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NOTE ON ARTICLE 7(1)(c) OF THE 2016 PRELIMINARY DRAFT CONVENTION

drawn up by the co-Rapporteurs *of the draft Convention and the Permanent Bureau*

NOTE SUR L'ARTICLE 7(1)(c) DE L'AVANT-PROJET DE CONVENTION DE 2016

établie par les co-rapporteurs du Projet de Convention et le Bureau Permanent

Preliminary Document No 5 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments

Document préliminaire No 5 de décembre 2016 à l'attention de la Commission spéciale de février 2017 sur la reconnaissance et l'exécution des jugements étrangers

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I. Introduction

1. Further to a proposal from Israel (Work. Doc. No 24), the Special Commission debated the inclusion of the phrase "situations involving infringements of security or sovereignty of [the requested State]" in Article 7(1)(c) of the 2016 preliminary draft Convention. The phrase in question was placed in square brackets for further consideration by the Special Commission at its 2017 meeting.

2. During the same meeting of the Special Commission, it was proposed (Work. Doc. No 30) to delete the term "manifestly" from Article 7(1)(c), because the term was considered to be ambiguous. However, it was also observed that the term "manifestly" has been used in public policy provisions of Hague Conventions for decades.

3. Article 7(1)(c) currently reads as follows:

Article 7
Refusal of recognition or enforcement

1. Recognition or enforcement may be refused if –
[…]
c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State [and situations involving infringements of security or sovereignty of that State];

4. In preparation for further discussions on this ground for refusal, this note aims, on the one hand, to provide background information on the phrase "situations involving infringements of security or sovereignty of [the requested State]" in Article 7(1)(c) and, on the other hand, to address the separate but related issue of the use of "manifestly" in the same provision.

II. On the inclusion of the phrase "situations involving infringements of security or sovereignty"

A. Materials regarding the 1965 Service Convention and 1970 Evidence Convention[1]

5. A refusal on the grounds of infringement of sovereignty or security of the forum State has a long history in the work of the Hague Conference in the area of cross-border civil procedure.

6. The phrase is found in several Conventions, including those concluded before the Hague Conference was established as a permanent Intergovernmental organisation.[2]

7. The 1965 Service Convention (Art. 13(1)) and the 1970 Evidence Convention (Art. 12(1)(b)) also use similar wording,[3] though only in the particular contexts that these two conventions contemplate.

8. The relevant provisions of these Conventions are as follows:

1965 Service Convention
Article 13

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1 *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*

2 *Convention of 14 November 1896 relating to Civil Procedure* provided that a letter of request could be refused execution if the requested State "deems that execution would infringe its sovereignty or security" (Art. 7(3)); *and Convention of 17 July 1905 relating to Civil Procedure* (1905 Civil Procedure Convention) (Art. II(3)(3)) and the *Convention of 1 March 1954 on Civil Procedure* (1954 Civil Procedure Convention) used identical words to the above.

3 See also the "predecessors" of these Conventions: the1905 and 1954 Civil Procedure Conventions.

(1) Where a request for service complies with the term of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would ***infringe its sovereignty or security****.*

1970 Evidence Convention
Article 12

> *(1) The execution of a Letter of Request may be refused only to the extent that –*
> *a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or*
> *b) the State addressed* ***considers that its sovereignty or security would be prejudiced*** *thereby.*

9. In the Practical Handbooks on the Operation of the 1965 Service Convention and on the Operation of the 1970 Evidence Convention, the reference to the notion of "sovereignty or security" is further clarified:

- The focus of the ground is upon the actual act (*i.e.*, the act of notification or the letter of request) and whether that act infringes the requested State's sovereignty or security.[4] That is, it looks to the actual compliance with request for service or the execution of the letter of request for evidence, as opposed to the underlying action or the future use of the evidence or document served.
- In the context of the 1965 Service Convention and the 1970 Evidence Convention, using the ground of "public policy" as an alternative was rejected on the basis that this formulation would be "too vague and ambiguous". The concept of "sovereignty or security" was considered "more precise and limited" than public policy.[5]
- More broadly, courts and commentators agree that the concept **"sovereignty or security" differs from public policy**. Commentators have also pointed out that this concept of public policy must be read narrowly. In the context of the 1965 Service Convention, it was stated that the concept has a "convention-restricted meaning".[6]

10. It should also be noted that the prejudice to "sovereignty or security" provides the *sole ground* for refusal of a request for service under the 1965 Service Convention that is compliant with the provisions of the Convention, and one of two grounds for refusal of a Letter of Request for the taking of evidence under the 1970 Evidence Convention that complies with the provisions of the Convention. There have been no other conventions that refer to sovereignty or security as being a subset of the public policy exception, but it has been discussed and considered in the context of negotiating other Conventions.

B. Discussions on the 1999 preliminary draft Convention and the 2005 Choice of Court Convention

11. A reference to the infringement of the sovereignty of a State was considered during the negotiations of the first phase of the Judgments Project and of the 2005 Choice of Court Convention. However, these discussions referred specifically to the service of documents, rather than considering an infringement of security or sovereignty as an independent ground of refusal of recognition and enforcement.

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4 See Permanent Bureau of the Hague Conference on private international law, *Practical Handbook on the Operation of the 1965 Service Convention* (Service Handbook), 4th ed., The Hague, 2016, and p. 71, para. 221 (citations omitted); and Permanent Bureau of the Hague Conference on private international law, *Practical Handbook on the Operation of the 1970 Evidence Convention* (Evidence Handbook), 3rd ed., The Hague, 2016, p. 110, para. 311 (citations omitted).

5 Service Handbook, 2016, p. 71, para. 222 (citations omitted).

6 *Ibid.*, para. 223 (citations omitted).

C. Discussions on the 1999 preliminary draft Convention

1. Relevant provision of the 1999 preliminary draft Convention[7]

Article 28
Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if –
[…]
*c) the judgment results from proceedings incompatible with **fundamental principles of procedure** of the State addressed, including the right of each party to be heard by an impartial and independent court;*
*d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was **not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence**;*
*e) the judgment was obtained by **fraud in connection with a matter of procedure**;*
*f) recognition or enforcement would be **manifestly incompatible with the public policy** of the State addressed.*

2. Comments on the 1999 preliminary draft Convention[8]

12. Regarding the correlation between sub-paragraphs d) and e), the Korean expert reported one case where the Korean Supreme Court refused to recognise the judgment because the document which instituted the proceedings was served on the defendant in such a way that, though it gave the defendant sufficient time to arrange for his defence, the service was in violation of either the rules of international law, or the law of the State where such service took place.[9]

13. On this same matter, Japan commented (at p. 352) that:

> "It is our view that **any <u>service of documents</u> that infringes the sovereignty of a State** should **not be given legal effect** in the context of recognition or enforcement of judgments deriving from such service […] This Article should be re-drafted so as to make it clear that, **should such infringement of the sovereignty occur, the court of the State addressed may refuse the recognition or enforcement of the foreign judgment**."[10]

3. Minutes No 9 Meeting of Monday 11 June 2001 (afternoon)[11]

14. The Republic of Korea and Japan had jointly tabled a proposal (Work. Doc. No 25). As explained by an expert of the Republic of Korea, the proposal:

- sought to "safeguard the sovereignty of the State where the service of process took place",[12] whereby recognition or enforcement of a decision could be denied where service of process "had been grossly negligent and would constitute a manifest violation of the rules of the State addressed";[13]
- provided the court addressed with "a discretion to refuse recognition or enforcement in the case of a gross violation of due process arising out of a defective service of process";[14] and

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7 Hague Conference on private international law, *Proceedings of the Twentieth Session* (2005), Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 191.
8 Prel. Doc. No 14 of April 2001, *Proceedings of the Twentieth Session* (2005), Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 344.
9 *Ibid.*, p. 348.
10 *Ibid.*, p. 352.
11 *Ibid.*, p. 523.
12 *Ibid.*, p. 526.
13 *Ibid.*
14 *Ibid.*

- addressed the fact that "the public policy reservation was not suited for this kind of case because grounds for refusal should be tailored to specific circumstances." [15]

15. The *co-Rapporteur*, Mr Nygh, was asked whether the State addressed could invoke the public policy exception to deny recognition or enforcement when the service of process constituted a gross violation of the sovereignty of the State addressed. Mr Nygh doubted whether the mere fact that the service of process violated the rules of the State addressed could be deemed to constitute a gross violation of its sovereignty. Even if this was the case, Mr Nygh considered that the notion of a gross violation of sovereignty was too subjective.[16]

16. It is important to note that, in prior negotiations, the matter of an explicit reference to the sovereignty was mainly discussed with regard to the ground of refusal relating to the service of documents. This raises the question whether a reference to "*infringements of security or sovereignty"* should not rather be considered in the context of Article 7(1)(a)(ii) of the 2016 preliminary draft Convention (dealing more specifically with notification).

D. The 2005 Choice of Court Convention

17. Article 9 of the 2005 Choice of Court Convention does not explicitly refer to situations involving infringements of security or sovereignty [of the requested State] as a ground for refusal of recognition or enforcement. With regard to the ground of refusal relating to the service of documents (see Art. 9(c)(ii) of the 2005 Choice of Court Convention, which is mirrored in Art. 7(1)(a)(ii) of the 2016 preliminary draft Convention), the Hartley / Dogauchi Report further clarifies that:

- Some States "consider the service of a writ to be a sovereign act", such that a State would "consider that it infringes their sovereignty for a foreign writ to be served on their territory without their permission";[17] and
- Such States "would be unwilling to recognise a foreign judgment if the writ was served in a way that they regarded as an infringement of their sovereignty."[18]

18. It is noteworthy that the formulation of the provision at Article 9(c)(ii) of the 2005 Choice of Court Convention and at Article 7(1)(a)(ii) of the 2016 preliminary draft Convention states "incompatible with fundamental principles of the requested State concerning service of documents" instead of the language of Article 13 of the 1965 Service Convention.

E. A reference to selected national law provisions

19. The Permanent Bureawu has reviewed the use of "sovereignty or security" as a ground of refusal of recognition and enforcement in the national law of selected States. For example, the national laws of Israel,[19] the People's Republic of China,[20] and the Russian Federation[21] explicitly include a reference to "sovereignty and security" as a separate ground for refusal of the recognition and enforcement of foreign judgments.

1. Israel

20. In Israel, Article 7 of the Foreign Judgments Enforcement Law provides:

> *A foreign judgment will not be declared enforceable if its enforcement is liable to* ***prejudice the sovereignty or security*** *of Israel.*

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15 *Ibid.*

16 *Ibid.,* p. 527.

17 T. Hartley and M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp-Oxford-Portland, Intersentia, 2010, p. 829, paras 187 [hereinafter, "Hartley / Dogauchi Report"].

18 *Ibid*. In this regard, it should be noted that if *international* service was effected under the 1965 Service Convention, or the 1963 Vienna Convention on Consular Relations, or national law of States (including any bilateral treaties), it can be deemed as valid. Therefore, it should be treated as such and cannot be visited or challenged at the enforcement stage later on.

19 Art. 7 of the Foreign Judgments Enforcement Law.

20 Art. 282 of the Civil Procedure Law of the People's Republic of China [Minshi Susong Fa] (as amended in 2012).

21 Art. 412 of the Russian Code of Civil Procedure, No 138-Fz of 14 November 2002.

21. Case law and doctrine have further considered the application of this article. Particularly, it is noteworthy that:

- certain commentators have suggested that Article 7 is "superfluous", as a situation where the enforcement of a foreign judgment adversely affects Israel's sovereignty or security would also constitute a violation of public policy under Article 3(3) of the same law;[22]
- in *Ungar, Minor, et al. v. Palestinian Authority, et al.* the court held that the Article 7 ground for refusal is a specific instance of the ground for refusal laid down in Article 3(3) (public policy).[23]

2. People's Republic of China

22. Article 282 of the Civil Procedure Law of the People's Republic of China sets forth the statutory requirements for recognition and enforcement in China of a judgment rendered by a foreign court. This provision provides, *inter alia,* that*:*

> *… If a legally effective judgment or ruling rendered by a foreign court* ***contradicts the basic principles of the law of the People's Republic of China or the national sovereignty, security, and social and public interest of China****, the people's court shall reject the application of recognition and enforcement.*

23. In addition, the People's Republic of China has concluded bilateral treaties for the recognition and enforcement of foreign judgments with 27 countries. Within these bilateral treaties, explicit use of the wording "sovereignty" and "security" is made, for instance, in:

a) the Bilateral Treaty on Civil and Commercial Judicial Assistance of 4 May 1987 between the People's Republic of China and the French Republic, whose Article 22 provides:

> *A judgment shall not be recognised or enforced in situations where*
> *[…]*
> *(5) the enforcement of the judgment is* ***prejudicial to the sovereignty, security*** *or public order of the requested Party.*

and

b) the Bilateral Treaty on Civil Judicial Assistance of 20 May 1991 between the People's Republic of China and the Italian Republic, whose Article 21 provides:

> *A judgment shall be recognised and proclaimed as enforceable, with the following exceptions:*
> *[…]*
> *(6) the content in the judgment is* ***prejudicial to the State sovereignty, security*** *or public order of the requested Contracting Party.*

24. However, no case law on these provisions is reported to date.[24]

3. Russian Federation

25. In the Russian Federation, Article 412 of the Code of Civil Procedure provides a list of grounds for refusing recognition and enforcement of foreign judgments. In particular, the provision states:

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[22] See, *e.g.*, Amos Shapira, "Recognition and Enforcement of Foreign Judgments *in personam* in Israel" (1977) 3 *Tel Aviv University Studies in Law* 171, p. 191.

[23] D.C.C. (Jm.) 4318/05, Nevo (31 August 2008). In this case, the opponents contested the enforcement of a U.S. judgment for damages against the Palestinian Authority and the Palestine Liberation Organization on the ground that it would be liable to influence Israel on many levels, including direct influence on the security situation and foreign relations with the Palestinian Authority. The District Court, however, held that these contentions lacked even minimal substantiation, and were unsupported, *e.g.*, by an official policy of the State of Israel.

[24] *Cf.* Qisheng He, "The Recognition and Enforcement of Foreign Judgments between the United States and China: A Study of *Salian v. Robinson"*, in 6 *Tsinghua China Law Review* (2013), p. 23.

1. A rejection of a forcible execution of the decision of a foreign court may be admissible if: [...]

*5) the execution of the decision may **cause damage to the sovereignty** of the Russian Federation or **present a threat to the security** of the Russian Federation, or contradicts public law and order in the Russian Federation.*

26. The Supreme Arbitrazh (Commercial) Court of Russia published an Information Letter in 2013 about the application of public policy as a ground of refusal in the recognition and enforcement of foreign judgments and arbitral awards.[25] This document further clarifies that the public policy exception applies when the sovereignty or security of the State is at stake, when recognition or enforcement affects the interests of major social groups, or when constitutional rights and freedoms of private parties are violated.

F. Preliminary conclusions

- The research materials above highlight that, in the framework of the 1965 Service and 1970 Evidence Conventions, the State addressed may refuse to comply with the request for service or for evidence if that request would infringe its "sovereignty or security". However, requests for service or evidence can still be granted under other available instruments.

- In line with Article 9(c)(ii) of the Choice of Court Convention, Article 7(1)(a)(ii) of the 2016 preliminary draft Convention refers to notice that is "incompatible with fundamental principles of the requested State concerning service of documents" instead of referring to notice that constitutes "a fundamental violation of the sovereignty or security of the requested State".

- During prior negotiations within the Judgments Project, the matter of an explicit reference to sovereignty was mainly discussed with regard to the ground of refusal relating to the service of documents. The Special Commission may wish to consider whether a reference to "*infringements of security or sovereignty"* should not rather be considered in the context of Article 7(1)(a)(ii) of the 2016 preliminary draft Convention (dealing more specifically with notification) rather than in the context of Article 7(1)(c) of the same text.

- With regard to the current reference to "*infringements of security or sovereignty"* in connection with the public policy exception (Art. 7(1)(c)), the Special Commission may wish to consider the necessity of retaining the text in square brackets, or rather omitting it. The Explanatory Report could clarify that the public policy exception should be interpreted as covering "*infringements of security or sovereignty"*.

- The following paragraphs illustrate the two approaches, as requested by the Chair of the June meeting of the Special Commission, and propose some tentative language for the draft Explanatory Report:[26]

- **Option 1**: the text in square brackets is retained:

- Departing from Article 9(e) of the 2005 Choice of Court Convention, Article 7(1)(c) of the future Convention includes an express reference to "*infringements of security or sovereignty"* as one of the exceptional situations that fall under the public policy exception. This is in line with certain States' laws, which specifically refer to "*infringements of security or sovereignty"* as a ground of refusal. Accordingly, a judgment whose recognition or enforcement infringes the national security or sovereignty of the requested State may be refused under the Convention.

  - It should also be noted that the reference to "*infringements of security or sovereignty"* should not be interpreted as being exhaustive. The requested State

[25] Information letter No 156 *Review of the Arbitrazh Courts' Practice of Considering Cases Concerning the Application of Public Policy as a Basis to Refuse the Recognition and Enforcement of Foreign Judgments and Arbitral Awards*, 26 February 2013, available at http://www.arbitr.ru/as/pract/vas_info_letter/82122.html (in Russian).

[26] Minutes No 7, para. 34, available through the Secure Portal of the Hague Conference at < www.hcch.net >.

may thus still invoke the public policy exception in Article 7(1)(c) for other situations that are in breach of its fundamental principles, yet do not constitute an infringement of its security or its sovereignty.

- **Option 2**: the text in square brackets is omitted:

  - This provision is modeled on Article 9(e) of the 2005 Choice of Court Convention. States may be unwilling to recognise or enforce a foreign judgment if such recognition or enforcement would amount to an infringement of the requested State's security or sovereignty or a violation of other fundamental principles of the requested State.

III. Discussions on the use of the term "manifestly" in regard to the public policy exception

27. During the June meeting of the Special Commission, the possible ambiguity of the adverb "manifestly" in Article 7(1)(c) of the 2016 preliminary draft Convention was raised. It was proposed that the term "manifestly" be deleted from that article. However, the term 'manifestly / manifestement' is one that is frequently used in previous Hague Conventions since 1958[27] and in other similar international instruments.[28] In fact, apart from some very early Hague Conventions, which referred to "*un motif d'ordre public*",[29] all other public policy provisions in previous Hague Conventions included the term "manifestly / manifestement".

28. The term "manifestly" is intended to set a high threshold. It is widely accepted that the concept of public policy must be "interpreted strictly" and recourse thereto "is to be had only in exceptional cases".[30] That is, the recognition or enforcement of the judgment in question "would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of th[e] State" in which enforcement is sought or of a right recognized as being fundamental within that legal order.[31]

29. It is apparent that the word "manifestly" has been used in previous cases to discourage the overuse of the public policy exception and to limit its use only where the recognition and enforcement of the relevant judgment would lead to an "intolerable result".[32] If the term were not included in the future Judgments Convention, it may be arguable that its omission amounts to an implicit acceptance of a broader scope of application of the public policy exception.

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[27] See, *e.g.*, the *Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*, at Art. 2; the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*, at Art 16; the *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, at Art. 10; the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, at Arts 5 and 14; the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, at Art. 18; the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, at Art. 24; the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, at Arts 22 and 23; the *Convention of 13 January 2000 on the International Protection of Adults*, at Arts 21 and 22; the *Convention of 30 June 2005 on Choice of Court Agreements*, at Arts 6 and 9, and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, at Art. 22; the 2015 *Principles on Choice of Law in International Commercial Contracts*, at Art. 11(3). It is noted that some of these Conventions refer to the public policy exception in the context of determining the applicable law to the dispute.

[28] See Art. 34 of the 2007 Lugano Convention; the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), at Art. V(2).

[29] See *e.g.* the *Convention of 15 June 1955 on the law applicable to international sales of goods*.

[30] See Sheriff Court of Lothian and Borders at Selkirk, 2012 S.L.T. (Sh Ct) 189, [with regard to Art. 22 Convention of 13 January 2000 on the International Protection of Adults], "the use of the word 'manifestly' suggests circumstances in which recognition of an order would be repellent to the judicial conscience of the court."; W v. W (Foreign Custody Order: Enforcement), 2005 WL 2452746, [Applying the Brussels II Regulation (EC No 1347/2000)], "'the court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention. With regard, more specifically, to recourse to the public policy clause the court has made it clear that such recourse is to be had only in exceptional cases'."

[31] See the Explanatory Report of the 2007 Lugano Convention by Professor Fausto Pocar, OJ 2009/C 319/01.

[32] See Permanent Bureau, *Practical Handbook for Caseworkers under the 2007 Child Support Convention*, The Hague, 2013, p. 103; see also Chaudhary v. Chaudhary, Court of Appeal, [1985] 2 W.L.R. 350.

After all, the use of “manifestly” is intended to ensure that the judgments of Contracting States are recognised and enforced by other Contracting States to the greatest extent possible.

30. In conclusion, in regard to the term “manifestly,” the term has been used in most of the previous Hague Conventions and other relevant international instruments to set a high threshold. It is meant to ensure that the States use the public policy exception only in case the recognition or enforcement of a judgment would constitute a manifest breach of the essential legal provisions of the State. It appears from the cases and previous discussions that the use of such term has not given rise to any significant issues regarding its interpretation. In light of this, the *co-Rapporteurs* and the Permanent Bureau recommend leaving the term in Article 7(1)(c).