bureau notes that the Model Form is also available in French.
[171] See the HCCH website at < www.hcch.net >.
[172] Australia, Czech Republic, Denmark, France, Germany, Greece, Lithuania, Luxembourg, Mexico, Norway, Poland, Slovakia, Sweden, United Kingdom. Czech Republic noted that requests are occasionally forwarded by the Central Authority in cases where difficulties are expected.
[173] Argentina, China (Hong Kong SAR), Estonia, Finland, Latvia, Monaco, Romania, Singapore, South Africa, Spain, Turkey, Ukraine. Spain noted that documents are occasionally forwarded directly.

173. Among the 13 responding States (including Switzerland) where Letters of Request are not forwarded directly, 12 States[174] advised that the request is forwarded by the local Central Authority. A number of justifications were given for this position: to provide assistance to judicial authorities, to verify that the request is properly completed, to ensure that the correct procedure for requesting evidence abroad is followed, and to collect statistical information. China (Hong Kong SAR) advised that its Letters of Request are forwarded by the Chief Secretary for Administration.

174. The vast majority of responding States accept Letters of Request by private courier (Q. 39). Of the 25 responding States, 23 States[175] advised that they accept Letters of Request by private courier. Two States advised that they do not.[176]

175. Fewer States accept Letters of Request by electronic means (Q. 40). Of the 24 responding States, 10 States[177] advised that they would accept Letters of Request by electronic means: Latvia and Sweden advised that they would also require a written request to follow; Spain advised that it would accept a request forwarded by fax, so long as it was followed by a written request; Romania advised that it would accept a request by fax. Australia noted that such requests would be acceptable in principle, although there existed a degree of concern regarding security and the transitional arrangements necessary to allow such requests in practice.

176. Fifteen States[178] advised that they would not accept Letters of Request forwarded by electronic means. The Czech Republic advised that its basis for refusing such Letters of Request is the absence of a signature or stamp of the requesting authority, but noted that it would be prepared to accept a Letter of Request that contains an electronic signature together with a qualified certificate of the electronic signature that is recognised by Czech law under an international instrument. Switzerland and Monaco noted that requests could be forwarded electronically, but should be followed by the originals forwarded by post. The United Kingdom considered that fax messages are unsecure and unreliable technology, and that at present its Central Authority does not have the resources to fully utilise electronic means of communication – but at some stage in the future it will be able to accept requests by email.

In sum,

- a Letter of Request is usually forwarded by either the judicial officer or the Central Authority;
- almost all responding States accept Letters of Request by private courier;
- less than half of the responding States would accept a Letter of Request forwarded by electronic means.

Conclusion

177. In light of the foregoing, the Permanent Bureau offers the following preliminary draft Conclusion and Recommendation for consideration by the Special Commission:

> "The Special Commission notes and encourages the practice of many States Parties to accept a Letter of Request that has been delivered by courier. The Special Commission also encourages States Parties to consider the possibility of accepting Letters of Request in electronic form."

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[174] Argentina, Estonia, Finland, Latvia, Monaco, Romania, Singapore, South Africa, Spain, Switzerland, Turkey, Ukraine.
[175] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Mexico, Norway, Poland, Romania, Singapore, Slovakia, Spain, Sweden, Switzerland, Ukraine, United Kingdom.
[176] Monaco, South Africa.
[177] Australia, Denmark, Estonia, Finland, France, Latvia, Lithuania, Romania, Spain, Sweden.
[178] Argentina, Czech Republic, Greece, Luxembourg, Mexico, Monaco, Norway, Poland, Singapore, Slovakia, South Africa, Switzerland, Turkey, Ukraine, United Kingdom.

D. Contesting the Letter of Request (Q. 41–43)

Challenges in Requesting State (Q. 41)

178. In most responding States it is possible to contest the sending abroad of a Letter of Request (Q. 41). Of the 25 responding States, 15 States[179] responded that the sending of a Letter of Request could be contested, and eight States[180] responded that it could not. Switzerland responded that different Cantons took different views, and Denmark and Greece advised that the issue had never arisen. Australia advised that the sending of a Letter of Request could be challenged on a number of grounds, including: the witness is willing to come to Australia; the witness is in Australia and able to attend the hearing; the witness is not able to give evidence material to the proceeding; the evidence would not be admissible if adduced in Australia; and justice would be served by refusing to issue the Letter of Request. Mexico advised that persons have a constitutional right to impugn any act harmful to personal guarantees. The United Kingdom advised that the procedure was for the challenging party to serve the application upon the other party.

179. Such contests appear to be relatively rare. Of the 12 responding States, only Argentina advised that such contests occurred often. Australia advised that such challenges occur regularly. Six States[181] advised they were rare, and four States[182] advised that they never occurred.

Challenges in Requested State (Q. 42)

180. Similarly, it is possible to challenge the execution of a Letter of Request received from abroad in most responding States (Q. 42). Of the 26 responding States, 14 States[183] advised that such a challenge was possible; nine States[184] advised that it was not possible. Switzerland advised that different Cantons took different views. Denmark and Greece advised that the issue had not arisen.

181. States also provided useful information concerning the circumstances in which such a challenge could be mounted. Argentina advised that such a request may be contested based upon formal requirements or exceptions such as jurisdiction or *lis pendens*, but noted that opinion was divided whether a judge may review only the formal requirements of the Letter of Request, or the merits of the application. Australia advised that the execution could be contested on any ground that would normally be available to a person where proceedings are held. Estonia advised that the acts of the Estonian Central Authority performed while processing a Letter of Request are administrative acts capable of challenge in an administrative court. Estonia also noted that a person called upon to give evidence may refuse on the basis of certain privileges. France provided the relevant sections of the *Code de Procédure Civile Français*, which state that a judge cannot refuse to execute a Letter of Request solely on the basis that French law claims exclusive jurisdiction over the matter, or that the remedy is unknown to French law (Art. 742); that a Letter of Request may be rejected if the matter falls outside the judge's powers, or if the Request is likely to prejudice the sovereignty or security of France (Art. 743); and that a judge may refuse a Letter of Request if it has been transmitted irregularly (Art. 745). Germany advised that a Letter of Request could be refused on the basis that it does not correspond to the form required by the requested State, or where it may violate the rights of persons involved in proceedings. China (Hong Kong SAR) advised that, where a request had been received, the Court would first decide whether it has

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[179] Argentina, Australia, China (Hong Kong SAR), Estonia, France, Germany, Latvia, Luxembourg, Mexico, Monaco, Romania, South Africa, Spain, Turkey, United Kingdom.
[180] Czech Republic, Finland, Greece, Lithuania, Poland, Sweden, Ukraine,
[181] Luxembourg, Romania, South Africa, Spain, Switzerland, United Kingdom.
[182] Germany, Latvia, Monaco, Singapore.
[183] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Estonia, France, Germany, Mexico, Poland, Romania, Singapore, South Africa, Spain, United Kingdom.
[184] Finland, Greece, Latvia, Lithuania, Luxembourg, Monaco, Slovakia, Sweden, Ukraine.

jurisdiction and, if so, whether as a matter of discretion the Court should make or refuse such an order. Mexico advised that persons have a constitutional right to impugn any act harmful to personal guarantees. Spain noted that a Letter of Request could be challenged for not meeting procedural or substantive requirements of the Convention, and that a (rarely used) procedure exists for this purpose.

182. Challenges to a Letter of Request in the requested State also appear relatively uncommon. Of the 16 responding States, Argentina advised that such challenges were common, Australia advised that such challenges occur regularly, and the United Kingdom advised that such challenges occur often. By contrast, 10 States[185] advised they were rare, and three States[186] advised that they never occurred.

183. Where a challenge has been lodged, 12 States[187] advised that the Requesting Authority or the parties would be informed of this by the Central Authority, three States[188] advised that the communication would be done by the judicial authority competent to execute the request.

184. In most responding States, the information is transmitted to the requesting Authority (13 States[189]) rather than to the Parties (France). Switzerland and Australia advised that both the requesting Authority and the parties would be informed.

185. Responding States appear evenly divided on the question of how such information should be conveyed. Of the 16 responding States, nine States[190] transmit such information by informal channels, and seven States[191] use formal channels.

186. Almost all of the 15 responding States permit the foreign requesting authority or the parties to present arguments in favour of the execution of the request. Five States[192] permit parties to do so through legal representatives in the requested State; and seven States[193] permit such arguments to be presented through a written response filed directly from the requesting authority abroad. Estonia and the United Kingdom permit such arguments to be filed directly by the party. France advised that the judge, before deciding whether to execute the request, must open the matter to submissions by the parties. Romania advised that no facility exists for the presentation of arguments. Switzerland advised that different Cantons take different positions: some allow representations by lawyers, others allow written submissions sent by the requesting Authority, and others allow submissions sent by the parties. Australia advised that the foreign Requesting Authority can present counter-arguments by filing a written response with the Crown Solicitor responsible for executing the Letter of Request.

Challenges in Both States (Q. 43)

187. Responding States appear to be divided on the question whether a party who has unsuccessfully contested the sending of a Letter of Request in the requesting State can also contest the execution of the request in the requested State (Q. 43). Of the 22 responding States, nine States[194] considered that a further challenge would be possible. Singapore noted that it may be possible to contest the authority of the executing judge, and Germany noted that it might be possible to challenge the

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[185] China (Hong Kong SAR), Czech Republic, France, Germany, Mexico, Poland, Romania, South Africa, Spain, Switzerland.
[186] Estonia, Monaco, Singapore.
[187] Argentina, Australia, Czech Republic, Estonia, Germany, Mexico, Poland, Romania, South Africa, Spain, Turkey, United Kingdom.
[188] Czech Republic, France, Switzerland (most Cantons).
[189] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Germany, Mexico, Poland, Romania, Singapore, South Africa, Spain, Turkey, United Kingdom.
[190] Australia, China (Hong Kong SAR), Czech Republic, Germany, Poland, Romania, Singapore, Switzerland, United Kingdom.
[191] Argentina, Estonia, France, Mexico, South Africa, Spain, Turkey.
[192] China (Hong Kong SAR), Germany, Mexico, Singapore, United Kingdom.
[193] Argentina, Czech Republic, Poland, South Africa, Spain, Turkey, United Kingdom.
[194] China (Hong Kong SAR), Estonia, France, Germany, Luxembourg, Mexico, Singapore, South Africa, United Kingdom.

jurisdiction of the requesting judge. Ten States[195] responded that it would not be possible for a party to challenge a Letter of Request on two occasions in this fashion. Switzerland advised that some Cantons would allow such challenges, and other Cantons would not.

In sum,

- in most responding States it is possible to challenge the sending or execution of a Letter of Request, although such challenges are relatively rare in most States;
- different views exist on the question whether it is possible for a party to challenge both the sending and execution of a Letter of Request in the requesting State and receiving State respectively.

E. Execution of the Request (Q. 44–56)

188. In almost all Responding States, Letters of Request are executed by a judicial officer (Q. 44). Of the 26 responding States, 25[196] States indicated that a hearing for an oral examination under Chapter I is heard before a judge, magistrate, special master, or other judicial officer. China (Hong Kong SAR) noted that, where a private examiner is specified in the Letter of Request, the examination will normally be conducted by the private examiner rather than a judge. Australia noted that the execution could also take place before an examiner appointed by the court. The United Kingdom advised that such a proceeding is conducted by an examiner appointed by the Lord Chancellor, and that a Practice Direction allows the court discretionary powers for another person to be nominated by the parties to be allowed to take evidence.

189. In a large majority of States, a Chapter I hearing is conducted in public, unless there is a legal reason for it to be conducted in private session (Q. 45). Of the 27 responding States, 20 States[197] advised that such hearings are usually public, and five States[198] responded that they are held in private. Switzerland advised that practice differed between Cantons, but that in about half of the Cantons hearings are held in private. Luxembourg advised that the proceedings could be either public or private depending on the circumstances.

190. Responses were mixed on the question whether judicial authorities "blue pencil" Letters of Request – *i.e.* rephrase, restructure and / or strike out objectionable questions or offensive wording so that a Letter of Request may be executed (Q. 46). Of the 27 responding States, 12 States[199] advised that their judicial officers would blue pencil a Letter of Request, while 12 States[200] advised that they would not. Germany advised that, while their judicial officers attempt to blue pencil, a Letter of Request will not be executed if a certain measure of shocking questions or offensive paragraphs is exceeded. Switzerland advised that the majority of its Cantons blue pencil, and a minority do not.

191. In the majority of States, the witness is not provided in advance with copies of the questions or matters to be addressed, as contained in the Letter of Request (Q. 47). Of the 27 responding States, four States[201] advised that the witness would generally be

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[195] Australia, Czech Republic, Finland, Latvia, Lithuania, Monaco, Poland, Romania, Slovakia, Spain.
[196] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Ukraine.
[197] Australia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Turkey, Ukraine.
[198] Argentina, China (Hong Kong SAR), Mexico, Monaco, United Kingdom.
[199] Australia, China (Hong Kong SAR), Czech Republic, Finland, France, Latvia, Luxembourg, Mexico, Norway, South Africa, Sweden, United Kingdom.
[200] Argentina, Estonia, Greece, Lithuania, Monaco, Poland, Romania, Singapore, Slovakia, Spain, Turkey, Ukraine.
[201] Australia, China (Hong Kong SAR), Finland, United Kingdom.

provided with such information, and 19 States[202] advised that they would not. The Czech Republic noted that, depending upon the matter, a witness may be invited to bring some documents that include requested information. Estonia noted that a witness is served with a summons that contains a certain amount of information regarding the matters to be addressed. Germany advised that it could not be ruled out that other German agencies may inform the witness of the matters to be addressed. Sweden advised that there were no rules governing the issue, and either alternative may be applied.

192. In the majority of States, documents produced by the witness are not authenticated by the Court (Q. 48). Of the 26 responding States, nine States[203] advised that such documents are authenticated, and 14 States[204] advised that they are not. Switzerland advised that such documents are authenticated in some Cantons, but not in the majority.

193. In most States, a witness is administered with an oath (Q. 49). Of the 27 responding States, 21 States[205] advised that an oath is administered, and four States[206] advised that an oath is not administered. Latvia specified that, while an oath is not administered, the witness is required to sign an equivalent affirmation. Estonia noted that a non-party witness must sign an affirmation, and a party who has not been able to prove a fact that needs to be proven has the right to request the hearing of the opposing party or a third party under oath. Switzerland advised that an oath is administered in some Cantons, but not in the majority.

194. In all responding States, a witness can be made subject to further examination and recall, although this will generally need to be effected through a second Letter of Request (Q. 50). Of the 24 Responding States, four States advised that the first request may be re-invoked,[207] and 20 States[208] advised that a second request was necessary. Switzerland advised that in half of its Cantons the first request could be re-invoked, and in half a second request was necessary.

195. The majority of responding States require that any documents that are to be presented to the witness form part of the Letter of Request (Q. 51). Thirteen States responded that such documents must form part of, or be attached to, the Letter of Request.[209] Two States[210] advised that a list of documents is sufficient. Seven States advised that the documents do not need to be sent with the Letter of Request.[211] Switzerland advised that in the majority of Cantons the documents must be sent with the Letter of Request. The United Kingdom advised that, provided the documents are legally admissible, documents may be presented to the witness without prior approval.

196. Answers were mixed on the question whether documents to be presented to a witness need to be preapproved or authenticated. Three States[212] advised that documents need to be authenticated, and four States advised that documents need to be pre-approved,[213] whereas four States advised that no authentication or pre-approval was

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[202] Argentina, Czech Republic, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Spain, Switzerland, Turkey, Ukraine.
[203] Estonia, Greece, Lithuania, Mexico, Singapore, Spain, Turkey, Ukraine, United Kingdom.
[204] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Finland, France, Germany, Luxembourg, Monaco, Poland, Romania, Slovakia, South Africa, Sweden.
[205] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Mexico, Monaco, Norway, Romania, Singapore, South Africa, Spain, Sweden, Turkey, Ukraine, United Kingdom.
[206] Denmark, Latvia, Poland, Slovakia.
[207] Estonia, Norway, Singapore, United Kingdom.
[208] Argentina, China (Hong Kong SAR), Czech Republic, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland (most Cantons), Ukraine.
[209] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Greece, Latvia, Luxembourg, Monaco, Romania, Slovakia, South Africa, Spain, Ukraine.
[210] Germany (must also describe contents of documents in request, and must be translated), Singapore.
[211] France, Finland, Latvia, Lithuania, Mexico, Sweden, Turkey.
[212] South Africa, Greece and Latvia (if the documents are to have evidentiary power).
[213] Australia, Estonia, Romania (also need certification of conformity), Spain.

necessary.[214] Germany advised that it would depend upon the circumstances of the case whether a document would need to be authenticated. Mexico advised that supporting material to assist the memory was admissible without any need for authentication.

197. Responding States provided a large amount of helpful information concerning the sanctions for non-appearance of a witness (Q. 52). In a minority of States, a witness who does not attend a hearing faces the possibility of a fine only.[215] A majority of States supplement the threat of a fine with the possibility of forced attendance or criminal sanctions.[216]

198. In a majority of responding States, interpreters must be court-certified (Q. 53). Of the 24 responding States, 14 States[217] advised that interpreters must be court certified, and nine States[218] advised that they need not be. Switzerland advised that practice is divided amongst Cantons.

199. A majority of responding States advised that the testimony of witnesses is transcribed by court staff or by the judge (Q. 54).[219] Some States provided further information relating to the form of the transcript. Three States[220] specified that the transcript took the form of a verbatim transcript, and four States[221] specified that the transcript took the form of a summary or *procès-verbal*. Five States also advised that an audio or video recording may also be made.[222] The United Kingdom specified that the testimony is transcribed by audio recording.

200. In almost all States, the final transcript of the hearing is delivered to the Requesting Authority (Q. 55). Of the 26 responding States, 25 States[223] responded that the transcript is so delivered. Latvia specified that the transcript may also be delivered to the parties if requested. China (Hong Kong SAR) advised that the transcript is sent to the Chief Secretary for Administration for transmission to the requesting State. Australia advised that the transcript would also be delivered to any other person or party specified in the request.

201. Of the 26 responding States, 25 States[224] agreed that the withdrawal of a Letter of Request must come from the Requesting Authority (Q. 56). Australia advised that the Letter of Request might be withdrawn by the parties, their representatives, or the Requesting Authority depending upon the stage of proceedings. Denmark also considered that a withdrawal might come from the parties concerned or their representatives depending upon the circumstances.

In sum,

- in almost all responding States, Letters of Request are executed by a judicial officer;
- in most responding States:
  - the execution of a Letter of Request is conducted in public;
  - a witness is not provided in advance with a copy of the questions or matters to be addressed;
  - a witness is administered with an oath;

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[214] France, Latvia, Singapore, Turkey.
[215] France (maximum €3,000), Germany, Luxembourg (maximum €2,500), Monaco (maximum €1,500), Poland, Slovakia (maximum SK 55,000 + cost of police assistance and the burden of legal costs), Romania, Spain (€180 to 600).
[216] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Greece, Latvia, Lithuania, Mexico, Norway, Singapore, South Africa, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.
[217] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Germany, Lithuania, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain.
[218] Australia, Denmark, Finland, France, Greece, Latvia, Sweden, Ukraine, United Kingdom.
[219] Argentina, Australia, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Latvia, Mexico, Monaco, Norway, Poland, Singapore, Romania, Ukraine.
[220] Australia, China (Hong Kong SAR), South Africa.
[221] Lithuania, Luxembourg, Slovakia, Switzerland.
[222] Czech Republic, Denmark, Norway, Poland, Switzerland.
[223] Argentina, Australia, Czech Republic, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, Sweden, Switzerland, South Africa, Spain, Turkey, Ukraine, United Kingdom.
[224] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom.

  - a witness may be subject to further examination and recall (although this usually requires a second Letter of Request to be forwarded);
  - a witness who does not attend court may be subject to coercive measures or criminal sanctions, in addition to a fine;
  - documents produced by the witness are not required to be authenticated;
  - documents that are to be presented to the witness must be included with the Letter of Request;
  - interpreters must be court certified;
  - the testimony of witnesses is transcribed by court staff or the judge; and
  - the final transcript is delivered to the requesting authority.
- a minority of responding States are willing to blue-pencil a Letter of Request;
- answers were mixed on the question whether documents to be presented must be pre-approved or authenticated.

F. Presence of Counsel or Parties (Q. 57–63)

202. The responses indicate a diversity of practices concerning the authority responsible for informing the requesting authority of the time and place of the execution of the request (Q. 57). Of the 27 responding States, 16 States[225] advised that this task is carried out by the judicial authority competent to execute the request, and seven States[226] advised that this task is carried out by the Central Authority. China (Hong Kong SAR) advised that this task would be carried out either by the private agent of the parties, or by the Law Officer (International Law). Singapore advised that this task would be carried out by the Attorney-General's chambers. Switzerland advised that in the majority of Cantons the task is carried out by the judicial authority competent to execute the request, and in a minority of Cantons by the Central Authority. Australia advised that responsibility for informing the requesting Authority depends upon the State or Territory in which the request is to be executed.

203. Responses suggest that requesting authorities do not often ask to know the time and place of the execution of the request (Q. 58). Spain and the United Kingdom responded that such requests occur almost always, and four States[227] responded that such requests are often made. By contrast, 16[228] States responded that such requests were rarely made, and five States[229] advised that they were never made (amongst these latter States, however, Singapore advised that this information is automatically provided to the requesting State).

204. Where such a request is made, the practice of most States is to transmit the information to the Requesting Authority (Q. 59).[230] Some of these States advised that, if requested they would also advise the parties concerned,[231] or their representatives.[232] Monaco advised that the response would be transmitted to all of the above. Switzerland advised that a minority of Cantons transmit such information to the requesting authority, while a majority transmit it to the parties concerned and their representatives. Luxembourg advised that the parties would be informed, and Australia and the Ukraine advised that they would inform anyone specified in the request. Mexico advised that it would inform the Central Authority.

205. A significant majority of responding States advised that the time and place of the execution of the Letter of Request is sent by informal, rather than by formal channels

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[225] Argentina, Czech Republic, Denmark, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Monaco, Norway, Poland, Slovakia, Spain, Sweden, Turkey.
[226] Estonia, Greece, Mexico, Romania, South Africa, Ukraine, United Kingdom.
[227] France, Germany, Sweden, Turkey.
[228] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Finland, Greece, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Slovakia, South Africa, Switzerland.
[229] Estonia, Latvia, Lithuania, Singapore, Ukraine.
[230] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Norway, Poland, Romania, Singapore, South Africa, Spain, Sweden, Turkey, United Kingdom.
[231] Germany, Latvia, Lithuania, Norway, Poland, Singapore, Slovakia.
[232] Germany, Lithuania, Norway, Poland, Slovakia.

(Q. 60). Of the 27 responding States, 16 States[233] advised that informal channels are used, and eight States[234] advised that formal channels are used. Latvia advised that both channels are used, and Switzerland advised that most Cantons use informal channels, but some use formal channels.

206. Responding States provided a diversity of responses on the question of the remedies available in their State as *requested* State, should the time and place not be communicated to the requesting authority or the parties (Q. 61). Eight States[235] responded that there were no specific remedies. Three States[236] suggested that a request could be made that the Letter of Request be re-executed. Two States[237] advised that the time of execution would be postponed and the parties notified. Similarly, Finland and Sweden suggested that an informal inquiry could be made of the time and place. Denmark suggested that a renewed request would need to be forwarded. Switzerland advised that some of its Cantons suggested that an appeal might lie on the basis of a violation of the right to be heard. Finland considered that an informal inquiry might be made, and South Africa suggested that an objection be made by diplomatic channels. Mexico advised that the Central Authority could return the entire act to the judicial authority so that it may fulfil its obligations under the Convention.

207. A similar diversity is evident among the remedies available in the *requesting* State, should the time and place of the execution of the Letter of Request not be communicated to the judicial authority or the parties (Q. 62). Eight States[238] advised that no specific remedies exist. Eight States suggested that the Letter of Request should be re-forwarded, or that the executing authorities should be asked to execute it again.[239] Estonia suggested that an appeal might lie on the basis of a violation of the right to be heard, and Switzerland advised that some of its Cantons suggested that the same remedies would be available as are available against evidence taken domestically in violation of procedure. Finland and Sweden suggested that an informal inquiry be made, and South Africa suggested the use of diplomatic channels. Germany advised that the absence of the requesting Authority or the parties would play a role in the evaluation of the evidence. Mexico suggested that the matter might be communicated to the Central Authority.

208. In most States, the representatives of the Parties are able to ask follow-up questions in some form (Q. 63). Of the 22 responding States, 17 States[240] provided a response suggesting that follow-up questions may be asked. Among these States, five States[241] specified that questions could only be asked by representatives, and three States[242] specified that such questions could be asked by the parties or by their representatives. Ten States[243] advised that it would be possible for questions to be put directly to the witness, although two of these States[244] specified that cross-examination would not be allowed. Two States[245] advised that all questions must be asked through the judge. Three States[246] advised that only the questions listed in the Letter of Request would be asked, and South Africa advised that follow-up questions should be asked through the means of a second Letter of Request. The United Kingdom specified that in

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[233] Australia, China (Hong Kong SAR), Czech Republic, Finland, France, Germany, Greece, Monaco, Norway, Poland, Romania, Singapore, Slovakia, Sweden, Ukraine, United Kingdom.
[234] Argentina, Estonia, Latvia, Luxembourg, Mexico, South Africa, Spain, Turkey.
[235] Australia, Czech Republic, Estonia, France, Germany, Luxembourg, Romania, Switzerland (most Cantons).
[236] Monaco, Romania, Slovakia.
[237] Greece, Singapore.
[238] Australia, Czech Republic, Estonia, France, Germany, Luxembourg, Singapore, Switzerland (most Cantons).
[239] Denmark, Greece, Monaco, Romania, Slovakia, Spain, Switzerland (some Cantons), Turkey.
[240] Australia, Finland, France, Germany, Latvia, Lithuania, Luxembourg, Norway, Poland, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom.
[241] Finland, Singapore, Slovakia, Spain, Sweden.
[242] Estonia, France, Romania.,
[243] Australia, Estonia, Finland, France, Germany, Latvia, Lithuania, Singapore, Slovakia, Switzerland.
[244] Germany, Switzerland.
[245] Poland, Turkey.
[246] Greece, Mexico, Monaco.

the rare instances where legal representatives attend, follow-up questions may be asked but strictly only with the Examiner's consent to clarify the answer to a particular question or questions, and that care must be taken to ensure that all the questions asked of the witness are therefore within the ambit of the Letter of Request; if representatives from both sides attend the examination, the case-officer at the Treasury Solicitor's office will generally conduct the examination of the witness. It is then in the discretion of the Examiner whether to permit questions from the other two parties. Where only one party is represented it is still within the Examiner's discretion to allow that representative to ask additional questions (although he is less likely to allow this by virtue of the other party not being represented). Finally, with the approval of the Examiner the Treasury Solicitor case officer may put further questions to the witness to elucidate any points remaining obscure.

In sum,

- in most States, the judicial authority executing the request is responsible for informing the requesting authority of the time and place of the request, but requesting authorities do not often make such requests;
- this information is usually sent to the requesting authority, rather than the parties;
- some States transmit this information by formal channels, and some by informal channels;
- many States do not have specific remedies available for the case where the time and place of execution is not notified to the parties or to the requesting authority;
- in most States, representatives of the parties are able to ask follow-up questions of the witnesses.

G. Presence of "members of the judicial personnel" (Art. 8) (Q. 64)

209. The presence of judicial personnel appears to be relatively rare (Q. 64). Of the 24 responding States, 20 States[247] advised that they had received no such request since 2004, and only four States[248] advised that they had. The States reported to have made such requests included Canada, Germany, the United States, and South American States.

210. Some States provided details concerning the ability of judicial personnel from the requesting State to ask questions. Spain advised that, where judicial personnel attend the execution of a Letter of Request, they are permitted to ask all manner of questions. Germany advised that such judicial personnel do not generally intervene actively in the taking of evidence. Switzerland advised that it would be possible for attending judicial personnel to ask complementary questions.

In sum,

- few data are available concerning requests that members of the judicial personnel be present at the execution of the Letter of Request. Such requests appear to be rare.

H. Privileges (Q. 65)

211. The invocation of privilege appears to occur relatively infrequently in the majority of responding States (Q. 65). Of the 23 responding States, 15 States[249] advised that no person had refused to give evidence as a result of a privilege or duty claimed since 2004.

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[247] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Singapore, Slovakia, South Africa, Turkey, United Kingdom.

[248] Germany, Norway, Spain, Switzerland.

[249] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Greece, Latvia, Lithuania, Mexico, Monaco, Poland, Romania, South Africa, Turkey.

Eight States[250] advised that this had occurred; seven of these States[251] reported that a claim of privilege occurred rarely.

212. Some information was also provided concerning the nature of the privileges claimed. They included:

- Prohibition of testimony;[252]
- Privilege against self-incrimination;[253]
- Diplomatic immunity;[254]
- Professional secrecy;[255]
- Inadmissible method of taking evidence;[256]
- Banking secrecy;[257]
- Legal privilege;[258]
- Parental relationship.[259]

213. Of the 10 reported instances of privilege being asserted, seven were asserted under the law of the State of execution, and three were asserted under the law of the requesting State.

214. Some responding States provided information concerning the procedures in the State of Execution that govern a claim of privilege by a witness. Estonia advised that the witness must give the court notice of the basis for the assertion of privilege, and substantiate the relevant facts to the court. Slovakia advised that the witness must contest the matter before the evidence is taken. Spain noted that, in such cases, the Central Authority contacts the Foreign Affairs Ministry. Switzerland advised that the first step should be to oppose the taking of evidence. The United Kingdom specified that the Examiner cannot rule on the objection, but must adjourn the examination until a Senior Master has decided the question.

In sum,

- the invocation of privilege under the Convention appears to be relatively rare;
- where privilege is invoked, the procedures of the Convention that make provision for privilege appear to be working smoothly.

I. Translation (Q. 66)

215. A clear majority of responding States advised that they consider that the translation requirement in Article 4(1) also applies to the documents attached to the Letter of Request (Q. 66). Of the 27 responding States, 25 States[260] advised that attached documents must be translated. France advised that documents need not be translated.

In sum,

- a clear majority of Responding States require documents that are attached to the Letter of Request to be translated.

J. Costs (Q. 67–70)

216. Under Article 4(3) of the Convention, a State with more than one official language may, in certain circumstances, cause the requesting State to bear the costs of

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[250] France, Germany, Luxembourg, Singapore, Slovakia, Spain, Switzerland, United Kingdom.
[251] France, Germany, Luxembourg, Slovakia, Spain, Switzerland, United Kingdom. Singapore did not answer this second aspect of the question.
[252] France.
[253] France, Slovakia.
[254] Spain.
[255] Luxembourg, Switzerland.
[256] Switzerland.
[257] Switzerland.
[258] United Kingdom.
[259] Switzerland.
[260] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland (majority of Cantons), Turkey, Ukraine, United Kingdom.

translation. This appears to occur rarely in practice (Q. 67). Of the 14 responding States, nine States[261] responded that costs had never been passed on in this manner, and three States[262] indicated that costs had been so passed on. Switzerland advised that some Cantons require such costs to be borne by the Requesting State, although the majority of Cantons advised that they have not had to make such a request.

217. Under Article 14(2), a requested State may seek reimbursement from the requesting State for costs occasioned by the use of experts, interpreters, or special procedures under Article 9(2) (Q. 68). Of the 24 responding States, 12 States[263] advised that they had either received or requested reimbursement of this character. Twelve States[264] advised that they had not. Finland specified that such a fee has been passed on for costs associated with the use of social workers to determine the custody of a child. Switzerland advised that such cases were rare, but specified that on one occasion the costs had been passed on for the hiring of a doctor to examine saliva. Australia advised that it had requested reimbursement for the costs of interpreters, and also for additional costs associated with the transportation of a blood sample abroad. The United Kingdom also advised that such cases are rare, and that such costs are usually met by the Requested State.

218. Article 14(3) provides that a Requested State may seek reimbursement from the Requesting State where the law of the requested State obliges parties to secure evidence themselves, and a suitable person is therefore appointed to secure such evidence (Q. 69). Of the 20 responding States, 19 States[265] advised that this provision did not apply, as the law of their State imposes no such obligation. Singapore advised that it had imposed such a charge, but also advised that its law imposes no such obligation.

219. Article 26 of the Convention provides that a requested State may seek the reimbursement by the State of origin of fees and costs in connection with the execution of Letters of Request if required to do so by constitutional limitations (Q. 70). Of the 24 responding States, 14 States[266] advised that this provision did not apply, as no such constitutional limitations exist. Eight States[267] advised that no such fees had ever been passed on. Two States[268] advised that such fees have been passed on. Among these latter States, Singapore advised that the approximate amount of fees and costs incurred in applying for an order for the examination of a witness and in obtaining and serving the process to compel the witness' attendance ranged from S$1,200 to S$1,500.

In sum,

- many Responding States do not pass on any costs under the Convention;
- some States seek reimbursement for costs under Articles 4(3) and 14(2), and this system appears to operate smoothly;
- reimbursement under Articles 14(3) and 26 appear to be sought very rarely.

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[261] China (Hong Kong SAR), Denmark, Estonia, Greece, Mexico, Norway, South Africa, Spain, United Kingdom.
[262] Luxembourg, Slovakia, Singapore.
[263] Argentina, Australia, Czech Republic, Finland, Germany, Poland, Romania, Slovakia, Spain, Switzerland, Ukraine, United Kingdom.
[264] China (Hong Kong SAR), Denmark, Estonia, France, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Norway, South Africa.
[265] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Estonia, France, Germany, Greece, Latvia, Monaco, Mexico, Poland, Romania, Slovakia, South Africa, Spain, Sweden, Switzerland, United Kingdom.
[266] Argentina, Australia, Czech Republic, Finland, France, Germany, Latvia, Lithuania, Poland, Romania, Slovakia, Sweden, Switzerland, Ukraine.
[267] China (Hong Kong SAR), Estonia, Greece, Mexico, Monaco, Norway, South Africa, United Kingdom.
[268] Singapore, Spain.

K. Requests for e-Discovery (Q. 71)

220. Requests for e-Discovery appear to be relatively rare (Q. 71). Of the 25 responding States, 22 States[269] advised that they had never received such a request.

221. Australia advised that it had received requests for e-Discovery, some of which were executed, and some of which were not executed, for reasons related to the electronic nature of the stored information. France and the United Kingdom also advised that they had received Letters of Request seeking e-Discovery, which were executed. No State advised that it had been asked that any specific rules or principles be followed, nor were any issues of privacy raised. Australian and France advised that no compatibility problems were encountered, and the United Kingdom advised that such problems were rare.

222. Switzerland advised that it received one such request under Chapter II.

In sum,

- Requests for e-Discovery are rare, but are becoming a reality.
- Some such requests have been successfully executed.
- Very few data are available on the practical difficulties that can arise in respect of such requests.

Conclusion

223. The Permanent Bureau considers that it is likely that the frequency of requests for e-Discovery will increase, and that such requests are consistent with the Convention. Accordingly, the Permanent Bureau offers the following draft preliminary Conclusion and Recommendation for consideration by the Special Commission:

> "The Special Commission notes that requests for discovery relating to electronically stored information are likely to increase, and considers that such requests should be treated in the same manner as requests for hard copy documents."

L. Request that a special method or procedure be followed in the taking of evidence (Art. 9(2)) (Q. 72–73)

224. Of the 24 responding States, seven States[270] advised that they had forwarded or received a Request that the taking of evidence follow a "special method or procedure" (Q. 72). Sixteen States[271] advised that they had not received, or were not aware of, any such requests. Australia advised that it had received requests for the taking of DNA evidence, and for the appearance of counsel via video-link.

225. France advised that it often received requests from the United States requesting that evidence be taken according to US procedure (*i.e.* using a stenographer, audio or video-recording, and cross-examination). Such requests are usually executed.

226. Mexico advised that testimony relating to banking information and documentary evidence was sometimes sought.

227. Switzerland advised that it had received a number of requests. Some Cantons had been requested to administer oaths to the witness: these requests were denied. Some Cantons have also been requested to record proceedings by video, or have a verbatim transcript taken: these requests have been accepted by some Cantons, and denied by others.

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[269] Argentina, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Switzerland, Turkey, Ukraine.

[270] Australia, China (Hong Kong SAR), France, Germany, Mexico, Romania, Switzerland.

[271] Argentina, Czech Republic, Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Monaco, Poland, Singapore, Slovakia, South Africa, Spain, Ukraine, United Kingdom.

228. Almost no responding States advised that they have made amendments to domestic law to better accommodate foreign requests for special methods (Q. 73). Of the 26 responding States, 25 States[272] advised that no such amendments have been made. France alone advised that its procedural code has been amended to permit the execution of requests seeking special procedures, including cross-examination, and allowing such proceedings to be transcribed.

In sum,

- Requests for special procedures under Article 9(2) are not common, but not unknown.
- Such requests are made for a wide variety of special methods.
- Only one State (France) has amended its domestic legislation to better accommodate foreign requests for special methods.

M. Pre-trial Discovery of Documents (Q. 74–75)

Article 23 Declarations (Q. 74)

229. The 2003 Special Commission extensively discussed the history, purpose and meaning of Article 23 (See Conclusions and Recommendations Nos 29 to 34). It "recommended that States which have made a general, non-particularised declaration under Article 23 *revisit their declaration* by considering an amendment adopting terms such as those contained in the UK declaration or the Inter-American Protocol". The Questionnaire asked States that still have a broad declaration to explain why they had not acted upon these recommendations (Q. 74).

230. Six States[273] advised that this question did not apply to them, and four others[274] advised that they had a differently specified declaration.

231. Argentina advised that it was considering the possibility of adapting the general objection made to the application of Chapter II of the Evidence Convention, into the terms of Article 16 of the Inter-American Protocol.

232. Australia advised that its declaration under Article 23 does not cover all discovery, but only "pre-trial discovery", and is in practice concerned principally with excluding an excessive train of enquiry.

233. France noted that on 19 January 1987 it amended its Article 23 declaration to accept requests for production of documents when they are listed in the letters rogatory and have a direct and precise connection with the object of the dispute. In a ruling delivered on 18 September 2003, the Paris Court of Appeal held that an exact description of the documents requested could not be required of the applicant, and that the French declaration should be understood to mean that the list of documents be identified with a reasonable degree of specificity using number of criteria such as date, nature, and author. The Court further held that such items could validly be sought for a period prior to that in which the principal facts occurred.

234. Greece advised that the matter is being considered, but that there is presently no intent to file an amendment that is based upon the UK's declaration due to the fact that Greece is in the process of reforming its legislation according to several EU Directives and within this scope the amendment is under consideration.

235. Lithuania advised that, having regard to the history of the provision, and taking into account the very infrequent use of the Convention, it is of the opinion that it is not necessary to revise the declaration at present.

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[272] Argentina, Australia, China (Hong Kong SAR), Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Poland, Romania, Singapore, Slovakia, South Africa, Spain, Switzerland, Turkey, Ukraine, United Kingdom.
[273] Czech Republic, Denmark, Latvia, Singapore, Slovakia, United Kingdom.
[274] Estonia, Mexico, Norway, Switzerland.

236. Monaco advised that the matter is being considered.

237. South Africa advised that its declaration was based upon a consideration of domestic law.

238. Spain advised that it is studying the possibility of modifying the declaration but that, regrettably, at the moment, there is no agreement to file a declaration that could be based upon either the UK declaration or Article 16 of the Protocol to the Inter-American Convention.

239. Sweden advised that it considered a request for pre-trial discovery to include a Letter of Request which requires a person (a) to state what documents relevant to the proceedings are, or have been, in his possession, custody or power, or (b) produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power.

240. Germany advised that no need exists, as Germany allows Letters of Request submitted in pre-trial discovery proceedings to be processed to an appropriate extent within each State. Such requests may be dealt with under the domestic law implementing the Evidence Convention insofar as this is not precluded by fundamental principles of German procedural law.

Consequence of Overbroad Request (Q. 75)

241. Most responding States advised that attempts will be made to execute a request for pre-trial discovery that is expressed in terms that are too broad (Q. 75). Of the 23 responding States, 17 States[275] advised that if the portion of a Letter of Request which seeks documents is too general and therefore cannot be honoured, the request for oral evidence will nevertheless be executed. Only three States[276] advised that, in such circumstances, the request would be rejected in its entirety.

242. Australia advised that where a portion of a Letter of Request is too broad, the Attorney-General's department will seek clarification from the Requesting Authority. Once clarified, the entire request will be referred to the relevant judicial authority for execution.

243. China (Hong Kong SAR) noted that, in practice, rather then immediately proceeding to execute the remaining part of the Letter of Request, the Requesting State would be informed that the Letter of Request is too broad. Execution would then be suspended pending a supplemental Letter of Request to clarify the scope of the request.

244. Singapore noted that it has declared that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

245. Switzerland noted that because Article 23 only refers to documentary evidence, oral testimony could not be used to circumvent the specifications of Switzerland's Article 23 declaration.

In sum,

- A number of States Parties continue to have broad Article 23 declarations.
- Responding States provided useful information concerning the circumstances in which they would accept or reject a request for pre-trial discovery.
- Most States Parties will execute a request for oral evidence even if it is accompanied by a request for discovery that is too broad.

[275] Argentina, China (Hong Kong SAR), Czech Republic, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Luxembourg, Monaco, Norway, Romania, Slovakia, Sweden, United Kingdom.
[276] Mexico, South Africa, Spain.

Conclusions

246. In light of the foregoing, the Permanent Bureau offers the following preliminary draft Conclusions and Recommendations for consideration by the Special Commission:

> "The Special Commission recalls and reiterates the Conclusions and Recommendations of the 2003 Special Commission and recommends that States which have made a general, non-particularised declaration under Article 23 revisit their declaration by considering an amendment adopting terms such as those contained in the UK declaration or in Article 16 of the Inter-American protocol."
>
> "The Special Commission notes and encourages the practice of many States Parties that, where request for the taking of oral evidence is accompanied by a request for pre-trial discovery that cannot be executed because it violates the State Party's Article 23 declaration, the request for the taking of oral evidence is executed rather than the entire request being rejected."

II. Taking of Evidence under Chapter II (Q. 76–77)

247. No Responding State advised that it had made an Article 18 declaration (Q. 76).

248. Responding States that have objected to the taking of evidence under Chapter II in whole or in part were asked why this decision was taken (Q. 77).

249. Argentina advised that it objected to Chapter II on the basis that the consular rules do not give Consular Agents and Commissioners the facility to carry out the acts provided for in Chapter II. Such officers and commissioners are only permitted to serve judicial and extrajudicial decisions and to conduct letters rogatory.

250. Denmark advised that, pursuant to Article 15(2), it has declared that a diplomatic officer may only take evidence following permission from the Ministry of Justice. The reason for this is an apprehension relating to the unchecked gathering of evidence on Danish territory by foreign officials.

251. Mexico advised that it had made a total reservation regarding Articles 17 and 18 in relation to the taking of evidence by commissioners, and the use of compulsory measures by diplomatic officers and consular agents, because all evidence must be obtained under the guarantee of juridical safety for the governed ones.

252. Poland advised that it has excluded the application of Chapter II, with the exception of Article 15, on the grounds that Chapter II amounts to a strong interference with national sovereignty, as under Polish law only Polish authorities are competent to undertake any actions related to Polish nationals.

253. Romania advised that it had made a reservation to Chapter II with the exception of Article 15 on the basis that it was considered that such an extension of consular competences, including the taking of evidence from persons who belong to a third State, may be interpreted by that State as an act of jurisdiction that is not recognised by its own jurisdiction.

A N N E X E / A N N E X

Annex – Statistical Data

Table 1: Total Requests

	State	2003	2004	2005	2006	2007	Total
1	Czech Republic					30	**30**
2	Denmark	25	25	25	25	25	**125**
3	Estonia					2	**2**
4	Finland	13	4	18	4	3	**42**
5	France	249	78	91	105	121	**644**
6	Germany	711	299	199	295	297	**1801**
7	Greece			30	30	30	**90**
8	China (Hong Kong SAR)	7	10	16	12	12	**57**
9	Italy	199	21	17	40	24	**301**
10	Latvia			1		1	**2**
11	Lithuania				1	0	**1**
12	Luxembourg	2	5	3	3	3	**16**
13	Mexico	4	7	4	5	4	**24**
14	Monaco	2	8	3	12	7	**32**
15	Norway	334	434	357	323	386	**1834**
16	Poland				9	5	**14**
17	Romania		2	26	18	0	**46**
18	Singapore	4	2	6	1	3	**16**
19	South Africa	7	7	8	8	7	**37**
20	Spain		88	27	84	100	**299**
21	Switzerland	111	146	132	191	177	**757**
22	Turkey	267	142	242	236	199	**1086**
23	Ukraine		1	3	6	19	**29**
24	United Kingdom	271	118	90	113	119	**711**
	Total	**2206**	**1397**	**1298**	**1521**	**1574**	**7285**

Table 2: Nature of Evidence Sought

State	Oral	Doc.	Bank records	Written responses to interrogatories	Inspection of Personal Property	Inspection of Real Property	Blood tests	Other evidence	Performance of other judicial act
France	74	10	35	0	0	0	0	4	4
Germany	105	25	0	2	0	2	3	22	1
China (Hong Kong SAR)	8	5							
Latvia		1							
Luxembourg	2						1		
Mexico		4							
Poland	5	3	1	0	0	0	1	4	0
Singapore	2	1							
South Africa	7	7		7					
Spain	98	85	34	33	45	0	4	0	0
Switzerland	94	6	7	13	1	0	2	4	0
Ukraine		27			2				
United Kingdom	82	41							
Total	**477**	**215**	**77**	**55**	**48**	**2**	**11**	**34**	**5**

Table 3: Time taken to execute Requests

	<2 months	Btw 2 & 4 months	Btw 4 & 6 months	Btw 6 & 12 months	>12 months	Returned unexecuted (Art. 12)	Currently pending	Total
Finland	1	0	0	0	0	1	1	**3**
France	26	33	19	22	0	0	27	**127**
Germany	6	42	41	9	22	36	4	**160**
Greece		All						**0**
China (Hong Kong SAR)	2	1	0	0	0	1	9	**13**
Latvia			1					**1**
Luxembourg	2							**2**
Mexico	2	0	1	0	0	0	1	**4**
Monaco	2	4	1				1	**8**
Poland	0	3	6	4	1	0	0	**14**
Singapore	1			1	1			**3**
South Africa							21	**21**
Spain	0	10	125	164	0	0	0	**299**
Switzerland	85	36	1	0	0	0	7	**129**
Ukraine		27	2					**29**
United Kingdom	2	10	4	15	5	9	78	**123**
Total	**129**	**166**	**201**	**215**	**29**	**47**	**149**	**936**

Incoming Requests

Table 4: Total Requests

		2003	2004	2005	2006	2007	Total
1	Estonia	2					**2**
2	Finland	2	2	4	1	1	**10**
3	France	60	11	7	12	8	**98**
4	Germany	564	250	224	196	197	**1431**
5	Greece			4	4	4	**12**
6	China (Hong Kong SAR)	0	2	1	0	1	**4**
7	Latvia			2	5	2	**9**
8	Lithuania				2		**2**
9	Mexico	8	13	7	10	19	**57**
10	Poland	396	319	108	116	187	**1126**
11	Romania		8	33	60	8	**109**
12	Singapore			1	2	1	**4**
13	South Africa			2			**2**
14	Spain		77	36	47	52	**212**
15	Switzerland	228	175	205	206	237	**1051**
16	Turkey	1462	2982	5696	1832	1805	**13777**
17	Ukraine			3	8	17	**28**
18	United Kingdom	7	5	2	5	10	**29**
	Total	**2729**	**3844**	**6335**	**2506**	**2549**	**17963**

Table 5: Nature of Evidence Sought

State	Oral	Doc.	Bank records	Written responses to interrogatories	Inspection of Personal Property	Inspection of Real Property	Blood tests	Other evidence	Performance of other judicial act
Estonia	2								
Germany	53	2	0	6	0	0	19	0	4
China (Hong Kong SAR)		1							
Latvia		3							
Mexico	0	10	4	4	0	0	0	1	0
Poland	211	9	1		1	0	1	3	6
Romania	4	4							
Spain	79	33	30	12	44	12	2		
Switzerland	12	2	1						
Ukraine				28					
United Kingdom	7	4							
Total	**368**	**68**	**36**	**50**	**45**	**12**	**22**	**4**	**10**

Table 6: Time taken to execute request

State	< 2 months	Btw 2 & 4 months	Btw 4 & 6 months	Btw 6 & 12 months	> 12 months	Returned unexecuted (Art. 12)	Currently pending
China (Hong Kong SAR)	1						
Poland	8	70	50	36	3	21	44
Spain	0	19	193	0	0	0	0
Romania	1	1	1	0	0	0	5
Germany	15	20	9	7	16	7	10
Switzerland	0	4	5	3	1	1	1
Estonia				2			
Latvia							2
Mexico	0	3	2	4	0	0	10
Ukraine		3	15	3			7
United Kingdom	3	5	0	0	0	0	3
TOTAL	**28**	**125**	**275**	**55**	**20**	**29**	**82**