

**SUPPORTING DOCUMENTS FOR INFORMATION DOCUMENT NO 4**

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**DOCUMENTS COMPLEMENTAIRES AU DOCUMENT D'INFORMATION NO 4**

*(disponible en anglais uniquement)*

*Documents for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments*

*Documents à l'attention de la Commission spéciale de juin 2016 sur la reconnaissance et l'exécution des jugements étrangers*

Fourthly, it should be remembered throughout that the preliminary draft Convention is not designed for a group of contiguous States sharing similar social, economic and political objectives. It is intended as a worldwide Convention. This is reflected in important differences such as the need for a greater control by the court addressed over the exercise of jurisdiction in the court of origin. But it permeates the preliminary draft Convention in a general sense leading to a difference not only in terminology, but also in a more flexible approach. This is, for instance, illustrated in the greater flexibility permitted in Article 21 relating to *lis pendens* and the existence of a provision for declining jurisdiction in Article 22 which is lacking in the Brussels Convention even after its revision.

Finally, the preliminary draft Convention will not have the benefit of a uniform interpretation by a common court. Although it will contain provisions encouraging a uniform application, in the ultimate the highest national courts will be the arbiters of the Convention. Nor will the jurisprudence of the European Court of Justice be necessarily relevant, even where the provisions are similar. Reference will from time to time be made in this Report to decisions by the European Court of Justice and of other courts in order to illustrate the issues and problems the Special Commission had in mind. In that respect only may it sometimes be helpful to refer to those decisions as a matter of historical development of the preliminary draft Convention.

#### **ARTICLE BY ARTICLE COMMENTARY ON THE CONVENTION**

##### *Preamble*

The Preamble will have to be determined at the Diplomatic Conference.

#### **CHAPTER I - SCOPE OF THE CONVENTION**

##### ***Article 1 - Substantive scope***

##### *Paragraph 1*

The first paragraph defines the substantive scope of the Convention. As it states, the Convention applies to "civil and commercial matters". The term "civil or commercial matters" has a long history in Hague Conventions. The term appeared for the first time in Articles 1, 5 and 17 of the Convention on Civil Procedure (*relative à la procédure*) of 14 November 1896 and almost immediately attracted controversy when attempts were made during the Fourth Session in 1904 to delete it on the ground that it was too restrictive.<sup>9</sup> Since then the term has been used in a number of other Hague Conventions, most notably, the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "Service Convention") and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (the "Evidence Convention"). The term "civil and commercial" also is used in the *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*. No substantive change should be implied from the use of the conjunctive "and" instead of the disjunctive "or". It certainly is not intended that the matter should

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<sup>9</sup> See, Conférence de La Haye de droit international privé, *Actes*, 4e session, at p. 84.

have both a civil and a commercial character. While commercial matters will always have a civil character, there are civil matters which are not commercial.

The Service and Evidence Conventions have received widespread acceptance both in common law and civil law countries. The United States and the United Kingdom are each parties to both Conventions. In accordance with the tradition of the Hague Conferences dating back to 1896 the term "civil or commercial" has not been defined in any of the earlier Conventions. Nor has "civil and commercial" been defined in the present preliminary draft Convention. In civil law countries the term "civil and commercial" would exclude matters of public law, although the exact definition may vary from country to country.<sup>10</sup> As explained in the Schlosser Report with regard to the use of "civil and commercial" in Article 1 of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* signed at Brussels on 27 September 1968 (the "Brussels Convention"),<sup>11</sup> the expressions "civil matters" or "civil law" is not a technical term in common law countries such as England and the Republic of Ireland and can have more than one meaning. In its widest sense it excludes only criminal law. On that basis, constitutional law, administrative law and tax law are included in the description "civil matters".<sup>12</sup> This is clearly not the intention of the preliminary draft Convention which in the second sentence of paragraph 1 explains that matters of a revenue, customs or administrative nature are not to be regarded as falling within the scope of "civil and commercial matters". As indicated by the words "in particular", this enumeration is not exhaustive and includes other matters of public law such as constitutional matters. The scope of the term "administrative matters" is reduced to some extent by Article 1(3) which makes it clear that a matter is not necessarily of an administrative character because a government or governmental instrumentality is a party to the proceedings.

Because of this clarification, it should be possible to arrive at an autonomous and uniform interpretation of the term "civil and commercial" which is important since by definition at least two States will be involved: the State of original jurisdiction and the State which is addressed in seeking recognition or enforcement. If there is no autonomous definition, the alternatives are: (i) to accept the definition of the State of origin; (ii) to apply the definition of the State addressed; and (iii) to apply a cumulative test requiring the proceedings in question to meet the definitions of each State.<sup>13</sup>

The principles to be followed in interpreting the words "civil or commercial" in the Service and Evidence Conventions were considered by a Special Commission convened in 1989. It adopted the following Conclusions concerning the "scope of the two Conventions as to subject matter":

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<sup>10</sup> See, GEIMER/SCHÜTZE, *Internationale Urteilsanerkennung*, 1983, Band I, § 19, V and VI.

<sup>11</sup> Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, by Professor PETER SCHLOSSER, OJ C59, 5 March 1979, p. 83. See also, BORN, *International Civil Litigation in United States Courts*, 3rd ed. 1996, at p. 896.

<sup>12</sup> See, in relation to the Evidence Convention: *Re State of Norway's Application* [1990] 1 AC 723.

<sup>13</sup> See, KROPHOLLER J., *Internationales Privatrecht*, 3rd ed., § 60 II.4. The cumulative test was applied by the House of Lords in *Re State of Norway's Application* [1990] 1 AC 723. See the similar comments in relation to the Evidence Convention made by the Netherlands *Hoge Raad* in HR, 21 February 1986, *NIPR* 1986 No 337; *NJ* 1987 149, abstracted in SUMAMPOUW (ed.), *Les nouvelles Conventions de La Haye*, Tome IV, p. 113.

- 1 The Commission considered it desirable that the words “civil or commercial” should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both cumulatively.
- 2 In the “grey area” between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept.
- 3 In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.
- 4 However, nothing prevents Contracting States from applying the Conventions in their mutual relations to matters of public law, though not necessarily in an identical manner for both Conventions.<sup>14</sup>

It is obvious that at least the first three of these Conclusions have a direct relevance to the interpretation of the term “civil and commercial matters” in the preliminary draft Convention.

It should be noted that the scope of the preliminary draft Convention is defined in terms of “matters” not “courts”. Consequently, the characterisation of the matter as civil and commercial should depend on the nature of the claim and not necessarily on the character of the court in which the action was brought, be it civil, commercial, penal or administrative. In particular, civil claims for compensation for victims of crime brought by them or on their behalf in conjunction with criminal proceedings should not for that reason be denied a civil character.<sup>15</sup> Likewise, the fact that the damages awarded are exemplary or punitive does not deprive the proceedings of a civil or commercial character, as long as the benefit of those damages goes to the plaintiff and not to the State.<sup>16</sup> Article 1(3), which will be discussed below, also indicates that the fact that a government or government instrumentality is a party to the dispute does not by itself deprive that dispute from a civil or commercial character, even though under the law of some States the participation of a governmental body may be sufficient to give the proceedings an administrative character.

There was a consensus in the Special Commission that the application of the Convention should be confined to proceedings in “courts”, that is to say, bodies exercising the judicial power of the State. This appears from the definition of the territorial scope in Article 2 and of “judgment” in Article 23. The Convention will apply to courts at all levels of jurisdiction.

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<sup>14</sup> Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Second edition, 1992, at p. 30.

<sup>15</sup> For examples of relevant provisions in national laws, see JOLOWICZ J.A., *Procedural Questions, International Encyclopedia of Comparative Law*, XI Torts (1983), Ch. 13 s. 5. Even apart from the Convention common law courts have recognised such orders for compensation: *Raulin v. Fischer* [1911] 2 KB 93. The court awarding compensation, however, must have exercised jurisdiction in circumstances which entitle the judgment to recognition under Part III of the Convention. [Contrast Brussels Article 5.4]

<sup>16</sup> See in relation to the Service Convention the decision of the German Constitutional Court of 7 December 1994 - 1 BvR 1249/94; NJW 1995, 649; RIW 1995, 320, abstracted in SUMAMPOUW (ed.) *Les nouvelles Conventions de La Haye*, Tome V at p. 359. See also: OLG München of 9 May 1989; 9VA 3/89; IPRax 1990, 175 note by R. STÜRNER, abstracted in *Les nouvelles Conventions de La Haye*, Tome V at p. 352. See further, Article 32.1 below.

## Paragraph 2

The second paragraph excludes from the scope of the Convention certain other matters despite their civil or commercial nature. They are excluded either because they are dealt with by other Conventions be it those of the Hague Conference, such as most family law issues, or the United Nations, such as commercial arbitration. Other matters are excluded because they may be seen as very specialised, such as insolvency or maritime matters, and best dealt with by specific international arrangements, or as closely intertwined with issues of public law, such as social security.

### Sub-paragraph a)

This sub-paragraph excludes the status and legal capacity of natural persons. It was the intention of the Special Commission that family law matters should be generally excluded from the scope of the Convention, particularly in view of the many Hague Conventions already operating in this area.<sup>17</sup> In the light of this policy the words "status and legal capacity" should be interpreted broadly even if this has a wider effect than may be immediately obvious under some legal systems. There will be little doubt that actions for the validity, voidability and nullity of marriages and legal separations, the dissolution and annulment of marriages, concerning the beginning and end of legal personality, the declaration or presumption of the death of a person, paternity and affiliation, concerning the name of a person and the adoption of children all raise matters of status and are hence excluded.<sup>18</sup> So too are proceedings affecting the status and capacity of minors and of mentally or physically incapable persons to enter into legal transactions such as contracts or the making of wills. Less obvious, at least in common law jurisdictions, is the exclusion of proceedings concerning the care, custody and control of , and access to, children whether as part of divorce or other proceedings. and whether or not the parents are married to each other.<sup>19</sup> Nevertheless, it was the view of experts from civil law jurisdictions that these matters would be excluded under this heading and this will be in accordance with the general policy above referred to.

It should be stressed that the exclusion only applies to proceedings which have as their main object one of the excluded matters. It should not be possible to exclude the application of the Convention merely by raising the validity of a marriage or the capacity of a minor to enter into a contract as an incidental matter. Furthermore, the exclusion only relates to the status and capacity of individual persons. Issues

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<sup>17</sup> See, *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Convention of 15 April 1958 on the recognition and enforcement of maintenance obligations towards children; Convention of 5 October 1961 on jurisdiction and applicable law for the protection of minors; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 13 January 2000 on the International Protection of Adults. All, except the two last-named, are in force.*

<sup>18</sup> See, FRAGISTAS, *op. cit.* § 4 III.2(a) at p. 367.

<sup>19</sup> Compare the discussion by SCHLOSSER, *op. cit.* at p. 89, of the similar formula in Article 1, paragraph 1 of the Brussels Convention.

affecting the status and validity of legal persons and the competence of their organs fall within the scope of the Convention.<sup>20</sup>

*Sub-paragraph b)*

This sub-paragraph excludes maintenance obligations from the scope of the Convention. The topic has been the subject of several Hague Conventions and may be studied again in the next quadrennium. Because both maintenance obligations and matrimonial property claims are excluded from the scope of the Convention, the problems of drawing an exact boundary between them which has arisen in relation to other Conventions, will not be relevant here.<sup>21</sup>

*Sub-paragraph c)*

This sub-paragraph excludes matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships from the scope of the Convention. Although the term "matrimonial property regime" is commonly associated with the various forms of community property found in most civil law, and in some common law, systems, the description is equally applicable to the system of separate property of the spouses which is the norm in most common law countries.<sup>22</sup> It refers to the rights in property which the spouses may have as a result of the matrimonial relationship, including rights in respect of the matrimonial residence provided for under the law of many countries. The addition of the words "and other rights and obligations arising out of marriage" makes it clear that claims for the adjustment of property rights between spouses as a result of their marital relationship which may arise either by virtue of the unwritten law or principles of equity, or by authority of a statute, are also excluded from the Convention.

In an increasing number of countries provision is made with respect of the property rights of cohabitantes (persons of the opposite sex who cohabit without marriage) and with respect to registered partnerships between persons of the same sex.<sup>23</sup> Often those rights approximate, or even assimilate, to those existing between married persons. The words "or similar relationships" have been added to make it clear that those rights and obligations are also excluded from the scope of the Convention.<sup>24</sup>

Whatever view is taken, it must be clear that claims are not necessarily excluded merely because they arise between parties to a marriage or marriage-like relationship. A claim arising under the general law of contract, tort or delict, or property is not excluded because it is made in a dispute between husband and wife. Such a claim does not fall within the description of the sub-paragraph.

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<sup>20</sup> See draft Convention, Article 12(2), below.

<sup>21</sup> See, e.g., *De Cavel v. De Cavel* (No2) [1980] ECR 731 in relation to the Brussels Convention.

<sup>22</sup> See, Report of the Special Commission by A.E. VON OVERBECK, *Acts and Documents of the Thirteenth Session (1976)*, Tome II, *Matrimonial property regimes*, at p. 138, § 1.

<sup>23</sup> For a thorough overview of cohabitation laws as at 1986, see, STRIEWE P., *Ausländisches und Internationales Privatrecht der nichtehelichen Lebensgemeinschaft*, 1986. For a recent review of registered partnership laws, see, FORDER C. and LOMBARDO S.H., *Civil Law Aspects of Emerging Forms of Registered Partnerships*, 1999, Ministry of Justice, The Hague. In some countries the cohabitation legislation has been extended to include same sex relationships, see, e.g., De Facto Relationships Amendment Act 1999 (NSW - Australia).

<sup>24</sup> Compare the addition of the words "or any similar relationship" in Article 4(1)(c) of the Child Protection Convention 1996.

*Sub-paragraph d)*

This sub-paragraph excludes wills and succession from the scope of the Convention. Again this is an area where the Hague Conference has been active in the past.<sup>25</sup> Although the use of the word “wills” may be seen by some as superfluous, its use clarifies that matters concerning the form and material validity of dispositions upon death are excluded from the Convention. For the purposes of the Succession Convention, its Reporter put forward a definition of the term “succession”, as follows:

“For the purposes of the Convention it would appear to include (1) a ‘disposition of property upon death’ ..., *i.e.*, a voluntary act of transfer whether in testamentary form or that of an agreement as to succession, and (2) the transfer of property upon death that occurs by provision of law, when *a)* there is no such voluntary act, or *b)* the voluntary act is wholly or partly invalid, or *c)* the law compels the distribution of assets belonging to the deceased to family members.”<sup>26</sup>

This definition will be useful in indicating the core of the concept in the preliminary draft Convention. Other matters covered by the term are “provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased”<sup>27</sup> whether family members or not. In relation to trusts created by testamentary disposition, disputes concerning the validity and interpretation of the will creating the trust are excluded from the Convention. Subject to this, however, proceedings concerning the effects, administration or variation of the trust between trustees and beneficiaries,<sup>28</sup> or disputes between the administrators of the trust and third parties are included within the scope of the Convention. Not all dispositions which are conditioned upon the death of a person fall within the scope of succession rights. Examples are the common law institution of joint tenancy where the survivor of the joint tenants automatically has the entire interest vested in him or her, or the life tenancy or usufruct which terminates upon death of the beneficiary. Disputes concerning those rights are not excluded from the Convention.

*Sub-paragraph e)*

This sub-paragraph excludes insolvency, composition or analogous proceedings from the scope of the Convention. The term “insolvency” covers, of course, both the bankruptcy of individual persons as well as the winding-up or liquidation of corporate entities which are insolvent, in those countries which still distinguish between those processes. It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term “insolvency” does not cover the winding-up or liquidation of corporate entities for reasons other than insolvency.

The term “composition” refers to procedures whereby the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term “analogous proceedings” cover a broad range

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<sup>25</sup> See, *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*; *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*; *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (not yet in force).

<sup>26</sup> Explanatory Report by D.W.M. WATERS, *Proceedings of the Sixteenth Session (1988)*, Tome II, *Succession to estates – applicable law*, at p. 537, paragraph 28.

<sup>27</sup> See, *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Article 7(2)(a).

<sup>28</sup> See, draft Convention, Article 11(1) below.

of other methods whereby insolvent persons or entities can be assisted to regain solvency while continuing to trade such as Chapter 11 of the US Federal Bankruptcy Code and Part II of the United Kingdom Insolvency Act 1986.

*Sub-paragraph f)*

In many countries the law relating to social security would normally be regarded as part of administrative law and for that reason alone as falling outside the scope of the Convention. But in so far as social security may be viewed as being of a private law nature, it is also excluded.

*Sub-paragraph g)*

This sub-paragraph excludes arbitration and proceedings related thereto from the scope of the Convention. There was general agreement in the Special Commission that the Convention should not interfere with the operation of international Conventions on the subject, the most important of which is the United Nations Convention on the Recognition and Enforcement of Arbitral Awards adopted in New York on 10 June 1958. There was some discussion in the Special Commission as to how the Convention should deal with the interaction between arbitration and judicial proceedings. However, the addition of the words "and proceedings related thereto" means that the exclusion of arbitral proceedings must be interpreted in the widest sense. Not only does the Convention not apply to the enforcement of arbitral awards but any proceedings relating to such matters as: the appointment of arbitrators, the validity of the arbitral clause, points of law referred to a court in the course of arbitration and any other proceedings whereby a court may give assistance to the arbitral process are also excluded.

*Sub-paragraph h)*

This sub-paragraph excludes admiralty or maritime matters from the scope of the Convention. Although no equivalent term to "admiralty" appears in the French text, it is understood that the words "*les matières maritimes*" include what in Anglo-American law is known as "admiralty". Because of the highly specialised nature of the subject and the fact that not all States have adopted the relevant international Conventions, the Commission decided to exclude the subject from the scope of the Convention. The effect is that the Convention will not apply to claims arising in relation to ships, cargoes and the employment of seamen, including claims arising out of the defective condition or operation of a ship or arising out of a contract for the hire of a ship, or for the carriage of goods or passengers on a ship.<sup>29</sup> These matters will be governed by national law of the State whose court is seised, including any international Convention to which that State is a party.

*Paragraph 3*

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

- the conduct upon which the claim is based is conduct in which a private person can engage;

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<sup>29</sup> See, Supreme Court Act 1981 (UK) s. 20, and in the US: *Carnival Cruise Lines v. Shute* 499 US 585 (1991).



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

Although the exact limits can never be exhaustively defined, we agree that these are the core criteria for determining whether a dispute involving government parties falls within the scope of “civil and commercial matters”. As indicated earlier, the quality of “civil and commercial” is not affected by the nature of the court in which the action is brought, be it a criminal or an administrative court.

Conversely, actions which are brought by or against governmental bodies which seek to enforce compliance or to prevent non-compliance with public regulations, as opposed to obligations arising from a contractual relationship or other obligations imposed by the general law of tort or delict, are obviously not within the scope of “civil and commercial matters”. However, this does not exclude the possibility that a claim which is of a civil or commercial nature may arise in conjunction with a claim of an administrative nature, such as a claim for restitution sought for injured consumers in a governmental proceeding which also seeks an order prohibiting the wrongful conduct. This would be analogous to the joining of a civil claim in a criminal prosecution which has been discussed above.

#### *Paragraph 4*

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

### ***Article 2 - Geographic scope***

This article defines the territorial, or geographical, scope of the Convention and the situations in which the Chapter I rules on direct jurisdiction and the Chapter III rules on recognition and enforcement will apply. In defining this territorial scope, the Special Commission has taken special care to ensure that the definition adopted does not result in treaty conflicts with existing international instruments, without pre-empting the decision on whether a disconnection clause is needed to safeguard the operation of such instruments.

#### *Paragraph 1*

This paragraph defines the scope of the direct jurisdiction rules of Chapter II, according to the principle that these rules apply whenever the court seised is a court of a Contracting State. Thus the chosen criterion differs from the one found in other Conventions such as the Brussels and Lugano Conventions, in which treaty-based jurisdiction, except for exclusive jurisdiction and prorogation, applies only where the

## D. “[I]n civil or commercial matters”

### a) Preliminary remarks

56. The Convention is applicable “in civil or commercial matters”. These terms, which determine the scope of the Convention’s subject-matter, are not defined in the Convention. The same terms are contained in several other Hague Conventions, in particular the Conventions on Civil Procedure of 1905 and 1954, and in the Evidence Convention. While some Contracting States tend to construe these identical terms more strictly in application of the Evidence Convention than with regard to the Service Convention, the Special Commission has recommended that these terms be applied consistently across both the Service and Evidence Conventions.<sup>99</sup>
57. Other multilateral or bilateral international instruments also refer to the concept of civil or commercial matters. Illustrations include the *European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms* (ECHR) (which in Art. 6(1) refers to “civil rights and obligations”), the *American Convention on Human Rights of 22 November 1969* (which in Art. 8(1) refers to “rights and obligations of a civil nature”), and, in the more specific area of private international law, the Brussels Ia Regulation (which, like its predecessors, uses the expression “civil *and* commercial matters”), and the 2007 EU Service Regulation (which uses the expression “civil *or* commercial matters”; on this Regulation, see also paras 337 *et seq.*). The interpretation of this concept by the Court of Justice of the European Union will be further reviewed below (see para. 74). The concept is also used in the *Hague Convention of 30 June 2005 on Choice of Court Agreements*.<sup>100</sup>

### b) The 1977 Special Commission

58. The concept of “civil or commercial matters” was the subject of lively debate both during the drafting of the Convention<sup>101</sup> and during the 1977 and 1989 meetings of the Special Commission on the practical operation of the Service Convention. During the 1977 meeting, the experts realised that the interpretation of these terms could diverge significantly from one legal system to another. For instance, several common law countries do not make the civil lawyers’ distinction between private and public law, or at least regard it as having no consequence. For those countries, any matter that is not criminal is civil or commercial. In civil law countries, it is customary to exclude criminal, tax and administrative law from civil or commercial matters. In the Egyptian interpersonal system,

<sup>99</sup> C&R No 40 of the 2014 SC.

<sup>100</sup> This Convention uses the expression “civil *or* commercial matters” (Art. 1(1)). For an analysis of the history of the phrase “civil and / or commercial”, see the “Report of the Special Commission by Peter Nygh and Fausto Pocar”, in Hague Conference on Private International Law, *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 207, (available on the Hague Conference website) replacement of “or” with “and” does not imply a change of the phrase’s meaning. It is certainly not necessary for the matter to be both civil *and* commercial; though commercial matters frequently involve a civil aspect, certain civil matters have no commercial aspects.

<sup>101</sup> The authors of the Convention eventually decided not to deal with this question, leaving its resolution to the States Parties, see the Explanatory Report (*op. cit.* note 9), pp. 356-366, see also pp. 79-80, 159- 161, 166, 305 and 307.

issues of personal status are not regarded as civil. Extensive differences also appeared regarding the question of which law should be applied to determine the content of these matters, some countries referring to the law of the requesting State (State of origin), and others to that of the requested State (State of destination).

59. The experts found that, in practice, Central Authorities are *very liberal* and willing to serve documents that they would not be obligated to serve under the Convention, with a view to being of assistance to their recipients. Most Central Authorities refuse to serve or to have served a document only in cases dealing with criminal or tax matters. In reliance on this finding and realising that it was not possible for them to recommend a uniform solution acceptable to all States, the experts limited themselves to expressing the wish that the Convention be applied in the most liberal possible manner in respect of the scope of its subject-matter.

### c) The 1989 Special Commission

60. The Special Commission meeting in 1989, which examined the practical operation of both the Service and Evidence Conventions, again reviewed the issue of the interpretation of the phrase “civil or commercial matters”. Following the 1977 Special Commission, two courts of last resort had ruled on the issue in cases concerning the *Evidence Convention*:
- in the case of *Arcalon v. Ramar*,<sup>102</sup> the **Supreme Court of the Netherlands** (*Hoge Raad*) held that a request for evidence issued by a California bankruptcy court was within the ambit of “civil or commercial matters” for the purposes of the Convention. According to the Supreme Court, the Convention’s objective and scope justify an *extensive construction* of Article 1;
  - in its ruling in *Re State of Norway’s Application*,<sup>103</sup> the **House of Lords (United Kingdom)** had to consider whether a request for evidence, in a case presented as a civil action but involving a claim for inheritance taxes asserted by the State of Norway against the estate of a deceased person, was a “civil or commercial matter”. The House of Lords held that a *cumulative system of characterisation* should be applied, *i.e.*, the nature of the issue determined according to the law of both the requesting and the requested States. In that case, the action for recovery of taxes was regarded as a civil or commercial matter in both Norway and the United Kingdom. Accordingly, the request for the taking of evidence lay within the scope of the Evidence Convention’s subject matter.
61. In addition, the experts were informed that a German Central Authority had refused to execute requests for service issued by courts in the United States in liability claims (in particular product liability claims) for the award of **punitive damages**. The Central Authority considered that the claim for “punitive” damages was not within the scope of “civil or commercial matters”. This practice was discussed during the Special Commission meeting.<sup>104</sup> As mentioned in the note to paragraph 7 of the Special Commission Report,

<sup>102</sup> HR 21 February 1986, *NJ* 1987, p. 149; *RvdW* 1986, p. 50; English translation at *I.L.M.* 1989, p. 1578.

<sup>103</sup> House of Lords, 16 February 1989, *All E.R.* 1989, p. 745; *I.L.M.* 1989, p. 693.

<sup>104</sup> See Report of the 1989 SC (*op. cit.* note 57), paras 7-10.

in a decision subsequent to the Special Commission meeting, the *Appellate Court (Oberlandesgericht) of Munich (Germany)* rejected the position adopted by the Central Authority and held that a claim for “punitive” damages was indeed a civil matter.<sup>105</sup>

62. After the discussions, the 1989 Special Commission in charge of reviewing the practical operation of the Service Convention and the Evidence Convention adopted the following conclusions as to the “[s]cope of the two Conventions as to their subject-matter”:

“a. The Commission considered it desirable that the words ‘civil or commercial matters’ should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.

b. In the ‘grey area’ between private and public law, the historical evolution would suggest the possibility of a *more liberal interpretation* of these words. In particular, it was accepted that matters such as *bankruptcy, insurance* and *employment* might fall within the scope of this concept.

c. In contrast, other matters considered by most of the States to fall within *public law*, for example *tax* matters, would not yet seem to be covered by the Conventions as a result of this evolution.

d. However, nothing prevents States Party from applying the Conventions in their *mutual relations to matters of public law*, though not necessarily in an identical manner for both Conventions.”<sup>106</sup>

63. In this respect, the autonomous interpretation of treaties provided for under Article 31 of the *Vienna Convention of 23 May 1969 on the Law of Treaties*, a traditional principle of public international law, should be remembered. Since the 1989 Special Commission meeting, a number of courts have ruled on the issue.

#### d) The 2003 Special Commission

64. In the light of the observations relating to the current practice reported above, the 2003 Special Commission (which examined the practical operation of the Service, Evidence and Apostille Conventions) wished to encourage an extensive interpretation of the phrase “civil or commercial matters”, and reaffirmed the conclusions adopted in 1989 under letters a) and b) cited above (see para. 62).<sup>107</sup>

65. The 2003 Special Commission also added the following conclusions:

“70. [...] the SC took note of the fact that while in some States tax issues were considered as falling within the scope of the Convention, in others this was not the case.

71. The SC also noted that in some States party, the Convention had been applied in proceedings relating to the recovery of proceeds of crime.

72. Finally, the SC cautioned that the meaning of ‘civil and commercial’ appearing in other instruments should not be relied on for interpretation without considering the object and purpose of such other instruments.”

<sup>105</sup> OLG München, 9 May 1989, published in part in *RIW* 1989, p. 483; annotation *IPRax* 1990, p. 157 (Stürner/Stadler). An English translation by B. Ristau of the entire decision has been published in *I.L.M.* 1989, p. 1570.

<sup>106</sup> Report of the 1989 SC (*op. cit.* note 57), Conclusion No 26 [our emphasis].

<sup>107</sup> C&R No 69 of the 2003 SC.

### e) The 2009 Special Commission

66. The 2009 Special Commission noted that the expression “civil or commercial matters” did not appear to have caused difficulties in the preceding five years and noted that C&R No 69 of the 2003 Special Commission appeared to have been followed.
67. The 2009 Special Commission also added the following conclusions:

“13. [...] The SC reaffirms that the words ‘civil or commercial matters’ should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.

14. The SC takes the view that a liberal interpretation should be given to the phrase ‘civil or commercial matters’. In doing so, one should focus on the nature of the cause of action and keep in mind that the Convention does not expressly exclude any particular subject matter from the scope of ‘civil or commercial matters’. The SC invites States Parties to encourage their Central Authority to communicate with the forwarding authority when problems of interpretation arise. It recommends that States Parties encourage forwarding authorities to include in their requests for service some information about the nature of the cause of action, in particular where a request may give rise to doubts as to whether it falls within the scope of the Convention.”

### f) The 2014 Special Commission

68. As with previous meetings, the Special Commission recommended that the term “civil or commercial matters” be interpreted liberally and in an autonomous manner, and helpfully added that this term should be applied consistently across both the Service and Evidence Conventions.<sup>108</sup>
69. In addition, the Special Commission has welcomed the flexible practice followed by Contracting States of not refusing to execute requests based solely on the entity making the request and to focus instead on the substantive nature of the matter referred to in the request.<sup>109</sup>

### g) Current practice

70. The liberal trend initiated by the *Appellate Court (Oberlandesgericht) of Munich (Germany)* in 1989 has been confirmed. The same Court held in 1992 that an action brought before a United States court for “*punitive damages*” is within the scope of the Service Convention’s subject-matter, even though the amounts claimed are exorbitant, in its opinion. The disputed merit of the claim cannot serve as an appropriate criterion to distinguish civil matters from those that are matters for criminal law, insofar as claims in damages brought

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<sup>108</sup> C&R No 40 of the 2014 SC.

<sup>109</sup> C&R No 41 of the 2014 SC.

in the United States are frequently not quantified.<sup>110</sup> Likewise, the *Appellate Court of Celle (Germany)* held that a claim for “*treble damages*” based on the RICO-Act of the United States was a civil matter within the meaning of Article 1(1) of the Convention, and should therefore be served on the defendant in Germany.<sup>111, 112</sup>

71. *Swiss case law* seems to be evolving in the same direction.<sup>113</sup> The Cantonal Court of Fribourg held that an enforcement instrument is a judicial document for the purposes of the Convention in any event where the prosecution relates to a receivable under private law.<sup>114</sup>
72. The *Supreme Court of the Netherlands (Hoge Raad)* reached the same conclusion and held that bankruptcy law was a matter within the scope of the Convention’s subject matter. The Advocate-General’s conclusion, to which the grounds for that ruling expressly refer, is based on an autonomous interpretation of the Convention.<sup>115</sup>
73. This brief review of recent case law suggests that the recommendations from the meetings of the Special Commission have been followed. The judges and Central Authorities of the States Parties seem more often than not to make *an autonomous, or at least liberal*, interpretation of the concept of “civil or commercial”. This practice should certainly be encouraged.
74. In this respect, it should be pointed out that several supranational courts have sought to provide an “autonomous” interpretation of the treaties within their jurisdiction. For instance, the *Court of Justice of the European Union*, construing the phrase “civil and commercial matters” in the 1968 Brussels Convention (now superseded by the Brussels Ia Regulation) ruled as follows:

“1. In the interpretation of the concept ‘civil and commercial matters’ for the purposes of the application of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, in particular Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives

<sup>110</sup> OLG München, 15 July 1992, *IPRax* 1993, p. 309, and the cited legal authors and precedents.

<sup>111</sup> OLG Celle, 14 June 1996, decision received from the German Central Authority.

<sup>112</sup> In *United States ex rel Bunk v. Birkart Globistics GmbH & Co.*, 2010 WL 423247 (E.D. Va. 2010) a US court noted that the Central Authority in Bavaria considered that a claim under the False Claim Act was only a civil or commercial matter in part and therefore, they refused to execute the request for service. The US Court held that in accordance with Art. 4 the authority to decide whether their request falls within the scope of the Convention is a matter for the Central Authority of the requested State.

<sup>113</sup> Although the case did not concern the application of the Convention, a Basel Court held that a judgment awarding “punitive” damages against the defendant was a civil matter, *BJM* 1991, p. 31.

<sup>114</sup> Cantonal Court of Fribourg, 10 February 1999, decision received from the Central Authority (see also note 117). It seems, however, that this decision is based more on the precedents of the Federal Supreme Court of Switzerland, which considers that prosecution for debts and bankruptcy, based on civil claims, is within the concept of civil or commercial matters, than on a genuine autonomous interpretation of the Convention. However, in *Prozess [T 7], K 18/04*, order of 18 July 2006, the Swiss Federal Insurance Tribunal (*Tribunal fédéral des assurances*) held that claims regarding insurance premiums that are part of the mandatory social medical insurance are considered to be within the scope of public law and are not “civil or commercial matters”. The Court reasoned that this type of insurance is financed, like taxes, by global contributions and therefore, the Service Convention does not apply. It should be noted that the message from the Swiss Federal Council of 8 September 1993 relating to the ratification of the Service Convention recommends the autonomous interpretation of the Convention, in accordance with Art. 31 of the *Vienna Convention of 23 May 1969 on the Law of Treaties* and the recommendation from the 1989 Special Commission.

<sup>115</sup> HR 15 June 2000, *NJ* 2000, p. 642.

and scheme of the Convention, and secondly, to the general principles which stem from the corpus of the national legal systems;

2. Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers. Such is the case in a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive. This applies in particular where the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users.”<sup>116</sup>

75. The absence of a supranational court as “guardian” of the uniform interpretation of the Service Convention emphasises the crucial importance of communication and exchanges between the authorities in charge of the Convention’s application; such interaction is a basic condition to secure, as far as possible, a harmonious implementation of the Convention. Autonomous interpretation remains the best way of achieving this goal.

## E. Judicial and extrajudicial documents

### a) Introduction

76. The Convention applies to both judicial and extrajudicial documents (Art. 1(1)). Article 17 specifies that “extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention”. It should be noted, however, that not all the provisions of the Convention are applicable by analogy to extrajudicial documents. Most importantly, Articles 15 and 16 of the Convention refer only to judicial proceedings.
77. Judicial documents for the purposes of the Convention are instruments of contentious or non-contentious jurisdiction, or instruments of enforcement.<sup>117</sup> Judicial documents include writs of summons,<sup>118</sup> the defendant’s reply, decisions and judgments delivered by a member of a judicial authority, as well as witnesses summons (subpoenas),<sup>119</sup> and requests for discovery of evidence sent to the parties even if these are orders delivered

<sup>116</sup> Judgment in *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, C-29/76, EU:C:1976:137.

<sup>117</sup> In a decision dated 10 February 1999 (*op. cit.* note 114), the *Cantonal Court of Fribourg (Switzerland)* held that an act of prosecution (service of a *notice of attachment* on a debtor domiciled in France) is treated as a judicial document for the purposes of the Convention, at least when the prosecution relates to a receivable under private law (ruling received from the Central Authority; see also note 114).

<sup>118</sup> *The Appellate Court (Oberlandesgericht) of Munich (Germany)* held that a United States “cross-complaint”, *i.e.*, pleadings entered by a defendant against another defendant, is to be likened to a writ of summons and should therefore be served in accordance with the Convention, OLG München, 17 November 1994, RIW 1995, p. 1026.

<sup>119</sup> In *Schneider v. Caesarstone Australia Pty Ltd.* (*op. cit.* note 63), the *Supreme Court of Victoria (Australia)* noted (at para. 11) that “[i]t is apparent that the phrase ‘judicial documents’ is intended to include subpoenas for witnesses to give evidence”. This view was endorsed by the *Supreme Court of New South Wales* in *Caswell v. Sony/ATV Music Publishing (Australia) Pty Ltd.* (*op. cit.* note 92).