CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

AFFAIRES GÉNÉRALES
GENERAL AFFAIRS

Doc. prél. No 14
Prel. Doc. No 14

juin / June 2001

NOTE CONCERNANT L'IMPACT DE L'INTEGRATION REGIONALE, EN PARTICULIER AU SEIN DE L'UNION EUROPEENNE, SUR LA CONFERENCE DE LA HAYE ET LES CONVENTIONS DE LA HAYE

Note établie par le Bureau Permanent

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NOTE ON THE IMPACT OF REGIONAL INTEGRATION, IN PARTICULAR WITHIN THE EUROPEAN UNION, ON THE HAGUE CONFERENCE AND THE HAGUE CONVENTIONS

Note drawn up by the Permanent Bureau

Document préliminaire No 14 de juin 2001
à l'intention de la Dix-neuvième session

Preliminary Document No 14 of June 2001
for the attention of the Nineteenth Session

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Note on the impact of regional integration, in particular within the European Union, on the Hague Conference and the Hague Conventions

INTRODUCTION

1. At the Special Commission on General Affairs and Policy of the Conference held from 8-12 May 2000, the Expert of Portugal, Professor de Magalhaes Collaço, representing the Presidency of the Council of the European Union, presented the situation with regard to European integration in the field of judicial co-operation in civil matters. She pointed out that the issue to be resolved was how the Community is to fulfill 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. The Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference reports as follows:

> "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." (Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Preliminary Document No 10 of June 2000, pp. 23-24.)

2. Following up on the Special Commission of May 2000, the Secretary General wrote to the National Organs of the Member States of the Hague Conference which are also Members of the European Union (see letter dated 14 June 2000 attached hereto).

3. While it is a matter for the European Union and its Member States to take the initiative which they deem appropriate arising from the legal developments within the Union, it may be useful for delegates to the Nineteenth Session, in order to be prepared for future developments, to have a preliminary overview of some of the matters that may have to be addressed. This Note will, therefore, briefly discuss the following issues:

(a) the possibility for regional organisations to become a Party to Hague Conventions under negotiation, or future Hague Conventions;

(b) the possibility for regional organisations to join the Hague Conference;

(c) the possibility for regional organisations to become a Party to any or all of the thirty-four Hague Conventions concluded since the Second World War.

(a) Possibility for regional organisations to become a Party to Hague Conventions under negotiation, or future Hague Conventions

4. The question of whether regional organisations may become a Party to Hague Conventions is, under the Statute, entirely open. The practice has always been that the final clauses of the Hague Conventions only provide for the possibility of signature and ratification, acceptance or approval, or accession by "States". As a rule, Hague Conventions provide that only Member States of the Hague Conference at the time of the Diplomatic Session that adopts the Convention may sign and ratify, or accept or approve it, and, as a rule also, any other State may accede, and accede only, to it, as a rule again, under certain conditions. There are exceptions to each of these practices, however, made possible by the absence of any rule in the Statute. Indeed, two recently-adopted Conventions, allow non-Member States, or certain non-Member States, to sign and ratify the Convention.[1]

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* As of 28 May 2001, the Hague Conference comprises 50 Member States (Note Permanent Bureau).

[1] See *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (Article 25) and *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Article 43).

5. In the context of the United Nations, several international instruments have recently opened the possibility for "regional organisations for economic integration" to become Parties, even where the organisations concerned are not eligible to become members of the United Nations or the specialised agency concerned. This is the case for example for the *New York Convention of 21 May 1997 on the Law of the Non-Navigational Users of International Water Courses*. In this Convention, the following clauses have been included:

> *New York Convention of 21 May 1997 on the Law of the Non-Navigational Users of International Water Courses*
>
> Article 34
>
> *Signature*
>
> The present Convention shall be open for signature by all States and by regional economic integration organizations from 21 May 1997 until 20 May 2000 at the United Nations Headquarters in New York.
>
> Article 35
>
> *Ratification, acceptance, approval or accession*
>
> 1. The present Convention is subject to ratification, acceptance, approval or accession by States and by regional economic integration organizations. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.
>
> 2. Any regional economic integration organization which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.
>
> 3. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Secretary-General of the United Nations of any substantial modification in the extent of their competence.
>
> Article 36
>
> *Entry into force*
>
> 1. The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
>
> 2. For each State or regional economic integration organization that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.
>
> 3. For the purposes of paragraph 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States.

6. Similarly, the *Montreal Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air* provides:

> *Montreal Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air*
>
> Article 53
>
> *Signature, Ratification and Entry into Force*
>
> 1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature …
>
> 2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in … applies equally to a Regional Economic Integration Organisation. …
>
> 3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.
>
> 4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.
>
> 5. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.
>
> 6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.
>
> 7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect …

7. Again, independently of the question of membership of the Organisation, several recent Conventions of the Council of Europe make specific provision for the European Community (Communities) to become a Party to the Convention. A recent example is offered by the *European Convention of 18 March 1986 for the Protection of Vertebrate Animals and for Experimental and Other Scientific Purposes*, which includes the following final provisions:

> *European Convention of 18 March 1986 for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes*
>
> Article 31
>
> This Convention shall be open for signature by the member States of the Council of Europe and by the European Communities. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the Council of Europe.
>
> Article 32
>
> 1. This Convention shall enter into force on the first day of the month following the expiration of a period of six months after the date on which four member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 31.
>
> 2. In respect of a Signatory which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of six months after the date of the deposit of the instrument of ratification, acceptance or approval.

(b) Possibility for regional organisations to join the Hague Conference

8. Article 2 of the Statute of the Hague Conference provides only for membership by States. Regional organisations such as the European Community may have separate legal personality under international law, distinct from that of the constituting sovereign States, but are not themselves sovereign States. It would therefore be difficult to argue that a regional organisation such as the European Community may qualify as a Member State under either paragraph 1 or paragraph 2 of Article 2 of the Statute, even though all its present constituent Member States are members of the Organisation.

9. There are at least two precedents of well-known international organisations providing for membership of regional organisations, or more specifically for the European Communities.

10. Article II of the Statute of the Food And Agriculture Organisation of the United Nations reads as follows:

> Article II
>
> *Membership and Associate Membership*
>
> 1. ...
> 2. ...
> 3. The Conference may by a two-thirds majority of the votes cast, provided that a majority of the Member Nations of the Organization is present, decide to admit as a Member of the Organization any regional economic integration organization meeting the criteria set out in paragraph 4 of this Article, which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission. Subject to paragraph 8 of this Article, references to Member Nations under this Constitution shall include Member Organizations, except as otherwise expressly provided.
>
> 4. To be eligible to apply for membership of the Organization under paragraph 3 of this Article, a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters.
>
> 5. Each regional economic integration organization applying for membership in the Organization shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.
>
> 6. Member States of a Member Organization shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified to the Organization.
>
> 7. Any change regarding the distribution of competence between the Member Organization and its Member States shall be notified by the Member Organization or its Member States to the Director-General, who shall circulate such information to the other Member Nations of the Organization.
>
> 8. A Member Organization shall exercise membership rights on an alternative basis with its Member States that are Member Nations of the Organization on the areas of their respective competences and in accordance with rules set down by the Conference.
>
> 9. Except as otherwise provided in this Article, a Member Organization shall have the right to participate in matters within its competence in any meeting of the Organization, including any meeting of the Council or other body, other than bodies of restricted membership referred to below, in which any of its Member States are entitled to participate. A Member Organization shall not be eligible for election or designation to any such body, nor shall it be eligible for election or designation to any body established jointly with other organization. A Member Organization shall not have the right to participate in bodies of restricted membership specified in the rules adopted by the Conference.

10. Except as otherwise provided in this Constitution or in rules set down by the Conference, and Article III paragraph 4 notwithstanding, a Member Organization may exercise on matters within its competence, in any meeting of the Organization in which it is entitled to participate, a number of votes equal to the number of its Member States which are entitled to vote in such meeting. Whenever a Member Organization exercises its right to vote, its Member States shall not exercise theirs, and conversely.

In addition, Article XVIII on budget and contributions provides in paragraph 6:

Article XVIII

Budget and contributions

...

6. A Member Organization shall not be required to contribute to the budget as specified in paragraph 2 of this Article, but shall pay to the Organization a sum to be determined by the Conference to cover administrative and other expenses arising out of its membership in the Organization. A member Organization shall not vote on the budget.

11. Under the Statute of the World Trade Organization, Article XII:

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement an the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the members the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

On this provision, the European Communities acceded as of 1 January 1995. According to Article XI, paragraph 1[2]:

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

12. According to Article 12 of the Statute of the Hague Conference, an amendment of the Statute requires the approval of two-thirds of its Members. Any proposal to that effect will have to address two further important questions, i.e. those of voting and of the financial consequences.

[2] It would seem that the European Communities do not contribute to the budget of the WTO.

(c) Possibility for regional organisations to become a Party to existing Hague Conventions

13. As we have seen, all of the existing Hague Conventions only provide for "States" to become Parties.

It would seem that the only method by which regional organisations might in their own right become Parties to existing Hague Conventions would be by the negotiation and ratification of appropriate Protocols, a complex and time-consuming process.

A situation which should at all costs be avoided is one in which it becomes impossible for either the regional organisation or its constituent States to become Parties to existing Hague Conventions. This is the danger if, in relation to a Convention (such as the 1996 Convention on the Protection of Children) whose subject matter is brought within the exclusive or partial competence of the regional organisation, the view is taken that the constituent States are now no longer entitled to ratify it in their own right. The impact of such a position on the Convention and on the citizens who might have benefited from its provisions, as well as on the other Hague States who negotiated the Convention in good faith, would be very serious. Careful study is needed of ways to avoid an outcome which entails such serious costs with no benefits.