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**RAPPORT SUR LES TRAVAUX DE LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT DE
LA CONVENTION DU 18 MARS 1970 SUR L'OBTENTION DES PREUVES À L'ÉTRANGER EN
MATIÈRE CIVILE OU COMMERCIALE**

établi par le Bureau Permanent

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CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR
COMMERCIAL MATTERS**

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The Special Commission on the operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters met at The Hague from 12th to 15th June 1978, with Mr T. B. Smith, the Canadian Expert, serving as Chairman.

This meeting was an extension of the Special Commission meeting on the operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which had met at The Hague from 21st to 25th November 1977, during which the suggestion had been made and supported by a majority of the experts that a further meeting be held on the 1970 Convention.

As was the case with the previous meeting, this Special Commission met with great success. Some 30 experts were present representing, respectively, nine of the ten States Parties to the Convention (Czechoslovakia, Denmark, Finland, France, Luxembourg, Norway, Sweden, United Kingdom, United States), ten States which were not Parties to the Convention (Australia, Austria, Belgium, Canada, the Arab Republic of Egypt, Federal Republic of Germany, Ireland, Japan, Spain, Switzerland) and four international organisations (United Nations Organisation, Council of Europe, Asian-African Legal Consultative Committee, Commonwealth Secretariat). It should be pointed out that, once again, the experts were drawn from the governmental bureaux which had responsibility for applying the Convention. Thus it was possible to gain direct knowledge of the experience which had been derived from the operation of this Treaty.

The discussions were essentially concerned with the Convention of 18 March 1970, although, at the last sitting, there was an exchange of views about the follow-up given to the meeting of November 1977.

I. OPERATION OF THE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The meeting opened with a round-table discussion which revealed that the Convention dealt with real needs and that it constituted a useful and efficient bridge between the civil law systems and those of common law. It also seemed that the application of the Convention had not yet given rise to major problems among the Contracting States. Of course, for many of them the Treaty had not been in force for very long.

§ 1 Scope of the Convention: reach of the same concept of civil or commercial matters

The discussion dealing with the characterisation of matters as civil or commercial disclosed the same borderline problems as those which had been encountered during the meeting on the 1965 Convention on Service of Process. All experts were agreed that penal matters were excluded from the scope of the Convention. Once again, as they had done during the previous discussions, the Egyptian Experts pointed out that according to their view matters of personal status (family law and succession) did not fall within the category of civil law, although these matters fell within the scope of the Convention according to the laws of the other Member States. In regard to tax and administrative matters the differences of opinion which had already been seen in connection with the Convention on Service of Process once again came out. In certain systems tax and administrative questions are clearly excluded from the civil and commercial areas. However, while with regard to the Convention on Service of Process it had appeared that in practice the Central Authorities displayed very great liberality and were prepared to serve documents which they would not be obliged to serve under the strict terms of the Convention, this for the purpose of rendering a service to the addressee of the document, it seemed that in connection with the taking of evidence more rigorous controls were applied. The latter situation involved not merely the simple transmission of documents but also the participation directly or indirectly of the requested authorities in a proceeding which was unfolding abroad, which makes the caution of the Central Authorities understandable. Certain experts indicated that in practice their courts accepted the characterisation as civil or commercial which was given by the requesting authorities under their own law, but a greater number of experts indicated,

to the contrary, that this determination should be made according to the views of the State addressed.

During the discussions an important question was raised: it was asked whether evidence obtained under the Convention in connection with a civil or commercial proceeding could be used in the requesting States for other purposes, particularly in tax or penal matters. Reference was then made to the situation which gave rise to the decision of the House of Lords in case of the Westinghouse Uranium Contract (No 1) (No 2) [1978] 2 W.L.R. 81. [1977] 1 All E.R. - H.L. The experts were of the opinion that the mere possibility that the proof obtained abroad in a civil or commercial proceeding might lead to a penal or tax proceeding in the requesting country should not prevent the Convention from being applied. On the other hand, if the evidence sought in a foreign country in connection with a civil or commercial matter could be directly linked to a penal proceeding underway in the requesting State, the State addressed might refuse to carry out the Letter of Request, as was done in the case mentioned above, where witnesses claimed in England a privilege not to testify because of their fear of being incriminated in a penal proceeding instituted in the United States (privilege granted under the Fifth Amendment to the U.S. Constitution); immunity from prosecution had then been granted to them by the American requesting authorities in order to obtain their testimony.

§ 2 *Meaning of the term 'evidence' and the problem of 'pre-trial discovery of documents'*

A The term 'evidence'

Concerning the meaning of the term 'evidence' the experts showed a tendency to favour a liberal attitude which would permit use of the Treaty mechanisms for all sorts of other judicial acts in addition to those covered by the first paragraph of article 1. Thus one might be able, by Letter of Request, to ask about changes in family status or capacity, or for a copy of an entry in a public register, or even to obtain the agreement or the opinion of a specialised judicial authority of the requested State in a family law matter.

B Pre-trial discovery of documents

A long discussion ensued concerning the procedure referred to as 'pre-trial discovery of documents' as known in the common law States. Article 23 provides for a reservation, included at the request of the United Kingdom, under the terms of which 'A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries'. All of the Contracting States except for the United States have made this reservation. It appeared that a serious misunderstanding held sway in regard to the concept of 'pre-trial discovery of documents'. The explanation given by the American Expert showed that all procedures for obtaining pre-trial discovery necessarily implied that a legal proceeding had been instituted in the requesting State and that the evidence in question was being sought under authorisation from a judge. Now this is exactly what happens in other legal systems where evidence is sought after the litigation has been initiated and before a hearing on the merits takes place. The procedure for obtaining pre-trial discovery does not generally occur before a legal proceeding has been initiated, as is done in the case of a bill to perpetuate testimony which is brought prior to the institution of a proceeding at law. It appears that when making this reservation the Contracting States did not intend to refuse all requests for evidence submitted by the American judicial authorities before the trial on the merits commenced before the jury. Finally, following the explanation given by the Experts of the United Kingdom, which had first proposed the reservation, it seemed that this reservation had been sought essentially for the purpose of countering requests for evidence which lack specificity in that they do not describe precisely enough the documents to be obtained or examined. It was also pointed out that in making the reservation the United Kingdom had restricted its scope. In employing this reservation Her Majesty's Government declared that it understood

'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' as including any Letters of Request which requires a person –

a to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

Following this explanation it seemed to the experts that, on this point, the Convention had been poorly drafted as shown by the misunderstanding resulting from the expression employed, 'pre-trial discovery'. The reservation could reasonably be applied only in those cases where the lack of specificity in the Letter of Request was such that it did not permit sufficient identification of the documents to be produced or examined. For this reason the Commission expressed the desire that the States Parties to the Convention and those which were to become Parties withdraw or never make this reservation, or at least that they restrict by declaration the application of the reservation to Letters of Request which are not sufficiently specific, taking as their example the declaration made by the United Kingdom.

§ 3 Forwarding authority for Letters of Request

While in Sweden and the United States the court seized of the lawsuit sends the Letter of Request directly to the foreign Central Authority, in most of the States Parties to the Convention Letters of Request drawn up by the competent judicial authorities of the country where the litigation is underway are sent abroad through the channel of a centralised authority in the requesting country, which turns out in fact to be the Central Authority designated to receive Letters of Request coming from abroad. This practice which has developed outside of the framework of the Treaty permits an authority which is accustomed to international contacts to exercise some preventive control and thereby to cut down on the hindrances to obtaining of the evidence abroad.

Unlike the Convention on Service of Process, the 1970 Convention does not provide for the use of a required model form for Letters of Request drawn up to be sent abroad. It appeared to the experts that it would be useful for the authorities of the Contracting States to agree to use a model form which would not of course be binding on the States but which, if it were adopted, would greatly facilitate the preparation of requests that could be easily understood abroad. This matter will be dealt with further in § 8, below.

§ 4 Receipt of Letters of Request

In all of the States which are or which have the intention of becoming Parties to the 1970 Convention the Central Authority designated is or will be the same as that which is utilized in the operation of the 1965 Convention on Service of Process.

The discussion showed that no serious problem had arisen among the Contracting States in connection with the receipt of Letters of Request, concerning the language employed or the objections that might be raised against the request.

§ 5 Execution of the Letter of Request

A The executing authority

While in dealing with the requesting authorities the Convention sets it out that this must be a 'judicial authority', most of the articles of the Convention speak, in regard to the authority executing the Letter of Request, of the 'competent authority' or of the 'authority requested'. It is only in article 9 that the authority which proceeds to carry out a Letter of Request is called 'judicial authority'. After a long discussion concerning the nature of the authority requested, the feeling emerged that courteous application of the Convention called for including as requested authorities not only courts and judges of the

requested State, but likewise other persons (commissioners, notaries public, *notaires*, lawyers) insofar as these persons are given in the specific case under their laws certain attributes of a judicial authority.

This being so, it seemed in general that very few difficulties had arisen in connection with the execution of Letters of Request under the Convention.

B Participation by judges of the requesting State

A certain number of States Parties to the Convention allow judges of the requesting State to be present at the execution of a Letter of Request (article 8). In practice this phenomenon occurs infrequently. It sometimes happens that judges of the requesting country wish not only to be present but also to participate in obtaining the evidence. Such a procedure is not automatically rejected in the Member States but special authorization must first be obtained in the requested State.

C Special methods or procedures

The second paragraph of article 9 provides that the requesting authority may ask that a special method or procedure be followed in obtaining the evidence. It seemed that in practice requests for use of a special method or procedure were very rare. Indeed the possibility to employ a commissioner coming from the requesting State, which most of the Contracting States allow for, provides a way of assuring compliance with a special method or procedure which is easier than doing the same thing by means of special instructions in the Letter of Request.

Furthermore, a broad consensus developed among the experts in support of the proposition that requests for blood tests in paternity cases constitute a method of obtaining evidence which clearly falls within the scope of the Convention.

D Measures of compulsion

Questions concerning the use of measures of compulsion in executing Letters of Request have given rise to no serious problems. However, in connection with obtaining evidence through requests for blood testing, a sampling of opinion around the table showed that the practices of the States vary considerably as regards measures of compulsion. Belgium, France, Ireland, Luxembourg, Scotland and the United States decline to apply any measure of compulsion in connection with blood tests, while Austria, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, Norway, the United Kingdom (except for Scotland) and Sweden permit the application of measures of compulsion.

E Return of the documents

The practices of the States vary in this area, some of them channelling the return of the documents through their Central Authorities as intermediaries, others leaving it to the authority executing the Letter of Request to send the documents back directly. The direct return of the documents seemed clearly to speed up the procedure. For this reason the experts expressed the wish that Letters of Request indicate clearly the authority or the person in the requesting State to whom the Letter of Request should be returned. The model form recommended by the Commission complies with this wish (see § 8, below).

F Refusal to execute

Refusal to execute turns out to be very infrequent in practice. The examples given are of an unusual nature; the case may be mentioned of a Letter of Request issued in connection with a lawsuit which brought into issue in the requesting State the conduct of a judge of the requested State in carrying out his judicial duties.

Mention should be made, however, of the fact that the Commission discussed a delicate problem brought up by the Expert of the United States, this being the obligation of the Central Authority of the State addressed to prosecute or to defend an appeal against a decision of the trial court granting or refusing execution of the Letter of Request. The discussion showed that there was a difference of opinion among the experts, some

drawing a distinction between the obligation to prosecute an appeal and that to defend one, others taking the view that the Convention imposed no obligation on the Central Authority in such a situation. In the end, the Commission confined itself to determining that no clear solution could be identified for the resolution of this delicate problem.

§ 6 *Taxes and costs*

In theory the execution of Letters of Request should not result in costs other than those mentioned in article 14, second paragraph, which provides for the reimbursement of fees paid to experts and interpreters and of the costs occasioned by the use of a special procedure requested by the State of origin. However, some of the experts brought up the fact that certain States claim reimbursement of high fees and costs, particularly in regard to *per diem* allowances and travel expenses paid to witnesses, although such costs should be borne by the State addressed.

Moreover, article 26 provides, on a reciprocal basis, that a Contracting State may 'request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the costs of any transcript of the evidence'. It appears that in practice article 26 has not been formally invoked by a Contracting State. One must conclude then that, in the relations between States Parties to the Convention, the appearance of witnesses should not give rise to reimbursement of costs and expenses on the part of the State of origin.

§ 7 *Intervention of diplomatic or consular officials and of commissioners*

When making reservations permitted by the Convention, only one of the States, Portugal, completely excluded Chapter II of the Convention, while only one other State, Denmark, excluded the intervention of commissioners. All the other Contracting States permit, subject to various conditions, diplomatic or consular officials or commissioners to proceed with obtaining evidence on their territories.

A Intervention of consuls

Concerning the intervention of consuls in respect of their nationals, it was pointed out that the system of the 1970 Convention was a step back in comparison with that of the 1954 Convention since it permits Contracting States to require that evidence be taken by the consul only if permission to that effect has been given in advance. However, the fact was brought up that in practice no serious hindrance had been given to the taking of evidence by consuls from their own nationals. As to the intervention of consuls with nationals of the State of residence or of third States, most of the States allow their intervention subject to an assortment of diverse conditions designed to permit the authorities of the State of residence to be informed about or to be present at the taking of evidence.

B Intervention of commissioners

The intervention of commissioners is rather broadly permitted by the States Parties to the Convention. This intervention comes up with frequency essentially in France and in the United Kingdom, and this solely in relations with the United States. The commissioners appointed by the American authorities may be persons coming from the United States, American consuls, or authorities or persons living in the State addressed and designated by the requesting American authorities. This latter practice is viewed favourably by the States where the commissioners carry out their function, for it avoids very heavy costs for travel and *per diem*. The French Expert in particular pointed out that his Government did not understand why the taking of very simple evidence concerning some of its nationals for use in uncontested proceedings underway in the United States (mention was made of a simple interrogation to determine or verify identity) was carried out by persons specially sent from the United States, which resulted in the useless and unjustified ballooning of the costs of the procedure, when

by means of a Letter of Request or the intervention of a consul the evidence could have been obtained free of charge.

C Measures of compulsion

As concerns the possibility for measures of compulsion to be made available to consuls and commissioners, the practices differ. The Experts of Czechoslovakia and the United States indicated that requests to make available measures of compulsion addressed to the local authority could be complied with. To the contrary, the French Expert made it known that in his country measures of compulsion could not be made available to a commissioner unless the commissioner was a French judicial authority named for this purpose by the requesting authority.

§ 8 *Extension of the Convention and special agreements*

No State Party to the Convention has taken advantage of the options offered by article 27.

It was noted furthermore that, alongside the 1970 Convention, there existed a whole network of bilateral conventions which are often more liberal than the Hague Convention itself. Such special agreements are honoured under article 32. It was pointed out, however, that none of these conventions or special agreements provides for a less favourable set-up than that established in the 1970 Convention.

The French Expert, starting out from the fact that the institution of a Central Authority under the Hague Conventions has brought on in each of the Contracting States the creation of an administrative centre which has the task of dealing with problems of international judicial co-operation in their entirety, would have liked to extend judicial co-operation between the Central Authorities through the use of the mechanism for Letters of Request provided in the 1970 Convention. Might it not be possible with the aid of a technique close to that of the Letter of Request to tighten up the co-operation among Central Authorities in order to obtain other mutual services such as information on the status of a proceeding, on the content of foreign law, etc.? The idea of reinforcing the ties among Central Authorities certainly met with a favourable reception within the Commission. However, certain experts drew attention to the technical difficulties tied in particular to the fact that the constitutional systems of their countries might not allow an administrative authority to intervene at the federal level or in any case on behalf of individual litigants. Even so, the fact that the Central Authorities exist and that they have been able to meet each other at The Hague - through the medium of the public officials who staff them - constitutes at this point in time already notable progress in the development of international judicial co-operation.

§ 9 *Recommendation concerning the use of a model form of Letter of Request*

In order to meet the wishes expressed by numerous experts, the Commission named a Drafting Committee for the purpose of preparing a model form of Letter of Request, which would be recommended' for use in applying the Convention. This Drafting Committee, chaired by Mr L. Chatin, Vice-Chairman of the Commission, and composed of Mrs Hökborg (Sweden) and Messrs Mitchell (United Kingdom) and Ristau (United States), prepared a model form which was reviewed and adopted at the final working session (see annex, *infra*).

This model for Letters of Request is entitled 'Request for international judicial assistance pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters'. It contains four chapters.

Chapter I contains purely administrative items which have to do with the transmission of the documents. It seemed that these items ought to appear in every Letter of Request, and this includes item No 3 concerning the person to whom the executed request is to be returned, who could at times be different from the sender listed under item No 1.

Chapter II likewise contains items which ought to be found in every Letter of Request since they simply follow sub-paragraphs *a-d* of article 3 of the Convention where it lists the information that the Letter of Request should contain.

Chapter III is made up of a series of items which may be included where applicable, and these illustrate the different possibilities set out in article 3, sub-paragraphs *d-i* and in articles 7, 8, 9, 11*b*, 14, second paragraph, and 26 of the Convention. The use of such a 'check-list' should facilitate the task of the requesting authorities, since it will draw their attention to the various possibilities spread through the articles of the Treaty.

Finally, Chapter IV contains the traditional items included in order to authenticate the identity of the requesting authority.

Of course, the very text of the model as presented sets it out that, under the first paragraph of article 4, 'the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language'. Attention is however drawn to the fact that the provisions of the second and third paragraphs of article 4 may permit the use of other languages.

The Special Commission, being of the opinion that the use of the words of art customarily employed in the domestic legal practice for the drafting of Letters of Request might well bring on difficulties of interpretation abroad, since the terminology used in domestic legal proceedings often is understood only by the local specialists, and on the other hand desiring to draw the attention of the requesting authorities to the various possibilities offered by the Convention, recommended to the authorities of the Member States that they take heed of this model when preparing Letters of Request pursuant to the 1970 Convention. The Commission was confident that such a recommendation, which would not be binding on the judicial authorities of the States Parties to the Convention or those which subsequently became Parties, would be broadly followed since its only purpose was to favour and facilitate international judicial co-operation.

RESULTS OF THE NOVEMBER 1977 MEETING

In regard to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which had been the principal subject of the discussions held in November 1977, significant progress could already be ascertained. On the problem of costs (mentioned under point I, § 1, B, 2, *c*, of the December 1977 Report drawn up by the Permanent Bureau), the Representative of the American Government was able to announce that thenceforth the services of the U.S. Marshals would be free of charge, on a reciprocal basis. Furthermore, some flexibility had come about in respect of the problem of translations in relations between France and the United Kingdom, and the channel through the Central Authority was in the future to be extensively utilized in the contacts between these two countries, whereas in the past these had remained under the old system of consular transmission. The Expert of the United Kingdom moreover announced that the costs of service would be thenceforth set at a modest sum, in the expectation that this would ultimately become free of charge.

Concerning the preparation of a practical guide to the operation of this Convention, the Permanent Bureau stated that a certain number of replies to the questionnaire set out in the December 1977 Report (under I, § 2) had already reached the secretariat. When all of the replies had been received, one of its officials would proceed to search through them and it would then be more feasible to assess the possibilities for preparing an informative document. Preparation of such a document would nevertheless require a certain amount of time, since it would be necessary not only to reduce the replies to a synthesis but also to translate each of these from the language in which it was drafted into the other official language of the Conference. In response to the wishes expressed by certain experts, the Permanent Bureau was to study the possibility of adding to this informative document a short chapter giving basic information on the practice under the 1970 Convention on Taking of Evidence Abroad.

As for the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, the Representative of the Commonwealth Secretariat

mentioned that a pamphlet edited by the Permanent Bureau of the Conference reprinting the text of the Report of Mr Loussouarn together with an English translation was about to be distributed very widely among all the Governments of the Commonwealth countries and that a recommendation for ratification of this Treaty was going to be sent out by the Commonwealth Secretariat. The Permanent Bureau announced moreover that the same pamphlet had been distributed to the member countries of the Asian-African Legal Consultative Committee, which was represented at the meeting in The Hague by its Secretary-General, for the purpose of making this Convention on administrative co-operation better known.

Finally, the American Expert made it known that the United States Senate had under consideration the ratification of this Convention and he expressed the hope that the United States would become a Contracting Party before long.