

**CONCLUSIONS DE LA COMMISSION SPÉCIALE DE MAI 2000  
SUR LES AFFAIRES GÉNÉRALES ET LA POLITIQUE DE LA CONFÉRENCE**

*établies par le Bureau Permanent*

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**CONCLUSIONS OF THE SPECIAL COMMISSION OF MAY 2000  
ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE**

*drawn up by the Permanent Bureau*

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## **INTRODUCTION**

The Special Commission on general affairs and policy of the Hague Conference on private international law met at The Hague from 8-12 May 2000 for the purpose of examining the status of the work in progress, in particular concerning the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, of discussing questions relating to the development and operation of the Organisation and of preparing the Nineteenth Session of the Conference, including the Agenda for the next cycle of work.

Mrs Monique Jametti Greiner, Expert of Switzerland, was elected as Chair of the Special Commission. Mr Xu Hong, Expert of China, was elected Vice-Chairman.

## **I CONSIDERATION OF TOPICS LISTED IN THE FINAL ACT OF THE EIGHTEENTH SESSION**

### *1 Hague Convention on the International Protection of Adults*

The Permanent Bureau recalled that the *Hague Convention on the International Protection of Adults*, unanimously adopted on 2 October 1999 by the Special Commission of a Diplomatic Character on the Protection of Adults, was first signed by the Netherlands on 13 January 2000, and hence bears that date. The Explanatory Report prepared by Professor Paul Lagarde had been completed and would be available in June 2000.

Several experts pointed out that there was a great need for this Convention, and they were aware of the necessity to begin the process of signature and ratification of the instrument. The delegation of the United Kingdom informed the Special Commission that on 29 March 2000 the Scottish Parliament passed the Adults with Incapacity (Scotland) Act, which incorporates provisions of the Convention into Scottish law.

### *2 Jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters*

The Permanent Bureau recalled that the fifth Special Commission on the recognition and enforcement of judgments in civil and commercial matters was held from 25-30 October 1999 and a preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters had been completed on 30 October 1999. The text had been distributed in November 1999 and was also available on the Conference's website ([www.hcch.net](http://www.hcch.net)). The Explanatory Report by Peter Nygh (Australia) and Fausto Pocar (Italy) was in the process of translation and would be available in June 2000. Together with the text of the preliminary draft Convention, it would be sent to the Governments for observations.

The fifth Special Commission had expressed the wish that the issues of e-commerce and intellectual property would be further examined in greater detail. A group of experts on electronic commerce had convened in Ottawa from 28 February to 1 March 2000. It was hoped that an experts meeting would be held in collaboration with WIPO in the fall of 2000 to address intellectual property issues.

A position paper submitted by the United States, a letter from the Ambassadors of Australia, Japan, the Republic of Korea and the United States and a letter from the Ambassador of the People's Republic of China all indicated that the negotiations had

reached a critical phase and that more time was needed. A letter from the 15 European Union Member States meanwhile, while admitting that the work might be delayed by some months, insisted that everything should be done to complete the Convention at the Diplomatic Session which should be held before the end of 2001.

The United States delegation explained why it had requested that the Hague Conference postpone the Diplomatic Session. Following consultation with various interest groups in the United States, a consistent view had emerged that there would be difficulty in accepting the text of the preliminary draft Convention in the United States. To achieve enough Congressional support for acceptance it would be necessary to present a more balanced text and a flexible mixed Convention would be the best solution. However, the US delegation was aware that, on the one hand, some delegations had argued that it would be difficult to accept even a limited grey area, and on the other hand, some American lawyers were not yet ready to accept the proposed list of prohibited bases of jurisdiction.

A number of experts noted that, since the 1992 proposal to create a Convention on the recognition and enforcement of judgments in civil and commercial matters, enormous human and financial resources had been devoted to the project by the Permanent Bureau, the Member States, the Chairman, the Rapporteurs and Observers. Many experts expressed their desire to work towards a compromise. It was agreed that it would not be beneficial to hold another Special Commission. A consensus emerged to the effect that it would be premature to hold a Diplomatic Session this year and that the necessary additional time and effort should be expended to achieve a worldwide Convention.

After extensive informal discussions had taken place, the delegations of Denmark and the United Kingdom presented a proposal which on the final day of the Special Commission was unanimously accepted. The proposal was based on the idea that the Diplomatic Session would not, as initially envisaged, be held at the end of the year 2000. It proposed that the Diplomatic Session be divided into two sessions: the first to be held in June 2001, the second in late 2001 or early 2002. The first session would seek to achieve consensus on certain issues and binding decisions would only be taken to the extent that such consensus or near consensus was being reached. The second session would proceed in the normal way for Diplomatic Sessions. In addition, it was hoped that progress would be made prior to the Diplomatic Sessions by way of informal meetings with experts, notably in connection with the experts meeting on intellectual property, and a possible second meeting on e-commerce. Attendance at such meetings would not be restricted, but would be open to all States. It was agreed that there should be free and open exchange of information prior to the Diplomatic Sessions, in particular to explain the work of any informal working groups. Questions were raised concerning the framework which should be given to the time-tabling and the structure of the preparatory work, and it was suggested that the Permanent Bureau examine the questions that, from a technical point of view, appeared to give rise to the greatest number of obstacles; whether or not there should also be a definite agenda for the first Diplomatic Session; how exactly decisions would be taken at that meeting, and whether any amendment would have to be made to the Rules of Procedure of the Hague Conference as a result. However, no final decisions were taken in respect of these matters.

The text of the proposal by the delegations of Denmark and the United Kingdom as orally amended and unanimously adopted reads as follows:

*"Considering the need to adopt a Hague Convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters,*

*Taking note of the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters of 30 October 1999 and the Report prepared by the Rapporteurs and shortly to be submitted to the Governments,*

*Noting that the successful outcome of the Diplomatic Conference presupposes that sufficient time and efforts are devoted to its preparation and to the discussions at the Conference,*

*The Special Commission on general affairs and policy of the Conference recommends:*

*1 That the Diplomatic Conference be divided into two sessions, the first to be held in June 2001 and the second at the end of 2001 or the beginning of 2002.*

*The first session should last one or two weeks for the purpose of discussing any proposals which have been made, but without decisions being made at that session, unless consensus or a near consensus has been reached on certain proposals.*

*The second session of two or three weeks duration should proceed in the normal way for Diplomatic Conferences.*

*2 That prior to the Diplomatic Conference, meetings on an informal basis be held, open to all States, either to be arranged for that purpose or in connection with such other meetings that may be held between the Governments participating in the Hague Conference, with a view to advancing the consideration and drafting of proposals for resolving important substantive and technical issues."*

*3 Conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage*

The Permanent Bureau presented Preliminary Document No 8 entitled "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?". This document summarises in broad terms the international instruments that already exist and contains a detailed study on substantive and comparative international law of different legal systems with a view to identifying possible subjects that could be dealt with in a new private international law instrument.

The Permanent Bureau stated that environmental jurisdictional questions are not excluded by the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters. The question was, therefore, whether specific aspects of ecological accidents (e.g. class action disputes) should be addressed in a special international instrument, and if so, how they should be taken into account. Other matters

to be tackled include in particular applicable law, the effects of a foreign administrative decision on judicial proceedings brought in another country and access to information for the injured party. The Permanent Bureau stated that the German Foundation for the Protection of the Environment which funded the Osnabrück colloquium in 1994 had offered to donate 150,000 DM (Dfl. 170,000) to the Hague Conference in order to finance continued work in this area.

Whilst recognising the importance of this area, the experts drew attention to the risk of overlap which might occur between various existing instruments. Attention was drawn to the work previously done by the Council of Europe and the European Union in this domain, and work that might be undertaken by the Organization of American States. A number of experts pointed to the problems raised by issues of public international law and indicated that the time was not ripe for a Hague Convention on this subject. While further study was welcome, these experts were not in favour of a governmental experts meeting on this topic. Other experts, however, felt that the topic was important and promising and spoke in favour of giving priority to the topic.

No delegation recommended that the issue should be deleted from the agenda and it was decided to maintain the topic on the agenda of the Conference, but without priority.

#### *4 Jurisdiction, recognition and enforcement of decisions in matters of succession upon death*

Preliminary Document No 4 of March 2000 provided a second update on the Note on the same topic drawn up in May 1992. It noted that little had changed since the subject had first been added to the agenda of the Hague Conference in the early 1990's. It was explained that developments were slow in coming because this was a particularly conservative field of law. There was a need for an international instrument dealing with these issues, but in the absence of a uniform applicable law it was not yet appropriate for such work to proceed. The Permanent Bureau expressed regrets that only one State, the Netherlands, had seen fit to ratify the 1989 *Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*. The Convention had been incorporated into the law of that State and the short report "First Conclusions regarding the application of the Hague Convention on the law applicable to succession to the estates of deceased persons (1989)", drawn up by the International Juridical Institute at The Hague (4 May 2000 – Annex I), distributed at the Special Commission meeting, suggested that the rules had proved successful.

After a short debate, the Special Commission agreed that the topic should be retained on the agenda, albeit with low priority.

#### *5 The problems of private international law raised by electronic data interchange and the protection of privacy in connection with transfrontier data flows*

The Permanent Bureau introduced the topic and referred to Preliminary Document No 7, entitled "Electronic Data Interchange, Internet and Electronic Commerce".

The Permanent Bureau drew attention to the fact that much work had already been carried out on this topic at various national, regional and international levels. Reference was also made to the Pelichet Colloquium (1997) and to the two recent meetings on the topic which the Conference had co-organised in Geneva (1999) and in Ottawa (2000). The Permanent Bureau noted that at present the primary emphasis of most of this work had been in relation to jurisdictional issues. It was explained that many of the articles of the future worldwide Judgments Convention would have to be drafted with e-commerce and Internet issues in mind. The Permanent Bureau stated that less work had been carried out with regard to applicable law and that a general study of this issue had yet to be made. Where work had been carried out, it had not dealt with questions of private international law but rather substantive issues concerning proof, electronic signatures and the encryption of electronic transactions.

A wide-ranging debate then followed. There was unanimity with regard to the importance of the topic. However, experts were divided as to what priority it should have on the agenda.

It was agreed that the issues of Internet and e-commerce had to be investigated and dealt with within the context of the future worldwide Judgments Convention.

It was equally accepted that work would have to be done to address the impact of electronic commerce on existing Hague Conventions, in particular those on service abroad, on taking of evidence abroad and on abolishing legalisation.

Several experts questioned whether the Hague Conference should work on the issues relating to alternative dispute resolution (ADR), whether on its own or as part of a wider convention. Other experts stated that it was extremely important to find solutions in this area. The Permanent Bureau drew attention to the fact that the main problem area in relation to ADR related to disputes between professionals and consumers, since no legal instrument yet dealt with this issue. A meeting dealing with the topic was scheduled for the fall of 2000 between the Hague Conference, the OECD, and the ICC, and to which all Member States would be invited. It was finally agreed that the Conference should study the mechanisms of ADR with respect to e-commerce, in particular between professionals and consumers.

Experts were divided as to whether the Hague Conference should commence work on a convention dealing with the private international law issues of the Internet and e-commerce. Some experts argued that it was essential for such a project to be given the highest possible priority. Others replied that the issues were too great and diverse to be dealt with in a single instrument. Some experts considered that the law applicable to electronic commerce should be addressed with high priority, while other experts explained that it is premature to make a single convention on this topic in view of the rapid and continuous evolution of the technical aspects of electronic commerce, which can potentially have an important impact on applicable law. In the end, the experts decided to recommend maintaining this subject on the agenda under the heading suggested by Preliminary Document No 7, "Questions of private international law raised

by the information society, including electronic commerce". The Permanent Bureau, while maintaining close liaison with other international organisations and with the private sector, will follow the progress in the area of electronic commerce, and will conduct a preliminary study, including an evaluation of the feasibility of this project.

#### 6 *Jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples*

The Permanent Bureau presented Preliminary Document No 9, entitled "Private International Law Aspects of Cohabitation Outside Marriage and Registered Partnerships". It was explained that, on the one hand, the number of unmarried cohabitants continues to increase significantly in certain countries and that, on the other hand, the form and nature of cohabitation differs not only from country to country, but also within certain countries. The legal response to unmarried cohabitation in national law follows two general directions, which are not necessarily mutually exclusive: some States have gradually extended rights and privileges to cohabitants in a fragmented, *ad hoc* way, while other States have granted distinct legal status to certain forms of extra-marital cohabitation, for example, registered partnerships. The absence of uniform private international law has created uncertainty with respect to the status of unmarried cohabitants, particularly in light of the free mobility of persons and issues of public policy. The creation of uniform rules is made difficult by certain States' unwillingness to recognise the legal status given in other States to unmarried cohabitants, as well as by the plethora of diverse definitions given to "cohabitation" in the various national systems. However, the issue remains a reality that must be addressed to the extent that the Special Commission deems it sufficiently serious, and to the extent that a consensus appears possible.

The Netherlands delegation presented a joint proposal by the Governments of Australia, Canada, Croatia, Denmark, Finland, the Netherlands, Norway, Spain and Sweden (see Annex II), suggesting the creation of a working group that would perform an exploratory examination of private international law issues related to both registered partnerships and non-marital cohabitation, and would make recommendations on this subject. This work was intended, in part, to follow up on issues discussed at the Fifth European Conference on Family Law of the Council of Europe, held in The Hague in March 1999.

Due to the free mobility of persons and the fact that cohabitation not only exists but is continually increasing, many experts supported the joint proposal. In addition, they felt that the experience and expertise of the Hague Conference in dealing with international family law issues renders the Hague Conference the best forum for studying and resolving questions of private international law with respect to cohabitation. The Secretary General of the International Commission for Civil Status, attending as an Observer, agreed that the Hague Conference should undertake work in this area, rather than leaving it solely to other organisations.

Many experts, however, opposed the proposal for a variety of reasons. First, they noted that sensitive issues of public policy are inextricably linked to the recognition of registered partnerships in States that do not know this institution. If the Hague Conference creates a working group in this area, it may be viewed as endorsing certain political positions. Indeed, as several experts stressed, vast differences persist among



the cultural and legal systems of the Member States. Therefore, some experts suggested that

the Hague Conference should undertake work only on those issues that interest the majority of Member States. By forcing a country to recognise these institutions, that country would be indirectly required to enact related legislation. Was work in this area really needed; might a solution not be found through the process of characterisation?

Opinions varied on the scope of the work that might be undertaken. Certain experts were in favour of limiting the scope of study to that of registered partnerships, because cohabitation is not recognised as a legal institution in most internal law systems, and to address it within the Hague Conference would be to lend legitimacy to it as an institution. In addition, registered partnerships can be treated under the laws of marriage in most countries. Others considered it premature to narrow the field of exploration at this stage of the discussions, especially in view of the difficulties in clearly distinguishing between registered partnerships and certain forms of cohabitation. It was also stated that even limiting the subject to registered partnerships would unacceptably implicate public policy.

Ultimately, the experts were divided on the desirability of creating a working group. While it was stressed that the working group is not intended to be imposed on uninterested Member States, many experts were opposed to establishing the working group nonetheless, due to the lack of support encountered. Certain experts suggested that instead of a working group, the Permanent Bureau could undertake a feasibility study on the basis of questionnaires or even a study of comparative law, for example. There was also a question of timing, certain countries not yet being ready to address this issue. For this reason several experts preferred to leave this issue on the agenda without priority so that it may be returned to at a future date, and encouraged those countries with interest to perform follow-up independently.

The Special Commission finally decided to maintain the topic on the agenda, without priority.

## *7 The law applicable to unfair competition*

Preliminary Document No 5 reviewed and updated the Notes on Conflict of Laws on the Question of Unfair Competition, drawn up in 1987, 1992 and 1995. The issue had been included on the agenda, without priority, since the Sixteenth Session.

The Permanent Bureau drew attention to the problems of defining the concept of unfair competition in common law legal systems. It stated that the applicable law issue was often dealt with by applying the law of the market affected. This approach had been adopted widely in the legal literature on the subject, in a resolution of the International Law Association, as well as in the laws and jurisprudence of certain States. Therefore, there seemed to be sufficient common ground now to try and establish an international instrument. The need for a convention with worldwide application was given greater urgency in the light of the evolution of the Internet. The Permanent Bureau concluded by suggesting that the topic be retained on the agenda and that a working group be convened to consider the various issues involved.

Several experts were in favour of retaining the law applicable to unfair competition on the agenda of the Conference and supported creating a working group that would explore the

possibilities in this area. However, it was also noted that the resources, energy and funds of the Conference are scarce, and must therefore be used with caution. The importance of the role of public authorities in this area of law, who already co-operate amongst themselves, was stressed and it was noted that public authorities should be consulted with respect to any further study on this topic.

In the end it was decided that the matter be retained on the agenda of the Conference without priority.

#### *8 The law applicable to assignments of receivables*

The Permanent Bureau referred to Preliminary Document No 3, entitled "Note on the law applicable to receivables financing", and explained that the work of UNCITRAL is approaching its end and that its final meeting is scheduled for June 2000. Because several issues of private international law remain uncertain, and in order to continue assisting UNCITRAL, the Permanent Bureau proposed to keep the law applicable to the assignment of receivables on the agenda of the Conference. It was noted that the new form of collaboration between the Hague Conference and UNCITRAL – the joint Working Group which had been organised at The Hague from 18-20 May 1998 – has proven successful and should serve as a model for future co-operation.

In response to a request for further explanation on the drafting process of the UNCITRAL rules following the joint Working Group with the Hague Conference, the Permanent Bureau explained that the conflicts of laws rules are to be found at two levels in the draft UNCITRAL Convention. The first level is comprised of the rules that are spread throughout the substantive law of the Convention and which, by doing so, complete the substantive rules. The second level is formed by a set of rules which are found in a separate chapter of the draft Convention. UNCITRAL had not reached a consensus on the scope of the rules found in the second level. The Permanent Bureau confirmed that the current draft of the UNCITRAL Convention differs in some respects from the proposals made by the joint Working Group with the Hague Conference.

The Special Commission agreed to maintain the law applicable to the assignment of receivables on the agenda of the Conference, without priority.

#### *9 Operation of Conventions on maintenance obligations and desirability of revising the Hague Conventions*

Preliminary Document No 1, "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", contains the Report and Conclusions of the Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance held from 13-16 April 1999. There exist four Hague Conventions and one Convention of the United Nations (New York Convention) that are applicable to this topic. Several problems with these Conventions have been identified: the complete failure of some States to carry out their obligations under the Conventions; differences of interpretation, practice and enforcement under the Conventions; cumulative application of the Conventions; and practical issues, such as the best method of transferring funds.

These problems have remained unresolved. Moreover, the Conventions have not met

the needs of the dependants requiring support, the New York Convention has contributed, in part, to inconsistent interpretation and practice, various changes have occurred in national legislation, and the proliferation of international instruments has created a complex system. For all of these reasons, the Special Commission of April 1999 unanimously decided that the Hague Conference should undertake to draft a new international instrument.

This new international instrument should: contain provisions regarding administrative co-operation; be comprehensive in nature and retain the best elements of existing conventions; and be considered in collaboration with other relevant international organisations. In addition, the new instrument should not inhibit continuing work of the Hague Conference in promoting ratification and effective operation of existing Conventions. In this connection, the Australian delegation announced that Australia would accede to the *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* in the near future.

Judge Pocar, Chairman of the Special Commission of April 1999, stressed two aspects of the proposal. First, the co-ordination of existing conventions is difficult. This problem arises particularly in the context of administrative co-operation of public authorities. Second, the new instrument should not cause upheaval in the existing system. In addition, in order to reach a good solution, participation in the process must be broad.

One expert opposed this proposal arguing that a new instrument will not solve existing problems with individual State co-operation because they arise from a lack of interest in the subject matter. A new instrument would be justified only if it brings substantive improvements, for example, granting free legal aid unconditionally, or at least based on child-centred criteria.

There was, however, general support for the proposal, it being noted that it was the result of consultations among the practitioners who took part in the Special Commission of April 1999. They recommended a concrete, practical and modern approach to this initiative, which should particularly address the issue of State co-operation and should result in one, single instrument. The topic should be given high priority. Interested non-Member States of the Hague Conference should be invited to participate.

#### *10 Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*

The Permanent Bureau introduced Preliminary Document No 6, entitled "Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention". It was explained that over the last few years many States have ratified and acceded to this Convention. Moreover, Turkey had indicated that it would ratify this Convention in the very near future. In addition, during a visit to The Hague on 1 May 2000, Morocco's Minister of Justice made a formal declaration of Morocco's intention to accede to this Convention. During the course of this meeting, the Bulgarian delegation also indicated the intention of Bulgaria to ratify this Convention in the near future.

Four areas of concern have been raised with the application of the Convention:

- ~~///~~ First, the method of processing applications, and making and enforcing decisions in certain States Parties has been criticised, particularly with regard to the lack of speed and rigour in the application of the procedures, as well as the excessive use of Article 13 exceptions.
- ~~///~~ Second, and in contrast with this first observation, remedies under the Convention may be too drastic when the Convention is applied with undue rigour, for example in a situation where a child is abducted by the primary carer, and the Convention is then used essentially as a means to safeguard visitation rights.
- ~~///~~ Third, the Convention's provisions regarding the rights to access and visitation are insufficient.
- ~~///~~ Finally, globalisation of the Convention has raised the question of whether acceding States are always adequately prepared and equipped to fulfil their Convention obligations.

- *The proposed fourth Special Commission*

The Permanent Bureau explained that in light of the above issues, a fourth Special Commission must convene in order to examine the operation of the 1980 Convention. Preliminary Document No 6 sets out a draft agenda of the proposed fourth Special Commission. Contrary to Hague tradition, this agenda addresses specific issues that must be discussed, rather than each and every article of the Convention. One goal of the fourth Special Commission should be to generate firm recommendations. In order to carefully structure discussion and assess the possibility of issuing firm recommendations, the Permanent Bureau must consult with the participants prior to the meeting. It also suggested reinforcing the participation of the judiciary in the fourth Special Commission. Finally, it had been informally suggested to the Permanent Bureau that the attendance of senior politicians should be foreseen on the final day of the meeting.

The experts generally noted the enormous success met by the 1980 Convention, and agreed that a fourth Special Commission should convene. In addition, most experts agreed with the proposed structure of the agenda, but stressed that certain themes should be given particular attention, such as the promotion of expeditious proceedings, the question of costs, the possibility of international mediation and judicial communication, and the central role of the child. Certain experts expressed the concern that the agenda was overly ambitious and may not be fully addressed in the time provided, even with the two additional meeting days proposed by the Permanent Bureau.

Several experts expressed their agreement with the idea that firm recommendations should result from the meeting of the fourth Special Commission. Some experts stressed, however, that firm recommendations must result only if a clear consensus between parties present can be reached. Other experts expressed doubts regarding the legal status these recommendations would have and questioned their potentially binding nature. In reply to this, examples were given from the past which showed the great effectiveness such Special Commission recommendations may have.

Many experts stated that direct involvement by the judiciary in the fourth Special Commission is desirable, especially in order to encourage further collaboration between judges. However, other practitioners, such as those employed by the Central Authorities, must also be invited to participate in the meeting.

There was some scepticism about the desirability of inviting senior politicians, such as Ministers and Secretaries of State, to the fourth Special Commission, although it was also admitted that politicians should be sensitised to the issues of international child abduction. Most experts seemed to think that the potential disadvantages of including politicians would outweigh the perceived potential benefits.

- *The rights of access and visitation*

In a joint proposal, the Experts of Australia, Spain, the United Kingdom and the United States requested the Permanent Bureau to prepare by the Nineteenth Diplomatic Session of the Hague Conference a report on the desirability and potential usefulness of a protocol to the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*. In a more satisfactory and detailed manner than Article 21 of that Convention, this protocol would provide for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return request (see Annex III).

This would encourage co-operation amongst the parties and would provide for a solution other than the "all-or-nothing" solution that custody law provides today. The initiative was also a response to the evolution of the rights of children and, in particular, the right to have contact with both parents.

Some experts noted that the 1996 Hague Convention on the protection of children also addresses this issue and should therefore also be considered by the Permanent Bureau. It was also pointed out that because this issue is also the subject of study and discussion in other international organisations, it would be prudent to wait for the results of the work done by these other organisations before undertaking this new initiative. In addition, there was some concern about disturbing the delicate balance maintained in the 1980 Convention regarding prompt return mechanisms.

There was general support for the joint proposal, and it was noted that the whole issue would also be considered at the Special Commission to review the operation of the Child Abduction Convention, to be held in March 2001.

- *INCADAT (see Annex IV)*

On behalf of the Minister of Justice of the Netherlands, Mrs A.J. Mulock Houwer, Director, Directorate General Prevention, Youth and Sanction Policy, gave an address on 9 May 2000 on the occasion of the launching of the electronic database of case law relating to the Child Abduction Convention. She emphasised that the establishment of this database ([www.incadat.com](http://www.incadat.com)), in addition to the Conference's general website ([www.hcch.net](http://www.hcch.net)), was a major achievement and an important step towards more consistency in the Convention's application and towards a better knowledge of the purposes of the Convention and accepted practices. The address was followed by words of welcome by the Secretary General, and an explanation of the evolution of the Hague Child Abduction Convention and the role of the Permanent Bureau and the objectives of



INCADAT by Mr William Duncan (First Secretary). A demonstration then followed by Mr Peter McEleavy (barrister and legal consultant to INCADAT) and Ms Marion Ely (attorney and legal manager

INCADAT). An address was also given by Ms Mary Banotti, MEP, European Parliament President's Mediator for Transnationally Abducted Children. The Permanent Bureau emphasised that this project had to be financed almost entirely with special funds, as the Conference's normal budget does not provide for this type of activity. The launch was followed by a reception in the Peace Palace, which included a performance by the "International Children's Choir of The Hague".

#### *11 Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*

The Permanent Bureau introduced this topic by reminding delegates that the Eighteenth Session, referring to Article 42 of the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, had invited the Secretary General to convene a Special Commission on the operation of the Convention, to which there were now forty States Parties. This meeting would take place from 28 November to 1 December 2000. Two major issues to be considered related to the systems and criteria for the accreditation of bodies (Articles 10-12) and the meaning of "improper financial or other gain" (Article 32). The Permanent Bureau added that it was currently seeking funds to launch a collaborative project with International Social Service at Geneva to assist in the effective implementation of the Convention in new Contracting States which require particular help.

A short debate then followed during which many experts announced that their States intended to ratify or accede to the Convention in the near future. The experts unanimously agreed that there was a great need for the review Special Commission. Several experts stated that there was a real problem with regard to individuals or other bodies deriving improper financial gain from intercountry adoptions. Attention was also drawn to the problems which could arise when children were adopted from non-Contracting States to Contracting States.

The debate closed with it being noted that the review Special Commission would be open not only to Member States of the Hague Conference and States Parties to the Convention, but also to all other interested States which had participated in the negotiations.

## **II DEVELOPMENT AND OPERATION OF THE ORGANISATION**

#### *12 The globalisation of the Hague Conference : a strategy for the future*

The Secretary General presented Preliminary Document No 2, entitled "The Hague Conference on private international law on the eve of the new millennium: some concrete suggestions for strategic action proposed by the Informal Group of Ambassadors of the Council of Diplomatic Representatives – summary of the discussions of the Group, prepared by the Chairman", which had resulted from the meeting of the informal group of Ambassadors in October 1999. The Secretary General noted that 105 different States were now Parties to Hague Conventions and that there were now 47 Member States of the Hague Conference with 6 other States waiting to join. He explained that this had major structural and resource implications for the Organisation.

The Secretary General drew attention to the four Recommendations contained within Preliminary Document No 2:

- i) increase the membership of the Hague Conference; 30 States had been identified as potential Member States;
- ii) publicise the Conventions and documents of the Conference, and organise seminars in co-operation with appropriate regional organisations; in this it was noted that several such seminars had been held in the last few years;
- iii) develop training programmes for authorities and judges applying the Conventions; attention was drawn to the seminar for 40 judges held in 1998 and a similar one to be held in June 2000;
- iv) provide assistance to the staff of the Permanent Bureau; in this it was noted that a government lawyer from the Special Administrative Region of Hong Kong / China would be seconded to the Permanent Bureau for six months.

The Special Commission was unanimous in its support for the Recommendations of the Ambassadors. During the debate on the topic several issues were addressed. Several experts suggested that the working methods of the Permanent Bureau should be re-examined. The Secretary General stated that he had always an open mind in this respect, but noted that this would inevitably require additional resources for the Organisation. Certain experts proposed that the Permanent Bureau investigate the possibilities of private funding. However, it was generally accepted that great caution would have to be exercised in this regard to avoid any potential conflicts of interests. The Secretary General reported that he had taken steps to this end and had already received private funding for INCADAT.

Several experts noted that there were difficulties with regard to increasing States' annual payments to the Hague Conference. Certain of these experts stated that if any increase were to be contemplated it would have to be justified, and it would have to be shown that the Conference was making efficient and effective use of its existing resources. Furthermore, several experts suggested that the Conference should concentrate its efforts on those areas where its involvement had proved successful. Others added that great care had to be exercised as to the choice of topics for the Conference to deal with. It was further suggested that the Conference need not always work towards drafting a Convention. Several experts suggested that even greater efforts should be made towards improving the operation of existing Conventions.

Certain experts suggested that the voting methods of the Conference be made more flexible. Concluding the debate, the Secretary General underlined the sensitive nature of this issue. While flexibility in working methods is indeed crucial, the texts produced by the Conference can be drawn up only on the basis of decisions on points of detail.

### *13 The impact of regional integration, in particular within the European Union, on the Organisation and its Conventions*

The Expert of Portugal, representing the Presidency of the Council of the European Union, presented the current situation with regard to European integration in the field of

judicial

co-operation in civil matters. The issue to be resolved is how the Community is to fulfil the role assigned to it by the Treaty of Amsterdam in a process traditionally reserved for States, which are the only Members of the Hague Conference on private international law.

Attention was drawn to the fact that Article 65 of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam, confers on the Community new internal areas of competence in the field of civil judicial co-operation. The Treaty does not explicitly attribute external areas of competence to the Community in this field. This competence can however be derived implicitly from the provisions of the Treaty in conformity with well-established jurisprudence of the Court of Justice of the European Communities. The matter is one which must be verified case by case. Attention was drawn to the fact that specific regimes are applicable in these matters to the United Kingdom, Ireland and Denmark.

In the light of this situation, the Community should be called upon to take part, in the future, in the current process which aims at drawing up a Hague Convention on jurisdiction, recognition and enforcement of foreign judgments.

Taking these elements into account, the Member States of the Community have decided to co-ordinate their position with regard to this project. Moreover, the possibility has been examined of proposing a clause which would allow accession by the Community to the future Hague Convention mentioned above.

Finally, the Representative of the Portuguese Presidency emphasised that the discussion on these matters is continuing within the Community as several issues still remain to be resolved.

The Representative of the European Commission explained the general rules concerning the manner in which the European Community exercises its external competence in the different international entities.

Assurances were given that the progress of European regional unification would neither endanger the existence of the Hague Conference, nor the important role played by this Organisation. On the contrary, both Organisations should try to find ways to develop a system of co-existence from which each could benefit.

In response to a question as to the proposed "grey zone" in the worldwide Judgments Convention, an expert explained that the fact the European Community might have external competence for an area did not necessarily mean that it had to resolve all issues falling within the scope of that area; to the extent that the European Community did not deal with any such issues Member States would be free to make their own decisions. On the other hand, it was explained that where the Community did enjoy and exercise full external competence for an area, Member States would have no discretion to act independently.

The Secretary General affirmed that the Permanent Bureau's attitude has always been that the changes within the European Community should be looked upon, rather than as a risk for the Hague Conference, as potentially bringing benefit to both the European Community and the Hague Conference on private international law. The changes did represent a certain challenge, however, since 15 of the 47 Member States of the Conference were also Members of the European Community. The working methods of the Conference should not be adversely affected by these changes in Europe.

The Secretary General also made reference to the possible affect of the Amsterdam Treaty on existing Hague Conventions. In particular, he expressed the hope – in line with the spirit of good co-operation between the Organisations – that the adoption of the Brussels II Regulation, rather than diminishing the chances of the 1996 Protection of Children Convention in the European Union, could be combined with signature and ratification of the 1996 Convention by all European Union Member States.

#### *14 Relations with other international organisations*

The Permanent Bureau indicated that it has continued to maintain good working relationships with various organisations. Each member of the Permanent Bureau explained in detail the work they followed of other international organisations, both governmental and non-governmental, in relation to their individual fields of study.

The experts were pleased with the Permanent Bureau's widespread co-operation with other international organisations and encouraged its continuation. Due to the increasing presence of non-governmental organisations, it was suggested that the Conference consider establishing guidelines governing NGO participation in the Hague Conference.

#### *15 Promoting wider ratification of Hague Conventions*

The delegation of the Republic of Korea announced that a special study group had been constituted in its country to examine the possible accession to and ratification of Hague Conventions. The Secretary General expressed his appreciation for this initiative. The Chair concluded the debate by noting that this issue had been dealt with previously in connection with item 12.

#### *16 Support for operation of existing Conventions by the Permanent Bureau*

The Chair reminded the Special Commission that this subject had already partially been discussed. She invited the Member States to support the Hague Children's Project (see Annex V).

The Permanent Bureau stressed its need for input from Member States in order to complete the Practical Handbooks on the Service and Evidence Conventions.

#### *17 Special Commissions on the operation of Hague Conventions on judicial and administrative co-operation*

The Permanent Bureau indicated that these Conventions are both useful and successful. The last Special Commission on this subject was held more than 10 years ago, and thus, it is time to re-evaluate their operation in view of recent developments. In particular, the mechanisms envisioned by these Conventions must be adapted to the electronic world (*cf.* item 5, *supra*). Recent discussions during the Geneva Round Table (*supra*, 5) appeared to indicate that this adaptation will not be exceedingly difficult.

The experts agreed that it was time to re-examine the Conventions on the service of documents abroad, on the taking of evidence abroad and on abolishing legalisation. They noted that it was necessary to take into account regional instruments on this subject, in

particular the European Union regulation on service of documents abroad, which builds on the experience of the 1965 Hague Convention.

### *18 Miscellaneous questions*

The Secretary General recited the list of documents published since 1996, including the Proceedings of the Eighteenth Session, Tomes I and II, and the CD-ROM "The Children's Conventions". The Permanent Bureau recalled the outstanding work done by Mrs Lalloz, who unfortunately will retire in June 2001, on the publications.

## **III NEW TOPICS**

### *19 Conflicts of laws relating to securities held through intermediaries*

In a joint proposal, the Experts of Australia, the United Kingdom and the United States suggested the development by the Hague Conference of a "short multilateral Convention clarifying applicable law rules for securities held through intermediaries" as "a basis for the world-wide adoption of consistent principles" (see Annex VI). Mr Potok, a member of the Australian delegation, gave a presentation on the new subject proposed. He explained that there exists a need for harmonisation of conflicts of law rules relating to the taking of securities as collateral held by intermediaries highlighting that, today, legal certainty as to the law applicable does not exist for any party involved in an international transaction of this type. Because securities have become computerised and because of the multiple levels of intermediaries, the traditional rule of *lex situs* is no longer appropriate in this situation. One possible solution is found in the approach of the European Union, that of using the "place of the relevant intermediary" (PRIMA) in order to determine the applicable law. The Australian Expert stressed that the work on this subject not only could be, but should be expedited in view of the immediate practical need of legal certainty.

The experts were of the opinion that this matter was timely and important, and needed to be addressed quickly. Some experts recommended an accelerated procedure which could conclude in less than a year and, thus, would respond to the immediate need of practitioners. On the other hand, many found this issue to be complicated and explained that they would, therefore, need time to consult with their own Governments and interested parties before undertaking any action.

Most of the experts encouraged close co-operation between the Hague Conference and other relevant organisations, such as UNCITRAL, Unidroit and the World Bank, in order to harmonise the choice of law rules with substantive law. Many experts stated that before a decision on whether to draft a new Convention is made, a feasibility study should be conducted by a working group consisting of experts from the Hague Conference and other international organisations, after consultation with relevant interest groups. Such a consultation would help avoid overlapping, as well as duplicative efforts, in this area; it would be necessary, for example, to take into account UNCITRAL'S draft Convention on receivables which could have an impact on the proposed subject. On the other hand, it was noted that although collaboration with other organisations is possible, the Hague

Conference was an appropriate forum, in and of itself, to undertake the study of the conflicts of laws issues. The proposed study should deal with all dispositions of securities held through intermediaries. The project should aim to produce transactionally focused rules, rather than abstract principles.

Several experts asked whether the Permanent Bureau would have sufficient resources, especially during the next year, to undertake this new project. The Permanent Bureau replied that the proposed initiative is manageable from a financial point of view. In addition, there is a real possibility to work efficiently in this area; preliminary studies have already been done, and the experts who have previously worked within this field will be prepared to collaborate with the Hague Conference.

The Special Commission decided to recommend that this issue be included on the agenda of the Conference, it being understood that, without waiting for the Diplomatic Conference, a working group open to all Member States, to experts and associations specialised in the field, should convene to examine, in collaboration with other international organisations, notably UNCITRAL and Unidroit, and the private sector, the feasibility of drawing up a new instrument on this topic.

#### *20 The rights of access and visitation between children and their parents*

The new topic proposed by Australia, Spain, the United Kingdom and the United States, was discussed in the context of item 10, *supra*.

#### *21 Adaptation of working methods of the Special Commission on general affairs and policy*

The Expert of France proposed an adaptation to the working methods of the Special Commission, whose current practice is to meet once every four years. Because of the rapid evolution of international law issues and recent technological advances, this practice is outdated. The Special Commission should hold its meetings more often, but for a shorter period of time, allowing for more flexibility and modernisation in following the activities of the Hague Conference and other organisations.

All of the experts supported this suggestion, generally agreeing that the Special Commission should meet every 2 years, while leaving the possibility of convening an additional meeting when absolutely necessary to the Permanent Bureau. It was noted that any additional meeting must be preceded by timely notice to the participants. Certain experts indicated that because the interim sessions would no longer be linked to the Diplomatic Conference, not only would the nature of these interim sessions change, but in addition the Special Commission would need to have the authority to make decisions, in order to steer the work of the Permanent Bureau. Several experts asked whether this change would pose any budgetary problems. The Secretary General replied this was certainly the case, but that with certain concessions (shorter meetings) the budget implication could be reduced. Along these lines, some experts suggested linking the interim sessions to other Special Commissions on specific topics.

The Special Commission decided to recommend that the Special Commission on general affairs and policy of the Conference be convened more often, *i.e.* in principle every two years, while allowing the Permanent Bureau the flexibility to convene additional meetings of the Special Commission, if necessary. The Special Commission should also have authority conferred upon it to take decisions whenever it meets.





## Summary of the Recommendations of the Special Commission

Following examination of the different items on the agenda, the Special Commission adopted the following Recommendations:

A In respect of the timing and organisation of the Nineteenth Session of the Hague Conference on private international law, which will be a Diplomatic Conference devoted to the question of jurisdiction, recognition and enforcement of judgments in civil and commercial matters:

~~///~~ that the Session, which had been planned for October 2000, be postponed and be divided into two sessions, the first to be held in June 2001 and the second at the end of 2001 or the beginning of 2002;

1 The first session should last one or two weeks for the purpose of discussing any proposals which have been made, but without decisions being made at that session, unless consensus or a near consensus is reached on certain proposals;

2 The second session of two or three weeks duration should proceed in the normal way for Diplomatic Conferences;

~~///~~ that, prior to the Diplomatic Conference, meetings on an informal basis be held, open to all States, either to be arranged for that purpose or in connection with such other meetings that may be held between the Governments participating in the Hague Conference with a view to advancing the consideration and drafting of proposals for resolving important substantive and technical issues.

B That the following items be included, with priority, in the Conference's agenda for future work –

~~///~~ the drawing up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter, and include rules on judicial and administrative co-operation. Non-Member States of the Hague Conference, in particular signatory States to the New York Convention of 1956, should be invited to participate in this future work;

~~///~~ the question of the law applicable to the taking of securities as collateral, it being understood that, without waiting for the Diplomatic Conference, a working group open to all Member States, to experts and associations specialised in the field, should convene to examine, in collaboration with other international organisations, notably UNCITRAL and Unidroit, and the private sector, the feasibility of drawing up a new instrument on this topic.

C That the following topics be retained in the Conference's agenda for future work –

1 questions of private international law raised by the information society, including electronic commerce;

and, without priority –

- 2 the conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage,
- 3 jurisdiction, and recognition and enforcement of decisions in matters of succession upon death,
- 4 jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples,
- 5 the law applicable to unfair competition,
- 6 the law applicable to assignment of receivables.

D That, prior to the Session, in March 2001, a fourth Special Commission be convened to study the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. That the Permanent Bureau should prepare a report on the desirability and potential usefulness of a protocol to the Convention that would, in a more satisfactory and detailed manner than Article 21 of that Convention, provide for the effective exercise of access/contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests. This matter would also be considered by the fourth Special Commission meeting in March 2001.

E That after the Session, a Special Commission be convened to study the operation of the Conventions on civil procedure, and on international judicial and administrative co-operation in the light, *inter alia*, of the impact of electronic commerce on these Conventions, in particular –

- ~~the~~ *the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,*
- ~~the~~ *the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters,*
- ~~the~~ *the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.*

F That the Special Commission on general affairs and policy of the Conference be convened more often, *i.e.* in principle every two years, while allowing the Permanent Bureau the flexibility to convene additional meetings of the Special Commission, if necessary. The Special Commission should also have authority conferred upon it to take decisions whenever it meets.