

Doc. pré. No 15
Prel. Doc. No 15

janvier / January 2009

**RÉSUMÉ DES RÉPONSES AU QUESTIONNAIRE DE SEPTEMBRE 2008 PORTANT SUR LA
CONVENTION ACCÈS À LA JUSTICE, AVEC COMMENTAIRES ANALYTIQUES
(RÉSUMÉ ET ANALYSE)**

établi par le Bureau Permanent

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**SUMMARY OF RESPONSES TO THE QUESTIONNAIRE OF SEPTEMBER 2008 RELATING TO
THE ACCESS TO JUSTICE CONVENTION, WITH ANALYTICAL COMMENTS
(SUMMARY AND ANALYSIS DOCUMENT)**

drawn up by the Permanent Bureau

*Document préliminaire No 15 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 15 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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**Summary and Analysis
(Access to Justice Convention)**

States and REIO [36]

1. South Africa
2. Germany
3. Argentina
4. Australia
5. Brazil
6. Bulgaria
7. Canada
8. China (Hong Kong SAR)
9. Cyprus
10. European Community
11. Croatia
12. Denmark
13. Ecuador
14. United States of America
15. Spain
16. Finland
17. France
18. Iceland
19. Japan
20. Latvia
21. Lithuania
22. Luxembourg
23. Malaysia
24. New Zealand
25. Norway
26. Netherlands
27. Poland
28. Czech Republic
29. Romania
30. United Kingdom
31. Saint Vincent and the Grenadines
32. Slovakia
33. Sweden
34. Switzerland
35. Turkey
36. Ukraine

Non-Contracting States and REIO [20]

1. South Africa
2. Germany
3. Argentina
4. Australia
5. Brazil
6. Canada
7. China (Hong Kong SAR)
8. European Community
9. Denmark
10. Ecuador
11. United States of America
12. Iceland
13. Japan
14. Malaysia
15. Norway
16. New Zealand
17. Saint Vincent and the Grenadines
18. Turkey
19. Ukraine
20. United Kingdom

Contracting States [16]

1. Bulgaria
2. Cyprus
3. Croatia
4. Spain
5. Finland
6. France
7. Luxembourg
8. Latvia
9. Lithuania
10. Netherlands
11. Poland
12. Czech Republic
13. Romania
14. Slovakia
15. Sweden
16. Switzerland

Summary

For persons having to bring court proceedings abroad, the Access to Justice Convention guarantees access to justice without discrimination for the habitual residents and nationals of its Contracting States. It is true that the present geographical scope of the Convention remains limited to European States, but accession or ratification by non-European States in the future will give this instrument real added value with respect to other similar bilateral or regional instruments.

From a general point of view, the practical operation of the Convention does not appear to present any major difficulties. It is nevertheless a suitable moment for the Special Commission to examine a number of specific issues, such as the granting of legal aid for legal persons, the presence in the State of the person seeking legal advice, as well as possible improvements to be made to the model forms.

The Special Commission meeting also gives the participants the possibility to exchange preliminary views on the future of this Convention. At present, the non-discrimination principle established by the Convention allows the interested person to have access without discrimination to the system of legal aid that exists in the State where the proceedings are brought. A further stage might be reached, for some types of cross-border disputes, which would ensure an appropriate level of legal aid by establishing a number of minimum norms in the Convention itself.

Introduction

1. Ahead of the meeting of the Special Commission on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions, scheduled to take place in February 2009, the Permanent Bureau of the Hague Conference on Private International Law drew up a Questionnaire¹ aimed at evaluating the practical operation of the *Hague Convention of 25 October 1980 on International Access to Justice*.² This Questionnaire, distributed in September 2008, was sent to the States Parties to the Convention, as well as to the Members of the Conference. It is the first time such information has been collected by the Permanent Bureau since the Convention entered into force on 1 March 1988.

2. The responses received are a valuable aid in the preparation of the discussions on the Convention that will take place during the meeting of the Special Commission and, in the medium term, in engaging discussion on the need to promote the Convention and any modifications to its text. The Permanent Bureau is thus very grateful to the 35 States and the European Community which replied to the Questionnaire (16 Contracting States and 19 non-Contracting States).³ These responses will effectively enable the Permanent Bureau to gain an overview of the different ways the Convention is applied in those States, and to distribute relevant practical information among the States interested.

3. The present document is a synthesis and analysis of the responses received by the Permanent Bureau.⁴

¹ Prel. Doc. No 4 of September 2008, "Questionnaire of September 2008 relating to the Hague Convention of 25 October 1980 on International Access to Justice" (hereinafter "the Questionnaire").

² Hereinafter "the Convention".

³ All the responses are available from the website of the Conference at < www.hcch.net >. The Permanent Bureau would like to remind readers that the Convention does not contain any specific provision allowing for an REIO (Regional Economic Integration Organisation) to become a Party to the Convention.

⁴ This document takes into account responses received after the deadline of 22 December 2008 to the extent possible. The individual responses from States and the latest update of the compilation of responses are available at < www.hcch.net > under "2009 Special Commission Section".

PART ONE – GENERAL INFORMATION AND STATISTICS

I Non-Contracting States

4. The Permanent Bureau received responses from 19 non-Contracting States and from the European Community.⁵ The Permanent Bureau is encouraged by the high number of responses received from non-Contracting States and interprets their wish to contribute to this study as a positive indication towards the Convention, even on the part of States which, for reasons evoked hereinafter, are not considering becoming a Party at present. In fact, some States, such as the United Kingdom, have taken this opportunity to look at the advantages the Convention could bring.

A Reasons for not being a Party to the Convention (Q. 1)

5. To explain their passiveness towards the Convention until now, States put forward a variety of arguments. Four States thus considered that the Convention provides no supplementary value to the solutions which already exist in their own system.⁶ The United States mentions that some rules recommended by the Convention (notably those regarding removal of the requirement of security for costs) are in opposition to some of their internal rules, which authorise the judge to require security for costs in certain cases. Ukraine and Ecuador both mentioned that they do not have the necessary means available to incorporate the Convention in their juridical system as it stands at present.⁷ Finally, nine States, without giving a particular reason, mentioned that they have not looked at the possibility, or are taking advantage of the opportunity of the Special Commission meeting to (re)examine the prospect of becoming a Party to the Convention.⁸

6. It can therefore be deduced that the majority of the non-Contracting States which replied to the Questionnaire have not yet adopted a final position towards the Convention. Nevertheless, some of these States have not categorically waived aside the possibility that they might be interested in the Convention in the future.

B Concerning the possibility of becoming a Party to the Convention (Q. 2)

7. Seven States (of the 19 that replied to this second question) and the European Community are at present examining the Convention with a view to becoming a Party.⁹ Work is currently underway in Argentina, Brazil and Turkey. South Africa, Malaysia and the European Community¹⁰ are discussing the possibility of becoming a Party to the Convention, whereas Ecuador intends to undertake supplementary measures after its current constitutional reform. However, ten States acknowledge that they will not be paying particular attention to the Convention in the near future.¹¹

⁵ Argentina, Australia, Brazil, Canada, China (Hong Kong Special Administrative Region) (hereinafter "China (Hong Kong SAR)"), Denmark, Ecuador, Germany, Iceland, Japan, Malaysia, New Zealand, Norway, Saint Vincent and the Grenadines, South Africa, Turkey, Ukraine, the United Kingdom and the United States of America (hereinafter "the United States").

⁶ Australia, Denmark, Germany and New Zealand.

⁷ It is important to note that the Convention does not require adoption of a system of free legal aid in civil and commercial matters. The Convention simply announces that aid must be offered to the nationals and habitual residents of the Contracting States "on the same conditions" as if they themselves were nationals or habitual residents of the State concerned. Consequently, if the nationals or habitual residents of the State concerned cannot be granted free legal aid, the Convention does not change that situation.

⁸ China (Hong Kong SAR), South Africa, Iceland, Japan, Malaysia, New Zealand, Norway, Saint-Vincent-and the Grenadines and the United Kingdom.

⁹ Argentina, Brazil, Malaysia, Norway, South Africa, Turkey and the United Kingdom (England, Wales and Northern Ireland).

¹⁰ Even though the European Community cannot itself become a Party to the Convention, it has manifested its intention to examine the possibility of acceding through the ratification and/or accession of all its Member States.

¹¹ Australia, China (Hong Kong SAR), Denmark, Ecuador, Iceland, Japan, New Zealand, Saint-Vincent and the Grenadines. Ukraine and the United States.

C Requests for legal aid by a person who is in the territory of a non-Contracting State (Q. 3)

8. The Convention eliminates possible discrimination concerning the entitlement of legal aid between the nationals of a Contracting State, and persons who are habitually resident in that State, and the nationals of another Contracting State or persons who are habitually resident there (Art. 1(1)). The second paragraph of this Article extends the scope of entitlement to legal aid to include persons who do not meet the criteria mentioned in the first paragraph, on condition, on the one hand that they have been habitually resident in a Contracting State where the judicial proceedings have been or will be brought and, on the other hand, that the cause of action arises from this former habitual residence. However, the responses received do not show that the extension limited to the scope of Article 1 of the Convention has been found to be very useful in practice. Indeed, two States affirmed that to date none of their residents has transmitted any application of this type to the competent authority of a Contracting State.¹² Unfortunately, 14 States had no information on this subject.¹³

9. Australia and New Zealand added that their respective domestic legislation provides for access to legal aid for persons residing abroad under the same conditions as persons residing in their State. In the case of New Zealand, legal aid more specifically takes the form of a loan.

D Security for costs (Q. 4 and Q. 5)

10. The requirement of a security, bond or deposit when proceedings are brought in a State by someone who is not a national or a resident of that State is found to be common in the majority of the non-Contracting States which replied to the Questionnaire. Only three of the seventeen States that replied indicated that when proceedings are brought in their State, no security, bond or deposit is required from persons who are not habitually resident or who are not nationals of the State concerned.¹⁴ In the other cases, security is generally required, on discretion of the court and / or after an application from the defendant to this effect. It is important to emphasize that in South Africa, Argentina and New Zealand, judges are reticent to require security for costs if this will effectively prevent the defendant from being afforded the opportunity of defending his rights. Moreover, the majority of the responses specified that the domicile or habitual residence of the defendant outside the national territory, and not his or her foreign nationality, is the factor which generally incurs the requirement of a security, bond or deposit for costs.

11. None of the States that replied possess information concerning their habitual residents or nationals with regard to whether they have to provide a security, bond or deposit when they bring proceedings abroad. One of the main advantages of the Convention is precisely the elimination of any security or deposit, in whatever form, which might be required from foreign nationals and / or non-residents of the State where the proceedings are brought, on condition, however, that these persons are nationals of or are habitually resident in a Contracting State. Becoming a Party to the Convention would consequently imply considerable change in this regard. On the one hand, persons who are habitually resident in a new Contracting State would benefit, by way of Article 14 of the Convention, from the exemption of security for costs when they are implicated, whether as defendant or plaintiff, in proceedings in another Contracting State. On the other hand, it should not be forgotten that there is a reciprocal effect to this mechanism and becoming a Party to the Convention requires each new Contracting State to no longer apply any of its discriminatory rules with regard to security for costs to defendants or plaintiffs who benefit from the system of Article 14 of the Convention. Against this, Article 15 provides that an order for payment of costs and expenses of

¹² Denmark and South Africa.

¹³ Argentina, Australia, Brazil, China (Hong Kong SAR), Ecuador, Germany, Iceland, Japan, Malaysia, New Zealand, Norway, Turkey, Ukraine and the United States.

¹⁴ Malaysia, Ukraine, United Kingdom.

proceedings pronounced against any person exempt from payment of security shall, on application of the creditor, be rendered enforceable without charge in any other Contracting State.

12. However, the formulation of Article 14 leaves some uncertainty with regard to exemption of the requirement of security for nationals of a Contracting State who are habitually resident in the State where the proceedings are brought.¹⁵ Indeed, literal interpretation of this Article would lead to the exclusion of persons bringing proceedings in the State where they are habitually resident.¹⁶ To remove the entitlement to exemption from nationals of a Contracting State who are habitually resident in the State of the forum, and then to grant it to them if the proceedings are envisaged in *a different* Contracting State appears to contradict the *ratio legis* of the provision. For illustration purposes, one could take the case of an Argentine national who is habitually resident in Spain. Once the Convention is ratified by Argentina, the Argentine national could then invoke Article 14 of the Convention to obtain exemption from payment of security for costs if he brings proceedings in France. However, this would not be possible if he were to bring the proceedings in Spain where he is habitually resident. It would appear to be paradoxical to maintain this difference in treatment which, moreover, would appear only to be valid in Contracting States of which the nationality is the factor incurring requirement of the security (see para. 11 above) and if there are no bilateral or other instruments which provide for exemption of the security. Should it find that this hypothetical case might nevertheless raise difficulties, it would be helpful if the Special Commission were to confirm the interpretation mentioned above.

E Other instruments (Q. 6)

13. The majority of the non-Contracting States that replied to the Questionnaire are Parties to a number of bilateral or multilateral agreements containing non-discriminatory rules, notably with regard to judicial co-operation.¹⁷ Only Iceland, China (Hong Kong SAR) and the United States indicated that they are not Parties to this type of agreement.

14. Argentina and Brazil are Parties to the Protocol on co-operation and legal aid in civil, commercial, social and administrative matters.¹⁸ Moreover, all the member countries of MERCOSUR,¹⁹ together with Bolivia and Chile, are Parties to this Protocol, which was amended in July 2002.²⁰ However, none of these States is at present a Party to the Convention. It should nevertheless be noted that Argentina and Brazil have begun to undertake steps in this direction.

¹⁵ It is interesting to note here that the Hague Convention of 1 March 1954 on civil procedure also includes the term "another" in its Art. 17. Moreover, the text of Art. 13 of the Preliminary Draft of the *Hague Convention of 25 October 1980 on International Access to Justice* read as follows: "No security or deposit of any kind may be imposed, by reason only of their foreign nationality or of the absence of domicile or residence in the country, upon persons having their habitual residence in a Contracting State who are plaintiffs or parties intervening before the courts of a Contracting State." In addition, the Minutes of the Second Commission of the Fourteenth Session of the Hague Conference do not mention any debate with regard to addition of the term "another" during adoption of the articles of Chapter II of the Convention (*cf. Actes et documents de la Quatorzième session, Tome IV, Entraide judiciaire*, The Hague, 1983).

¹⁶ J.W. Soek, "Recent developments in the field of *cautio judicatum solvi*, cost free access and free legal assistance", *Netherlands International Law Review*, 1981, p. 300; P. Volken, *Die internationale Rechtshilfe in Zivilsachen*, Schulthess, Zurich, 1996, p. 234.

¹⁷ For a full list, see the individual responses from the States.

¹⁸ MERCOSUR/CMC/DEC No 5/92 (translation by the Permanent Bureau).

¹⁹ MERCOSUR is an abbreviation for *Mercado Común del Sur* (Common Market of the South). Four countries are permanent members: Argentina, Brazil, Paraguay and Uruguay. Venezuela is currently a candidate to become a permanent member. There are also five associate Member States: Bolivia, Chile, Colombia, Ecuador and Peru.

²⁰ *Acuerdo de cooperación y asistencia jurisdiccional en materia civil, comercial, laboral y administrativa entre los estados partes del Mercosur y la República de Bolivia y la República de Chile* ("Agreement of co-operation and judicial assistance in civil, commercial, employment and administrative matters between the Member States of Mercosur and the Republic of Bolivia and the Republic of Chile" [translation by the Permanent Bureau]) of 5 July 2002, available from the MERCOSUR website at < www.mercosur.int >.

15. Ukraine is a Party to the *Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters*. Ten States²¹ have signed this Convention and two States²² acceded in 1996. However, none of these States is a Party to the Access to Justice Convention.

16. Finally, seven of the 19 non-Contracting States which replied to the Questionnaire are Parties to the Hague Convention of 1 March 1954 on civil procedure.²³

17. This large number of treaties indeed confirms the importance of judicial co-operation and of access to justice abroad under fair and just conditions. Sharing these goals as they do, it is to be hoped that States which are Parties to similar instruments shall also take an interest in the Hague Access to Justice Convention so as to extend their minimum rules for access to justice beyond their own region or continent.

II Contracting States

18. The Permanent Bureau received comments from 16 Contracting States.²⁴

A Operation of the Convention (Q. 9 and Q. 10)

19. The Contracting States appear on the whole to be satisfied with the Convention. Five States considered the general operation to be good²⁵ and two States found it to be satisfactory.²⁶ A number of States, however, admitted that the limited number or lack of applications made under the Convention does not make it possible for them to give a realistic view of the situation.

20. In addition, none of the States have experienced difficulties with applying the Convention in practice, whether with regard to legal aid, security for costs and enforceability of orders, legalisation of copies of entries and decisions, or to elimination of physical detention and safe-conduct for witnesses and experts.

B Statistics

21. The Permanent Bureau would like to obtain statistical information on the application of Chapters I and II of the Convention so as to identify the origins and types of application made.

22. Ten of the 16 States were able to provide detailed statistics concerning Chapters I and II of the Convention. It was difficult for some States to forward statistical information on the Convention because the data is compiled without distinguishing the instrument or the rule under which the application is transmitted or received. The domestic legislation of the Netherlands, for example, allows anyone to apply for legal aid without using the services of the Central Authority; and is the reason why statistics transmitted by that State do not necessarily reflect reality. In addition, Spain indicated that applications have been received and transmitted using means other than those provided for by the Convention. Slovakia and Switzerland, however, indicated that no statistics were available.

²¹ Armenia, Belarus, Kazakhstan, Kirghizstan, Moldavia, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

²² Azerbaijan and Georgia.

²³ Argentina, Denmark, Germany, Japan, Norway, Turkey and Ukraine. Iceland has signed but not yet ratified the Convention to date.

²⁴ Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden and Switzerland.

²⁵ Croatia, Poland, Romania, Sweden and Switzerland.

²⁶ The Netherlands and Slovakia.

23. Within the framework of Chapter I, the Permanent Bureau is more particularly interested in the number of applications for legal aid, in the types of persons making them and their scope. The Permanent Bureau would also like to know the length of time between transmission of the application to the requested State and its determination.

24. Ten States indicated that they had received no application for legal aid under the Convention.²⁷ France, on the other hand, counted eight cases between 2003 and 2007. However, legal aid was granted in France to a national of a Contracting State on only one occasion. The majority of the Swiss competent authorities were unable, for statistical purposes, to identify the categories of persons making the applications. The same was true for Poland and Slovakia. However, for a number of its competent authorities, Switzerland indicated that the information concerned nationals of or persons habitually resident in a Contracting State, without indicating the number of persons who were granted legal aid.

25. Ten States indicated that no application for legal aid had been transmitted under Articles 1 and 4 of the Convention.²⁸ Between 2004 and 2007, France transmitted eight applications, mainly to Switzerland. However, no information is available with regard to the categories of persons that made the applications or that were accepted by the requested authority.

26. Contrary to Directive 2003/8/EC of the European Community,²⁹ which excludes fiscal and administrative matters from its scope, Article 1, paragraph 3 of the Convention includes applications in administrative, social and fiscal matters. Legal aid, however, can only be granted in these matters if the requested State offers this possibility. Unfortunately, either none of the States were able to provide any statistics or none of the States received or transmitted any applications in these matters.

27. The aim of the Questionnaire was also to compile information on the periods of time necessary for determination of the applications for legal aid. Although Article 12 of the Convention requires that they "be handled expeditiously", no specific period of time is mentioned.³⁰ States that receive applications indicated that after its receipt the application can be handled immediately, but in some isolated cases the time necessary for its determination has extended to up to two months. States that transmit applications for legal aid also have difficulty in evaluating the time required to handle their application. As indicated by France, it is difficult to provide precise information because when the application is transmitted to the responsible authority, that same authority does not supply any statistics regarding the time required to handle the application.

28. Finally, the Questionnaire asked the Contracting States about the extension of legal aid to later stages in the proceedings. Under Article 13, paragraph 2, of the Convention, a person who is granted legal aid under Article 1 is entitled to legal aid for the recognition or enforcement of the decision in a Contracting State, and this without renewed examination of his or her application.³¹ Unfortunately, in each case either no statistics were available with regard to the use of this rule in practice, or States indicated that no application of this type had been transmitted or received.

²⁷ Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Latvia, Lithuania, Luxembourg, the Netherlands and Romania.

²⁸ Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, Latvia, Lithuania, Luxembourg, the Netherlands and Romania.

²⁹ Council Directive 2003/08/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. L 26 of 31 January 2003, pp. 41-47.

³⁰ For comparison, Directive 2003/8/EC provides for a period of 15 days for the transmission of applications between the requesting and requested authorities. However, the requested authority is not obliged to handle the application within a specific period of time.

³¹ A reservation with regard to para. 2 of Art. 13 is, however, possible in accordance with Art. 28(2) *b*).

29. The statistics relating to Chapter II concern the number of applications transmitted, received or enforced with respect to the enforceability of orders for costs of proceedings. The responses from the States Parties, however, do not enable an accurate picture to be drawn of the situation. Indeed, three States indicated that statistics were not available, and other States indicated that they have never transmitted or received an application in accordance with Chapter II.

C Case law and reference work

30. The Permanent Bureau has taken note of the new publications on internal law and the new on-line tools aimed at facilitating applications for cross-border legal aid within the European Community.³²

31. The Permanent Bureau also extends its grateful thanks to those States that forwarded information concerning their domestic legislation resulting from the implementation of the Convention. A compilation of this information is available in the document "Synopsis of Responses to the Questionnaire of September 2008 relating to the Hague Convention of 25 October 1980 on International Access to Justice", Preliminary Document No 9 of December 2008, drawn up for the Special Commission on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions.

PART TWO – SUBSTANTIVE ISSUES

I Scope of the Access to Justice Convention

A Legal aid for legal persons (Q. 26)

32. The text of the Convention does not distinguish between natural persons and legal persons. However, the Explanatory Report of the Convention excludes application of Chapter I to legal persons.³³ Fourteen States indeed confirm that they have not granted legal aid to legal persons within the framework of the Convention,³⁴ even if some of them, such as Spain or Switzerland, provide that some legal persons may be granted legal aid under exceptional circumstances. For comparison purposes, it should also be noted that other States grant legal aid to legal persons (for example, the States Parties to the MERCOSUR Protocol 5/1992, in accordance with its Art. 3(2), or Belgium, on the basis of Art. 667 of the Belgian Judicial Code.)

33. Taking account of such developments in comparative law, the inclusion of legal persons in the scope of Chapter I might be desirable, even necessary, despite the interpretation proposed by the Reporter in 1983. It would seem to be a good opportunity for this question to be examined during the meeting of the Special Commission and for a conclusion or recommendation to be adopted in this regard if required.

B Concept of habitual residence (Q. 28)

34. During negotiation of the Convention, the concept of habitual residence was a relatively new connecting factor. It has been widely used in the field of private international law since then and the most recent Hague Conventions also use it as a

³² See the *European Judicial Atlas in civil matters* at: http://ec.europa.eu/justice_home/judicialatlascivil/html/la_information_en.htm (last consulted 8 January 2009) and the *European Judicial Network in Civil and Commercial Matters* at: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm (last consulted 8 January 2009).

³³ Explanatory Report drawn up by Gustaf Möller, *Actes et documents de la Quatorzième session, Tome IV, Judicial co-operation*, The Hague, 1983, p. 266, note 11.

³⁴ Bulgaria, Croatia, Cyprus, the Czech Republic, Spain, Finland, France, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia and Switzerland.

connecting factor.³⁵ It is therefore not surprising to note that States have not experienced any difficulties with the concept of habitual residence.

C Legal advice (Q. 17)

35. Article 2 of the Convention requires the presence of the person seeking legal advice in the State where the advice is sought to be able to grant him or her legal aid. The Explanatory Report indicates that for some States the presence of the person seeking legal advice is a criterion of admissibility.³⁶

36. The Permanent Bureau invites the Special Commission to reflect upon the requirement *sine qua non* of the presence of the person seeking legal advice in the State where the legal advice is sought for legal aid to be granted. Naturally, in those States whose domestic legislation provides for such a restriction, this restriction will continue to apply, as Article 1 of the Convention requires that legal aid is granted "on the same conditions" as those provided for the nationals or habitual residents of the State concerned. In those States, therefore, where physical presence is required, it will remain so. However, it would be desirable to extend the granting of legal aid without additional conditions being required by the Convention itself.

D Reservation under Article 28(1) (Q. 27)

37. Article 28, first paragraph, of the Convention provides the possibility for a State to make two types of reservation:

- (1) to exclude application of Article 1 to persons who are not nationals of a Contracting State, but who are habitually resident in a Contracting State other than the one which made the reservation, or
- (2) to exclude application of Article 1 to persons who are habitually resident in the State which made the reservation, if there is no reciprocity of treatment between the State which made the reservation and the State of which the applicant for legal aid is a national.

38. Although six States which replied to the Questionnaire have made this double reservation,³⁷ it appears that the impact of this reservation is limited in practice. Indeed, three States indicated that this reservation has never been applied to a concrete case.³⁸ Moreover, these are Member States of the European Community, bound therefore by Directive 2003/8/EC, and therefore unable to invoke the reservation with regard to persons domiciled or habitually resident in one of the States of the European Community (with the exception of Denmark). In the same way, the MERCOSUR Protocol is applicable to all nationals, permanent residents and habitual residents of a Contracting State.³⁹ Given these restrictions, the States concerned might reflect upon the need to maintain this reservation for the (relatively rare) hypothetical cases where the reservation can be invoked.

II Model Forms

39. The Convention provides standard forms for the transmission of the applications as well as for the applications themselves. Twelve States declared themselves to be satisfied

³⁵ For example, with regard to applicable law, Art. 3 of the *Protocol of 23 November 2007 on the law applicable to maintenance obligations* and Art. 5 of the *Hague Convention of 13 January 2000 on the Internationale Protection of Adults*.

³⁶ Explanatory Report drawn up by Gustaf Möller, *Actes et documents de la Quatorzième session, Tome IV, Judicial co-operation*, The Hague, 1983, p. 267.

³⁷ Albania, France, Luxembourg, Morocco (which has not yet ratified the Convention), Romania and Slovakia.

³⁸ France, Luxembourg and Romania. Slovakia indicated that no information was available concerning application of this reservation.

³⁹ Art. 3.

with these forms. Spain, however, would like these forms also to be available in other languages, such as Spanish or German, as well as in French and English. In addition, France indicated that applications are transmitted using the forms adopted by the European Commission in 2004-2005,⁴⁰ which should only concern applications towards other Member States of the European Community.

40. The Special Commission meeting is an opportunity to modernise the forms by amending them.⁴¹ The Permanent Bureau therefore invites the participants to the meeting of the Special Commission to reflect on the usefulness of creating a form which can be transmitted by any reliable means of communication, including electronically. It might also be envisaged to recommend to Contracting States, without modifying the forms, to add translations in other languages.

III Co-existence of the Convention with other instruments

41. No particular difficulty was experienced with regard to the relationship between the various instruments to which the Contracting States are Parties and the Convention. The relevant instruments complement each other, as provided in the general provisions of the Convention (Arts 21 *et seq.*). A good example is provided by the European Community, which notably specifies that Article 13 of the Convention, relating to aid provided for service abroad, remains applicable in the States of the European Community that are Parties to this Convention complementary to and in accordance with Council Directive 2003/8/EC.

Conclusion

42. The number of States which have become a Party to the Access to Justice Convention has probably not met all the expectations that the Conference held in 1980. It is true that access to justice without discrimination beyond one's own borders removes important obstacles for persons having to bring proceedings abroad. However, the present geographical scope of the Convention remains limited (because only European countries are Parties) and does not then guarantee real "international" access to justice.

43. In this regard, extension of the Convention to other States outside Europe has become very important. It is precisely the global vocation of the Convention and its potential as common base for international access to justice which makes this instrument complementary to other bilateral and regional instruments. This is why the Permanent Bureau is looking forward to non-European States becoming a Party to the Convention in the future and invites those States, in particular those which are already Parties to similar instruments, to consider doing so.

44. Beyond noting the future geographical widening of the Convention, the Special Commission is invited to reflect on the specific issues raised in this document, notably the granting of legal aid for legal persons (para. 32), the condition of the presence in the State of the person seeking legal advice (para. 35), and improvements to be made to the model forms (para. 39). Confirmation of a position on the issues addressed would be helpful to improve application of the Convention in practice.

⁴⁰ Commission Decision of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (2004/844/EC) and Commission Decision of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC (2005/630/EC).

⁴¹ Art. 30 of the Access to Justice Convention.

45. In the longer term, it would be important to examine the need for more structural reform of the Convention. In the light of bilateral and regional experience in the matter, and the system of legal aid provided in the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter "2007 Child Support Convention"), it is clear that the non-discrimination principle is now insufficient to guarantee effective access to justice. Indeed, the Convention is limited to extending a local system of legal aid to persons coming from abroad. Another possibility might therefore consist in guaranteeing an appropriate level of legal aid in cross-border disputes by establishing, for a number of well-targeted categories of cases, minimum norms relating to legal aid in the Convention itself. To this end, it would be necessary to examine whether the Members of the Conference would be able to accept a system of legal aid similar to that provided for by the 2007 Child Support Convention. Other types of cross-border disputes involving less cost could effectively benefit from this approach. In these cases, the lack of resources for the persons concerned constitutes an insurmountable obstacle to the exercising of their rights abroad. The Special Commission meeting provides an opportunity for an exchange of preliminary views on this topic.