Some reflections of the Permanent Bureau on a general convention on enforcement of judgments

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*Introduction**

1 This is a preliminary, first response of the Permanent Bureau to the proposal made by the United States in the Legal Adviser's letter of 5 May 1992 'that the Hague Conference resume work in the field of recognition and enforcement of judicial decisions with a view to preparing a single convention to which Hague Conference Member States and other countries might become Parties and that would enter into force only between ratifying or acceding States that agree that it should enter into force as between them'. It is understood that the proposal aims at negotiating a convention whose scope, in terms of its subject matter, would be limited to 'civil and commercial matters', as are the Hague *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Article 1, see, however, also Article 23), the Brussels *Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*[1] [hereinafter: the Brussels Convention] (Article 1) and the Lugano *Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil or Commercial Matters*[2] [hereinafter: the Lugano Convention] (Article 1). This means that the future convention would, in principle, not apply to questions of family law including succession (with the possible exception of maintenance obligations, covered by the Brussels and Lugano Conventions but not by the Hague Convention), bankruptcy, social security and arbitration.

The lack of and need for a general convention on the recognition and enforcement of judgments

2 It strikes one indeed as an anomaly that at a time when the various economic regions in the world are becoming more interdependent every day and when the 1958 New York Arbitration Convention[3] and the 1980 Vienna Sales Convention[4] (in whose tracks the Hague *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* will hopefully follow) demonstrate the viability of worldwide legal frameworks in the commercial area, there is still, one hundred years after the First Session of the Hague Conference took place in 1893, no such multilateral instrument available on a worldwide scale for the recognition and enforcement of judicial decisions.
The current situation is certainly anomalous from the perspective of an international businessman who must now sometimes choose between arbitration with an option of the award being enforceable in over 80 countries, and litigation in a national court without any comparable option, except if the litigation is concentrated in countries connected by an international instrument on enforcement of judgments, such as Western Europe where the Brussels and Lugano Conventions apply. With rapidly expanding commercial contacts worldwide (despite occasional regression), legal uncertainty, delays and costs caused by the absence of a general enforcement of judgments convention are likely to interfere increasingly with the needs of trade and business.

3 The situation would have been different if the Hague *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* [hereinafter: the Hague Convention] had become a success. But it has not,[5] most probably for two main reasons: (1) the success of the Brussels Convention (which built to a large extent on the Hague Convention and was negotiated in part by the same persons), followed by the Lugano Convention, and (2) its unusual, complex form: Convention, Protocol of the same date and Bilateral Supplementary Agreements required by the Convention.

4 The current state of affairs is unsatisfactory in itself, but might have been more tolerable if all the countries in the world had a recognition and enforcement regime as receptive to foreign judgments as, for example, that available in the US.[6] This is not the case, however, as many countries impose restrictions such as jurisdiction tests, reciprocity, choice of law tests, *revision au fond*, etc. In addition, the Brussels and Lugano Conventions, in a – from a worldwide perspective – regrettable departure from the scheme of the 1971 Hague Convention, in their Articles 3 and 4 not only permit the use of exorbitant jurisdictional bases against persons not domiciled in a Contracting State but also require other Contracting States to recognize and enforce the resulting judgment. Jurisdictional exorbitance is not limited to Europe however: see the recent resuscitation by the United States Supreme Court of the exorbitant practice of 'tran-

* The abbreviation 'No' refers to the numbered paragraphs of this Note.
[1] As amended by the Conventions of Accession to the Brussels Convention (1) of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (in force for all EC States except Greece, Spain and Portugal since 1 June 1988); (2) of 25 October 1982 of the Hellenic Republic (in force for all EC States except Spain and Portugal since 1 April 1989); and (3) of 26 May 1989 of the Kingdom of Spain and the Portuguese Republic (as of 1 May 1992 in force for Spain, France, United Kingdom, Italy, Luxembourg, the Netherlands and, as of 1 July 1992, also for Greece and Portugal).
[2] As of 1 May 1992 this Convention was in force for Switzerland, France, the Netherlands, Luxembourg and the United Kingdom.
[3] The New York *Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* is in force for all 37 Hague Conference Members with the exceptions of Portugal, Suriname, Turkey and Venezuela, as well as for an additional 50 or so other countries of all continents.
[4] The Vienna *Convention of 11 April 1980 on Contracts for the International Sale of Goods* is in force for the following Hague Conference Member States: Argentina, Australia, Austria, Chile, China, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Hungary, Italy, Mexico, Netherlands, Norway, Spain, Sweden, Switzerland, United States and Yugoslavia.
[5] The Hague Convention and its Protocol are in force only for three States: the Netherlands, Portugal and Cyprus.
[6] Although the full faith and credit clause of the Constitution of the US does not apply to 'internationally foreign' judgments, there is a strong tendency in the US to give such judgments effects similar to those that sister state judgments enjoy under the full faith and credit clause.

sient' or 'tag' jurisdiction[7] which premises the power to adjudicate on the mere fact that the defendant was served with process in the forum State.

The Hague Convention

5 Eliminating exorbitant grounds of jurisdictions not directly, but indirectly, in the recognition and enforcement stage[8] is one of the main purposes of the 1971 Convention and its Protocol. In fact, this is what the Supplementary Protocol is all about. After Articles 10 and 11 of the main Convention, in what might be called the 'white list', have set out the internationally respectable grounds of jurisdiction, the Supplementary Protocol in its Article 4 provides a 'black list' of exorbitant grounds of jurisdiction. Despite the general lack of success of the Hague Convention, this black list has acquired international authority as a codification of internationally *un*acceptable grounds of jurisdiction, as is evidenced by their inclusion in several international instruments: the Copenhagen Convention of 11 October 1977 among Denmark, Finland, Iceland, Norway and Sweden (Article 2), the Oslo Treaty of 17 June 1977 between Germany and Norway (Article 23) and the Ottawa Convention of 24 April 1984 between the United Kingdom and Canada.

6 The weakness of the 1971 Convention, if any, in all likelihood does not stem from its substance but rather from its complicated *formal* structure in combination with its indecisiveness concerning the items listed in Article 23 of the main Convention. The explanation is to be found in the Convention's history. Firstly, the Extraordinary Session was unable to complete its mandate and left the task of drawing up a list of generally agreed exorbitant jurisdictional grounds to a Special Commission, which drew up the Protocol; there is no technical reason, however, why the Convention and the Protocol should not be combined in one single instrument. Secondly, the Extraordinary Session opted for a system of bilateralization which may, as such, still be a good idea[9] but which, in combination with the extensive list of 23 optional items in Article 23, led to the complicated system of Supplementary Agreements.[10]

7 We are now 25 years further, and it would seem that in light of subsequent developments, in particular the Brussels and Lugano Conventions, it may be possible to achieve broader agreement on the inclusion or exclusion of the various items of Article 23 of the Hague Convention. Each and all of them concern clearly defined issues, many if not most of which have now been resolved by the Brussels and Lugano Conventions. If this were the case, the agreeable scope of the Convention might well be substantially broader than that which was attainable in the late sixties, and there might be no need for bilateral Supplementary Agreements.

8 The Permanent Bureau is strongly convinced that the substance of the Hague Convention and its Protocol is still essentially valid. The Permanent Bureau is open, however, to the objection that the *form* of the instrument may cause inconvenience. It may well be, therefore, a worthwhile exercise to examine the Hague Convention anew in light of the present circumstances and either to conclude that the Convention still has a future or, if that does not seem to be the case, to explore the possibility of drawing up a single instrument based on the Convention and inspired by the Brussels and Lugano Conventions and other recent instruments.[11]

The Brussels and Lugano Conventions

9 The Brussels and Lugano Conventions undoubtedly amount to an unprecedented regional achievement in the codification of international civil procedure. Yet '[i]t was only by the device of isolating application of existing exorbitant bases of jurisdiction within the states of the European Community, but preserving them in their application to non-European domiciliaries, that the framers of the Brussels Convention were able to prepare a new supranational code on jurisdiction.'[12] Except for the treaties referred to *supra* No 5 – as far as the Permanent Bureau is aware – none of the EC States has so far assumed 'in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in another Contracting State against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded as a ground of jurisdiction specified in the second paragraph of Article 3' (Article 59 of the Brussels and Lugano Conventions).

10 The Brussels Convention is a closed instrument, and is open only to EC Members. The Lugano Convention is open to accession – the observers of the Permanent Bureau were among those insisting upon this during the negotiations – but only on the invitation of a Contracting State and with the consent of all Contracting EC and EFTA States and, even then, any Contracting State can refuse to apply the Convention in the relations to the acceding State (Article 62, paragraph 1(b), and paragraph 4). These are, therefore, very severe conditions for accession as is emphasized by the Jenard/Möller Report (No 76). The framers of the Lugano Convention thought here of non-European States, such as the United States and Canada, and they opted in fact for a system which allows any Contracting State to accept or not a non-EC/EFTA Member State as a treaty Member.[13]

[7] See *Burnham* v. *Superior Court* 110 S.Ct. 2105 (1990).
[8] The US and UK delegations to the Extraordinary Session (1966) had originally proposed to eliminate exorbitant grounds of jurisdiction both directly and indirectly (Work. Doc. No 30, *Actes et documents de la Session extraordinaire (1966)* (hereinafter: *Actes et documents*), p. 288; the first part of this proposal was subsequently withdrawn, see *Rapport explicatif* on the Protocol (Droz), *Actes et documents*, p. 498).
[9] See, *infra*, No 24.
[10] The idea was that ratification of the main Convention and its Protocol would be sufficient and that the Supplementary Agreements could be concluded by the Executive, see Fragistas Report, *Actes et documents*, p. 362.
[11] *E.g.* the Ottawa Treaty of 24 April 1984 between Canada and the United Kingdom (mentioned *supra* No 5); the Inter-American *Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, etc.
[12] C. McLachlan, Report for the Newly Established ILA Committee on International Civil Litigation, p. 2 (1992).
[13] The Permanent Bureau has been informed that in the framework of political co-operation within the EC there has been some discussion on the possibility of inviting Poland, Czechoslovakia and Hungary – countries which were not thought of as potential Contracting States at the time of drafting of the Lugano Convention – to accede to the Lugano Convention; moreover it is not to be excluded that the Baltic States may be admitted as Members of EFTA which would qualify them automatically for accession to the Lugano Convention.

Options

11 Which options are open to Member States of the Conference who see the (potential) need for a convention on (jurisdiction and) recognition and enforcement of judgments which would bridge the important economic centres in the world? It would seem that the three main options would be the following:

(1) acceding to the Lugano Convention;

(2) becoming a Party to the 1971 Hague Convention and its Protocol;

(3) negotiating and becoming a Party to a new convention on (jurisdiction and) recognition and enforcement of judgments.

12 (1) Acceding to the Lugano Convention may be a possibility for some States, but (see No 10 *supra*) only on invitation and with the consent of all Contracting States to the Lugano Convention. Moreover, the Lugano Convention's solutions may pose problems. First, the exorbitant jurisdictional bases enumerated in Article 3 of Lugano may violate due process standards of some States and, accordingly, those States could not agree to enforce judgments rendered in another Contracting State on one of these bases against a person not domiciled in a Contracting State. Secondly, the exhaustive listing of direct grounds of jurisdiction may pose problems to some States: the very principle of non-review by the enforcing court of the jurisdictional grounds assumed by the first court may not be acceptable; the system may be too rigid and some of the jurisdictional bases recognized by Lugano may well be either overly broad or overly restrictive.

(2) Becoming a Party to the Hague Convention and its Protocol and concluding the Supplementary Agreements referred to in Chapter V of that Convention is a second option, which should perhaps not be too readily excluded. After all, the Convention and its Protocol are in force as international instruments and no major objections have been raised against it, except for its somewhat complicated form. It might be worthwhile examining with the current States Parties – the Netherlands, Portugal and Cyprus – whether it would not be possible to agree on a standard Supplementary Agreement.

(3) If none of the two options above were acceptable, the third main option would be to negotiate a new convention which might lean towards a convention of the Lugano type – based on direct grounds of jurisdiction – or towards the Hague Convention – based on indirect grounds of jurisdiction – or it might, as suggested in the US proposal, be of an intermediate type.

Objectives of a new convention

a *Eliminating exorbitant jurisdictional grounds*

13 Whichever of the three types of convention just mentioned is chosen, one of its main purposes should be to deal in clear terms with jurisdictional bases that are unacceptable for recognition purposes. As we have seen, an authoritative list of such bases already exists and is contained in Article 4 of the Protocol to the Hague Convention.

b 'Traité double', 'traité simple' *or an intermediary solution?*

14 Should the Convention be a '*traité simple*', providing only for indirect grounds of jurisdiction, or a '*traité double*', providing also for direct grounds of jurisdiction? The Legal Adviser of the US makes an unorthodox proposal: 'While taking account of the 1971 Hague Convention, we would propose that the Hague Conference build on the Brussels and Lugano Conventions in seeking to achieve a convention that is capable of meeting the needs of and being broadly accepted by the larger community represented by the Member States of the Hague Conference. For example, it appears that it might be possible to accept certain of the bases of jurisdiction and bases for recognition and enforcement of judgments set out in the Brussels and Lugano Conventions and thereby make provision for a generally accepted system for use in Europe and beyond. However, other aspects of these Conventions may not be so broadly acceptable and would need change to accommodate the needs and preferences of countries from other regions of the world than Western Europe. It seems to us that we need not necessarily choose between a *traité simple*, dealing essentially only with those judgments that are entitled to recognition and enforcement in party States, and a *traité double* also dealing with permissible bases of jurisdiction for litigation involving persons or entities habitually resident in party States. We believe that there should be consideration of the possibility for party States to utilize jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention.'

15 The main advantage of this proposal over a *traité simple*, it would seem, is that it will achieve partial *uniformity* at the level of jurisdictional grounds among Contracting States. The uniformity will only be partial because countries would remain free to maintain existing non-exorbitant grounds of jurisdiction and, indeed, might create new ones which leaves room for new developments in response to new needs. This would mean, however, that the enforcing court, just as in the case of a *traité simple*, but unlike the Lugano Convention, *could* not *dispense with controlling the grounds upon which the original court has based its jurisdiction*. Moreover, if the grounds of jurisdiction offered by the new convention were to be direct, but not exclusive, this must mean that the parties were offered the choice between approaching different courts in different jurisdictions. This would mean opening the doors for forum shopping and it would lead to difficult problems of *lis pendens*.

16 One of the problems with a convention of a *traité double* type is that unless the new grounds of jurisdiction were to be framed very close to those of the Lugano Convention, one may expect some reluctance on the part of (some of) the Lugano countries to accept such grounds.[14]

[14] The negotiations among the six original EC countries and Ireland, the United Kingdom and Denmark, then among those nine and the three new members, followed by those among the EC and EFTA countries have shown that possibilities for change from the basic scheme were, in fact, very limited, if not minimal.

Additional pressure to stick as closely as possible to the existing Brussels and Lugano texts may come from the system of uniform interpretation. The EC Court of Luxembourg ensures the uniform interpretation of the Brussels Convention. In the Lugano Convention a system has been set up, under *Protocol No 2 on uniform interpretation of the Convention*, by which the courts of each country will 'pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention', and a 'system of exchange of information concerning judgments delivered pursuant to this Convention as well as relevant judgments under the Brussels Convention' has been set up.[15] Given the weight and authority of the Court in Luxembourg, this will in all likelihood mean that this Court will have a decisive impact on the course of the interpretation of the Lugano Convention by the EFTA countries.

17 The format of a *traité simple* would avoid these difficulties, the EC or EFTA countries would be less under pressure to stick as closely as possible to the Brussels or Lugano Convention texts, and the development of new non-exorbitant jurisdictional grounds could continue. At the same time, if the Convention were to be broadly ratified, the indirect grounds of jurisdiction would acquire international respectability which would have a uniformizing effect. In short, a good *traité simple* would have many of the same advantages as the intermediate suggestion, while avoiding its inconveniences.

18 Of course, it cannot be excluded that negotiations in the Hague Conference might lead to a new *traité double*. The most cautious approach, however, it would seem would be to start with examining the possibility of a *traité simple* and see whether one could made a further step. This was also the course taken by the initial negotiators of the Brussels Convention.

19 Elements for a 'white list' of acceptable indirect jurisdictional grounds may be found in Articles 10 and 11 of the 1971 Convention. Some of these will need revision in light of subsequent developments (*e.g.* 10(4), *lex loci delicti*). Additional inspiration can be found in the Lugano Convention, although questions may arise as to the international (*i.e.* beyond Europe) acceptability of such grounds of jurisdiction as the option for support claimants to sue, at their option, the obligor either in their domiciliary forum or in the obligor's home country; the jurisdictional privileges granted to policy holders and consumers; Article 5(1) relating to the *forum contractus* as this provision has been interpreted, in light of the Rome Convention, by the European Court of Justice, etc.[16]

c *Simplified recognition and enforcement procedures*

20 One of the main purposes of a new convention should, no doubt, be to provide for a simplified and expeditious method for obtaining the recognition and enforcement of judgments that benefit from the convention. The Brussels and Lugano Conventions provide for such a simplified procedure in their Chapters III. Even though under a *traité simple* the enforcing court cannot dispense with a control for the jurisdictional grounds of the original judgment, it is conceivable that the procedure for enforcement[17] may nevertheless be a simple one. One could imagine, for example, that at the request of any interested party the original court confirms that it has verified that it has assumed jurisdiction on a ground which corresponds with one or more of the grounds of jurisdiction of the Convention. In that case a simplified procedure along the lines of Articles 27 and 34 of the Lugano Convention could be established.

Negotiating within the Hague Conference

21 Choosing the Hague Conference as a forum for negotiations would present certain advantages over other fora as well as involve some limitations. Clearly, negotiations within the framework of the Hague Conference would not be possible if some Member States were to be excluded from those negotiations. Just as the 1971 Convention and its Protocol were negotiated among all Hague Conference Members at the time, so would any new negotiations.

Obviously, the Hague Conference has its limitations in terms of its infrastructure. It would not be possible to negotiate in twelve languages or so. On the other hand, the Conference can offer a certain continuity in negotiation procedures, flexibility, informal working methods and expertise.

22 The Hague Conference now includes 37 Member States, including all EC States and all EFTA States with the exception of Iceland and Liechtenstein. These two countries may be invited to participate in the work of the Conference if it is felt that 'by virtue of the subject treated ... such participation is necessary'.[18] The Conference's voting procedures are flexible: it would be conceivable to proceed largely by way of 'indicative voting' or consensus.

23 The US proposal suggests that the new convention 'would enter into force only between ratifying or acceding States that agree that it should enter into force as between them'.
Technically speaking this is certainly feasible: one could very well imagine a system by which the establishment of treaty relationships between ratifying States would be made subject to mutual acceptance of such relationships. Such a system would come close to that of Article 38(4) of the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* for accessions, except that it would extend to the negotiating States themselves. It would amount to a 'bilaterali-

[15] The Luxembourg Court's Registrar is designated as the 'central body' for transmission, classification and communication of relevant judgments and documents (Article 2 of the Protocol).
[16] Further inspiration might be found in the Nordic Convention of 1977; in the Ottawa Treaty of 24 April 1984 between Britain and Canada; and Articles 1-3 of the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, 1984.

[17] Recognition is likely to present less problems – we therefore leave it aside for the sake of simplicity.
[18] Decision of the Fourteenth Session of the Hague Conference, Final Act D1, *Actes et documents de la Quatorzième session (1980)*, Tome I, p. I-63.

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zation' of the treaty regime as was the idea of the 1971 Hague Convention, but in a much less complicated way.

24 Although technically feasible, a system of bilateralization would have the disadvantage of creating a crumbled pattern of treaty relations. Is bilateralization unavoidable? Is it necessary to presume that, in respect of certain States – even Member States of the Hague Conference – judgments *in civil and commercial* proceedings made by the judiciary of those States can, as a rule, *not* be trusted? Rather than excluding the whole category of such judgments for no reason other than that they originate from a certain State, it would seem preferable to try and negotiate a convention which would permit a check on a case-by-case basis. The techniques of permitting refusal of enforcement of a judgment in the case of manifest incompatibility with public policy (*ordre public*) of the requested State or with its requirements of due process of law or if it was obtained by fraud are so well advanced that it should be possible to negotiate a convention system which would leave control over foreign judgments to the judiciary (*cf.* Articles 5 and 6 of the Hague Convention and Articles 27 and 34 of the Brussels and Lugano Conventions, as developed by the case law of the Luxembourg Court).

25 Obviously there are many aspects to this very important topic which need to be discussed and it may well be too early to take any clear decisions at the meeting of the Special Commission on general matters and policy in June 1992. It would seem to the Permanent Bureau that it might be advisable well ahead of the Seventeenth Session to organize a half-week meeting of experts in this particular field to discuss the feasibility of the topic in order to enable the Diplomatic Conference to take a decision.