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**DOCUMENT DE PROCÉDURE SUR LA POURSUITE DU PROJET SUR LES JUGEMENTS**

établi par le Bureau Permanent

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**PROCESS PAPER ON THE CONTINUATION OF THE JUDGMENTS PROJECT**

drawn up by the Permanent Bureau

*Document à l'attention du Groupe de travail et du Groupe d'experts*

*Document for the attention of the Working Group and the Experts' Group*

## 1. Introduction

1. For a project as important – and complex – as the Judgments Project, it is necessary to regularly take stock of progress, plan possible next steps and assess efficient and effective resource allocation within the Permanent Bureau and among the Members of the Hague Conference. This Paper is designed to assist with all these considerations. As a reminder, the origins of the Judgments Project go back to a 1992 proposal to undertake work in the field of jurisdictional bases and recognition and enforcement of judgments.<sup>1</sup> Ten years later, the Hague Conference, with a nearly doubled membership,<sup>2</sup> took a new direction on the basis of a stocktaking summary<sup>3</sup> and a reflection paper,<sup>4</sup> which directed work towards specific issues where basic agreement existed and for which it seemed likely to achieve a consensus-based instrument. The groundwork for the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (“Choice of Court Convention”) was thus laid. Some years later, in April 2011, at the initiative of the Permanent Bureau, a reflection process was launched in order to allow an Experts’ Group to explore the background of the Judgments Project in the light of recent developments with the aim of assessing the possible merits of resuming the Project. In April 2012, the Council on General Affairs and Policy of the Conference (“the Council”) examined the findings of the April 2012 Experts’ Group meeting and divided the mandate for further work into two parts. First, the Council established a Working Group, the initial task of which was to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including “jurisdictional filters”. Second, the Experts’ Group was tasked with further study and discussion with regard to the desirability and feasibility of making provisions in relation to matters of jurisdiction, including parallel proceedings, in the same or another future instrument.

2. In February 2013, the Working Group and the Experts’ Group met back-to-back in The Hague. It was the first meeting of the Working Group and the second meeting of the Experts’ Group. Given their thus far identical composition, it was decided that the most cost-efficient approach was for both Groups to meet consecutively. During the discussions, however, it proved to be difficult to sufficiently differentiate between the diverse objectives of the two Groups. At the conclusion of the two meetings, the scope

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<sup>1</sup> See the letter from the Legal Adviser of the Department of State of the United States of America dated 5 May 1992 with regard to a “mixed Convention”: “It seems to us that we need not necessarily choose between a *traité simple*, dealing essentially only with those judgments that are entitled to recognition and enforcement in party States, and a *traité double* also dealing with permissible bases of jurisdiction for litigation involving persons or entities habitually resident in party States. We believe that there should be consideration of the possibility for party States to utilize jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention. So long as such jurisdictional bases are not excluded as exorbitant, judgments based on them would not be entitled to recognition and enforcement under the convention, but party States would remain free to recognize and enforce them under their general law”. Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Specialised Sections” then “The ‘Judgments Project’” and “The originating proposal”.

<sup>2</sup> While in 1992 the Hague Conference was composed of 38 Member States, in 2002 this number had grown to 62 Members.

<sup>3</sup> See “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference”, Prel. Doc. No 16 of February 2002 for the attention of Commission I of the XIXth Diplomatic Session, *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous matters*, Leiden, Koninklijke Brill NV, 2008, p. 429; Also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Specialised Sections” then “The ‘Judgments Project’” and “Response to the preliminary draft convention”.

<sup>4</sup> See A. Schulz, “Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters”, Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Conventions” then “Convention No 37” and “Preliminary Documents”.

and priorities for the future work of the Groups were considered as a package and ultimately led to the suspension of both the Working and Experts' Group meetings until a later date.<sup>5</sup>

3. Since February 2013, a number of Members of the Groups have been involved in extensive consultations with a view to determining an agreed way forward. Despite the significant efforts made, no conclusion has yet been reached. In April 2013, the Council took note of the reports of the February 2013 Working Group and Experts' Group meetings, "and the useful progress that was made in those discussions".<sup>6</sup> The Council further noted the fact that Members of the Groups were continuing to consult on next steps for the Project, with a view to reconvening later in 2013. Since the Council meeting, consultations have intensified, including some high-level bilateral meetings, but are yet to result in an agreed path forward for the Project.

4. Against this background, the Permanent Bureau, following consultations with Antti Leinonen and Yolande Dwarika, Chair and Vice-Chair of the Council, respectively, and David Goddard, Chair of the Working Group and Experts' Group, has drawn up this Process Paper.

## **2. Purpose of this Paper**

5. It should be made clear at the outset that this Paper does not take any position as to the ultimate scope of the instrument or instruments that may arise out of the Judgments Project. This is a matter for the Members of the Organisation to decide. Rather, this Paper is focused on the process. It is an attempt to assist the Members of the Working Group and the Experts' Group in advancing their positions on possible ways to further organise and sequence the work, before reporting to the Council meeting of 2014. After all, a significant number of participating Members joined the Hague Conference in the course of the discussions of the original Judgments Project<sup>7</sup> and it is important that all Members participating in the Project be in a position to make certain policy determinations as to future directions. To assist, the Paper will first recall the mandates conferred by the Council, then consider all views expressed so far, and finally suggest a possible path forward.

## **3. Mandates conferred by the Council**

6. In 2012, the Council adopted two distinct mandates for further work on the Judgments Project. These mandates reflect different stages of advancement in the process of developing new instruments at the Hague Conference. The first mandate (relating to the Working Group on recognition and enforcement, incl. "jurisdictional filters") requires work that would typically lead to the negotiation of a new Convention; this mandate thus reflects a fairly advanced stage in the decision-making process. The second mandate (relating to the Experts' Group on jurisdictional matters) includes further preliminary work and discussion, thus reflecting an earlier, still exploratory stage in the decision-making process.

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<sup>5</sup> See "Ongoing work on international litigation", Prel. Doc. No 3 of March 2013 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs".

<sup>6</sup> Conclusion No 8 of the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (9-11 April 2013), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs".

<sup>7</sup> The following States and REIOs, which are Members of the Working Group or the Experts' Group, have become Members of the Hague Conference since 1992: Belarus (2001), Brazil (2001), Costa Rica (2011), European Union (2007), India (2008), New Zealand (2002), Russian Federation (2001), Slovakia (1993), South Africa (2002).

7. The mandate of the Experts' Group is indeed to study and discuss "the desirability and feasibility of making provisions in relation to matters of jurisdiction".<sup>8</sup> The Experts' Group has therefore been requested to make a policy recommendation as to whether work on jurisdiction should be elevated to the negotiation level. A comparison with the mandates of other Experts' Groups recently set up by the Council in other areas is useful to gain insight into the Council's intentions. For example, in 2009, the Council invited the Permanent Bureau to convene a Working Party "to explore further the feasibility of mechanisms" in respect of a possible future instrument on access to foreign law.<sup>9</sup> In April 2012, the Council decided to establish an Experts' Group "to carry out further exploratory research on cross-border recognition and enforcement of agreements in the course of international child disputes" and to conduct an "evaluation of the benefit of a new instrument".<sup>10</sup> Finally, in April 2013, the Permanent Bureau was authorised, resources allowing, to convene an Experts' Group to assist with the continuation of "exploratory work, including further comparative research [...] and investigation on the feasibility of a future instrument" on the recognition and enforcement of foreign civil protection orders.<sup>11</sup> All these examples reflect a request by the Council for preliminary evaluative research and discussion with the purpose of gaining a better understanding of the issues involved in the area and the possibility of a future instrument. Moreover, these mandates do not assume that work leading to a new Convention in these areas will or should be undertaken.

8. In contrast, the mandate of the Working Group is "to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments".<sup>12</sup> When comparing this mandate to similarly worded mandates that have resulted in recent Hague Conventions, it is evident that the Council intended for the Working Group to advance towards a new instrument. For example, the Choice of Court Convention resulted from a mandate addressed to the Secretary General to "convene an informal working group and facilitate and conduct a transparent and flexible working process with a view to preparing a text to be submitted to a Special Commission".<sup>13</sup> Work towards the Securities Convention<sup>14</sup> resulted from a mandate to a Working Group to "examine the possibility of preparing and adopting [...] a new instrument".<sup>15</sup> In the lead up to the Adults Convention,<sup>16</sup> the Special Commission relied upon work prepared by a Working Group and a small drafting committee.<sup>17</sup> These mandates, like the mandate of the present

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<sup>8</sup> Conclusion No 18 of the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs".

<sup>9</sup> Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs".

<sup>10</sup> Conclusion No 7, see *supra*, note 8.

<sup>11</sup> Conclusion No 9, see *supra*, note 6.

<sup>12</sup> Conclusion No 17, see *supra*, note 8.

<sup>13</sup> Conclusions of Commission I of the Nineteenth Session of April 2002, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs".

<sup>14</sup> *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary*.

<sup>15</sup> See "Report on the Meeting of the Working Group of Experts (15-19 January 2001) and Related Informal Work Conducted by the Permanent Bureau on the Law Applicable to Dispositions of Securities held with an Intermediary", Prel. Doc. No 2 of June 2001, *Proceedings of the Nineteenth Session*, Tome II, *Securities* (2002), Leiden, Brill (Martinus Nijhoff), 2006, p. 83; Also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Conventions" then "Convention No 36" then "Preliminary Documents".

<sup>16</sup> *Hague Convention of 13 January 2000 on the International Protection of Adults*.

<sup>17</sup> See, Minutes of First Commission, Minutes No 1, and Final Act of the Eighteenth Session, *Proceedings of the Eighteenth Session*, Tome I, *Miscellaneous Matters*, The Hague, SDU, 1999, pp. 237 *et seq* and p. 47 (respectively). See also P. Lagarde, Explanatory Report on the Convention on the International Protection of Adults, *Proceedings of the Special Commission with a diplomatic character of September – October 1999, Protection of Adults*, The Hague, SDU, 2003, p. 391-451; also available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Conventions" then "Convention No 35" then "HCCH Publications", p. 22.

Working Group, illustrate the advanced nature of the work required and give a clear indication that the ultimate intention of the Council is for work towards a new instrument to proceed.

9. Importantly, the two mandates adopted by the Council in 2012 are autonomous and can be carried out separately. Admittedly, they both pertain to related areas of international civil procedure and may allow for cross-fertilisation. For example, work on jurisdictional filters will require comparative analysis of existing jurisdiction rules, which would, to some extent, assist with any future work on jurisdiction. If, however, circumstances require that the two tracks progress separately, this process would be in line with the wording and objectives of the Council's mandates.

10. There now follows a brief overview of the different positions taken in discussions as to the interpretation and interrelation of these mandates, before considering other organisational factors of relevance.

#### **4. Summarising positions**

11. At present, there is a lack of consensus among the Members of the Groups as to whether the Groups' respective mandates should be conducted simultaneously or not; in other words, whether the Working Group should undertake work on the recognition and enforcement of judgments at the same time as the Experts' Group discusses the desirability and feasibility of making provisions in relation to matters of jurisdiction.

12. Members of the two Groups expressed differing views on this basic issue during the February 2013 meetings, at the April 2013 Council meeting and during consultations that have been taking place since February. It should also be noted that a number of Members are still to express a view as to the sequencing of the work.

13. The positions expressed so far may be summarised as follows:

- (i) One view is that the work of the Experts' Group and the work of the Working Group need to be undertaken at the same time, in discharge of the respective co-existing mandates.
- (ii) According to another view, it is premature to determine whether it is manageable for the work of the Experts' Group and the Working Group to be carried out at the same time and for this reason both Groups should continue their work until it is clear whether or not the volume of work is too significant to be performed on parallel tracks.
- (iii) Another position that has been taken is that the scope of work on the Judgments Project should, in a first stage, be limited to the mandate of the Working Group; the mandate of the Experts' Group should only be considered once an instrument addressing recognition and enforcement has been completed.

14. Having summarised these positions, it is important not to lose sight of two factors that appear to be shared by *all* participating Members. Firstly, all those who have expressed a view appear to consider the resumption of activities by the Working Group as a component of the next round of substantive work. This is in line with the drafting nature of the Working Group's mandate as set out above. Practically speaking, this would indicate that if and when an agreement on further process is reached, the expectations would be that at the next meeting of the Working Group, discussions would resume

where they left off in February 2013.<sup>18</sup> A second shared opinion is that the views expressed on the work that is needed to complete the mandate of the Experts' Group gravitate around the difficulties of the substance (jurisdictional issues) and the nature of the mandate (desirability and feasibility of making provisions in relation to such issues). On this crucial aspect, a number of participating Members have stated that they have not yet had an opportunity to make a policy determination as to whether ultimately they wish to elevate questions of jurisdiction to the level of negotiations. This raises the question of whether domestic policy-building should not be allowed to further progress before constructive international discussions can be held.

## 5. Suggested path forward

15. At this juncture, the Permanent Bureau takes the liberty to propose a possible path forward to the Members of the Groups, after careful consideration of all of the above factors, as well as of the intrinsic aspects pertaining to the preparation of a new Hague Convention, and, most importantly, the efficient management of resources.

16. The lessons drawn from the Project's long history, both in its initial stages and in recent times, strongly plea for a clear and tractable work programme, with the possibility of building up additional elements in further stages. Such a bottom-up approach has been previously suggested over the course of the Judgments Project. For example, in its 2002 stocktaking summary,<sup>19</sup> the Permanent Bureau, after a review of the progress made on the Project thus far and careful consideration of the areas where there appeared to be a lack of consensus creating obstacles to progress, proposed that work should proceed with a focus on an "essentially agreed upon nucleus".<sup>20</sup> Similarly, at its meeting in 2012, the Experts' Group concluded that "in working towards a future instrument, it will be important to begin by working on an agreed core of essential provisions".<sup>21</sup> From an organisational perspective, these past experiences suggest that the workload should remain in balance with the available resources in order to make progress.

17. Given the nature and complexity of the work required by both Groups, and the importance of the Project as a whole, it is essential that the resources of both the Members of the Groups and the Permanent Bureau are carefully considered when dealing with the issue of sequencing of the work.<sup>22</sup> Progress in parallel, with back-to-back meetings of the two Groups at regular intervals, as attempted in February 2013, may be a cost-effective approach that enables Members of the Groups to best assess the links between both mandates. However, it presupposes an important investment of resources and preparations of a broad range of often complex technical issues by all those involved. As resources are limited, this approach inevitably entails a risk of insufficient and fragmented efforts. Indeed, spreading the resources and time of the Permanent Bureau and Members too thin in order to address the full array of issues facing both Groups at the same time may result in slower and even impeded progress on both sides. Recent experience suggests that Members of the Groups, especially those who are new to this

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<sup>18</sup> See Annex 1 of "Ongoing work on international litigation", *supra*, note 5.

<sup>19</sup> See *supra*, note 3.

<sup>20</sup> *Ibid*, para. 15.

<sup>21</sup> See "Conclusion and Recommendation No 2 of the Expert Group on possible future work on cross-border litigation in civil and commercial matters", Work. Doc. No 2, submitted to the Council on General Affairs and Policy of the Conference (17-20 April 2012), para. 4(b), available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "The Judgments Project" and "Recent developments".

<sup>22</sup> For Members of the Groups, parallel work on the two mandates requires the joint participation of two experts, *i.e.*, one expert on the substance (international civil procedure) and a policy expert with experience in Hague Conference work. For the Permanent Bureau, work in 2013 benefits from the significant contribution made by the Government of Australia to the Judgments Project, which resulted in the hiring of a Legal Assistant from Australia, Ms Cara North, for a period of 12 months (from January to December 2013). The Permanent Bureau hopes to secure financial assistance for the continuation of Ms North's involvement in the Project. Furthermore, the current recruitment of a Principal or Senior Legal Officer will enable some redistribution of responsibilities within the team so that the First Secretary with primary responsibility for this area can invest more time on the Judgments Project.

Project, may encounter difficulties in sufficiently differentiating between the tasks and objectives of the two Groups and may thus benefit from a sequence in fulfilling the two distinct mandates. In terms of which mandate to address first, it is suggested that resources could initially best be used to tackle the more practically achievable tasks at this stage and indeed respond with gradual successes to the high expectations raised by this Project. In February 2013, the proceedings on recognition and enforcement of judgments were resumed in a very promising manner, which reinforces the impression that the prospects of achieving a successful outcome are realistic.<sup>23</sup> The Permanent Bureau sees therefore merit in prioritising the work of the Working Group and resuming the discussions of the Experts' Group at a later stage.

18. At this stage, one can only speculate on the effects of the suggested sequencing of the work in the longer term. Several scenarios may be envisaged: one possibility would be that a focus on the Working Group's mandate would expedite the decision-making process and eventually lead to a Convention on the recognition and enforcement of foreign judgments *only*, with work on jurisdiction, including parallel proceedings, possibly progressing on a separate track at a later stage. Another possibility would be that the recommendations of the Experts' Group encourage the Council to charge the Working Group with additional work on jurisdiction, including parallel proceedings, so that either a single, comprehensive Convention, possibly with an optional part on jurisdictional matters, or a Convention and a separate Protocol would be concluded. The final *output* will need to be decided by the Council at an appropriate time.

## 6. Possible further steps

19. It is hoped that the suggested path forward will aid the participating Members in forming and agreeing upon a clear view as to how the work should proceed in the coming months (and, subject to the Council's decisions, at a later stage).

20. In terms of possible timing and agenda of both Groups, the Permanent Bureau suggests that:

- (i) the Working Group continue to further advance its work in response to its mandate and report to the Council in 2014;
- (ii) the Experts' Group inform the Council in 2014 that while its study and discussion on the desirability and feasibility of work on international jurisdiction is suspended to allow all Members of the Groups to have a clearer idea as to the evolution of the work on recognition and enforcement, it intends to resume its work at some point in the future so as to allow Members of the Experts' Group to develop a more informed position on the policy issues at stake in relation to jurisdictional matters; and
- (iii) at the appropriate time, the Council consider the results of the work of the Working Group and the recommendations of the Experts' Group in order to determine the scope and nature of the future instrument(s).

21. The Permanent Bureau encourages all participating Members to assess and discuss the above proposal. Members of the Groups are also invited to seize any opportunity to meet informally to discuss this process proposal. One such potential opportunity could be immediately before or after the Informal Meeting of the Members to take place in The Hague from 17 to 18 September 2013. Other international meetings may offer additional opportunities for some participating Members to continue their in-person dialogue.

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<sup>23</sup> This is not suggesting *a contrario* that work on jurisdiction is more challenging. Given the suspension of the Experts' Group meeting before its mandate was completed, it is simply premature to make a prognosis at this stage.

22. In the present circumstances, the reserved dates for a next meeting in October 2013 seem unlikely, as the discussions on process will require additional time and efforts. If sufficient progress is reported on an agreed path forward, the Permanent Bureau will prepare and convene a new round of substantive discussions prior to the 2014 Council meeting. It is hoped that the possible timing and agenda of this next round of discussions will be determined further to the suggestions made in this Paper. In any event, it seems fair to assume that it is in the common interest of Members of the Hague Conference to have the focus of work and discussions redirected towards substantive work as soon as possible.