

Council on General Affairs and Policy of the Conference – March 2017

Document	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 16 of February 2017
Title	Framework of voting by correspondence, including e-mail	
Author	Permanent Bureau	
Agenda item	Item VI.4	
Mandate(s)	n.a.	
Objective	To develop a policy for voting by correspondence, including e-mail, taking into account the existing regulatory framework, recent instances of written voting procedures and the respective processes that applied, as well as comments made by Member States during the Meeting of the Standing Committee of 9 February 2017.	
Action to be taken	For Approval <input checked="" type="checkbox"/> For Decision <input type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	n.a.	
Related documents	n.a.	

A. Introduction

1. A key aspect of intergovernmental organisations (IGOs) is their ability to take decisions through their relevant decision-making organs.¹ Such decisions are taken either by consensus or by applying formal and informal voting procedures, including written voting procedures.

2. Like many other IGOs, the Hague Conference on Private International Law (HCCH) adopts a mixed approach in its decision-making procedures: while the Sessions, Council and Special Commission meetings “to the furthest extent possible, operate on the basis of consensus” (Art. 8(2) of the Statute),² some statutory matters need to be decided by a formal vote (*e.g.*, the admission of a new Member under Art. 2(2) of the Statute).

3. In addition, the HCCH also developed a practice to follow a written voting procedure in relation to various subject matters which are first being discussed and addressed by a (small) representative group of Member States (in particular the Standing Committee of the Council of Diplomatic Representatives) but which eventually need to be submitted to all Members for final decision or approval.³ These procedures, which have been used if consensually agreed upon, provided a high level of flexibility, offering a cost efficient and highly effective approach to decision making.

4. This Preliminary Document traces some of the (more recent) instances in which Members have opted for a written voting procedure, and proposes a clear framework for this type of decision-making procedure for the future.

B. History of the use of written voting procedures at the HCCH

5. The HCCH takes decisions at in-person meetings, including Sessions, Councils, Special Commissions, as well as Working and Expert Groups (meetings). It uses, to the furthest extent possible, consensus as the basis for such decisions. This practice has gained ground since the year 2000 when, for the first time, the principle of consensus was expressly used for a legislative project (*i.e.*, to develop what would become the Securities Convention, 2000-2002).⁴ Exceptionally, and only if it is not possible to attain consensus, an in-person meeting would take decisions by a vote as per the Rules of Procedure.⁵

6. The HCCH also has a long-standing tradition of using written voting procedures to decide statutory matters. More recently, Members decided to include into the Organisation’s 2016 *Regulations on Financial Matters and Budgetary Practices of The Hague Conference on Private International Law* (Financial Regulations) an express proviso contemplating a written voting procedure both for their approval and subsequent amendment.⁶

7. In addition, the Members of the HCCH have decided to vote using a written procedure on an *ad hoc* basis. For example, the records of the Twentieth Session, held in 2005, show that the Session adopted a written voting procedure to adopt the amendments to the Procedure.⁷ More recently, in 2015 and 2016 respectively, Members took a total of five decisions employing

¹ See generally the *Voting Procedure Case* (1955) ICJ Reports 67, p. 75.

² See also Art. 1A of the HCCH’s Rules of Procedure, which provides that “[i]f exceptionally it is not possible to attain consensus, decisions shall be taken by vote in accordance with the following rules.”

³ The use of written voting procedures is common in international organisations. See for example, Art. 19§3 of the *Rules of Procedure of the Rail Facilitation Committee Intergovernmental Organisation for International Carriage by Rail* (OTIF).

⁴ In 2005, consensus was declared to be generally applicable to Diplomatic Sessions, meetings of the Council on General Affairs and Policy, and of Special Commissions. See Final Act of the Twentieth Session, in *Proceedings of the Twentieth Session (2005)*, Tome I, *Miscellaneous matters*, Part C, Cambridge, Antwerp, Portland, Intersentia, p. 57, (forthcoming). Since then, Art. 8(2) of the Statute of the HCCH (Statute) provides that “The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.” Similarly, Art. 1A of the HCCH’s Rules of Procedure provides that “[t]o the furthest extent possible, all decisions shall be taken by consensus. [...]”. This practice led to certain adaptations of the text of the Rules of Procedure for Plenary Meetings (the predecessor to the current Rules of Procedure).

⁵ See *supra* footnote 2.

⁶ See Art. 18(1) and Art. 18(2) Financial Regulations. Art. 18 Financial Regulations concerns the entry into force, and amendments to, the Organisation’s Financial Regulations. The provision only makes provision for the use of the written voting procedure; it is silent otherwise as to when, and on what basis, a written voting procedure is triggered, and what process is to be applied.

⁷ See Final Act of the Twentieth Session, in *Ibid*, p. 57.

a written voting procedure, ranging from decisions concerning the governance of the Organisation, to those relating to the adoption of a new instrument.⁸

C. Written voting procedures – discretionary procedure, including process

8. If not expressly prescribed by a rule, the decision to use a written voting procedure is discretionary.⁹ The discretion is generally broad, and a written voting procedure will be used if Member States consensually agree to its use. This is correct in relation to both currently existing rules that impliedly or expressly contemplate written voting procedures, and written voting procedures agreed to on an *ad hoc* basis.

9. The consensual agreement comprises two limbs. This first limb is the agreement to use a written voting procedure; the second limb is the agreement on the process applicable to the written voting procedure. *In toto*, the consensual agreement provides the legal basis for the written voting procedure, including its process.

1. The first limb: whether to use a written voting procedure

10. The first limb concerns whether a decision should be taken using a written voting procedure or not. Examples include the Twentieth Session which decided to adopt a written procedure for the entry into force of the amendments to the Rules of Procedure. Relevantly, the Session decided that the Secretary General shall, within certain timeframes, invite the Members to “cast their votes on the amendments [...] in writing, [...], by notification to the Permanent Bureau”.¹⁰

11. More recently, at the 2014 meeting of the Council on General Affairs and Policy (2014 Council), Member States decided to use a written voting procedure for the approval of the Hague Principles on Choice of Law in International Commercial Contracts (Hague Principles) and the Commentary. The consensual decision, recorded as Conclusion and Recommendation No 2 of the 2014 Council, stated that the Permanent Bureau should:

“finalise the Principles and the draft Commentary [...], where after the final version of the texts will be submitted to Members for approval in a written procedure.”¹¹

12. Similarly, Working Groups have resolved to use written voting procedures as the appropriate decision-making procedure. For instance, the Working Group charged with preparing the new Financial Regulations consensually decided to use a written voting procedure for the approval of these Regulations, while the Working Group on Staff Rules equally decided consensually to put the approval of the new Staff Rules for the HCCH to a written vote.¹²

2. The second limb: what process applies to the written voting procedure

13. The second limb concerns the process by which the written voting procedure is to be carried out, and there have been variations in the processes chosen by Member States.

14. The process applied depends in part on the provision that governs it, or on the Members' approval of an *ad hoc* process. Still, it is possible to identify key features of past processes, whether they are prescribed, or were selected by the Members. They included, for example, the period of time within which Members were to cast a vote, if applicable; whether there will be a

⁸ Examples include the approval of the Financial Regulations in 2015; the sale of the former offices of the Permanent Bureau in 2015; the approval of the *Hague Principles on Choice of Law in International Commercial Contracts* in 2015 (Hague Principles), and, most recently, the approval of the new Staff Rules in 2016. For these and other examples, see the Annex.

⁹ See for example Art. 2(2) of the Statute which prescribes a written voting procedure for the admission of new Member States.

¹⁰ See Final Act of the Twentieth Session, in *Ibid.*, p. 57.

¹¹ See “Conclusions and Recommendations of the Council on General Affairs and Policy (8-10 April 2014)”, Conclusion and Recommendation (C&R) No 2, available on the HCCH website at < www.hcch.net >, under “Governance” then “Council on General Affairs”.

¹² Decision of the Working Group on Staff Rules at its meeting of 9 December 2016. The record of this decision is part of a Summary Note concerning the meeting. This Summary Note is available on the Secure Portal of the HCCH, and can be accessed by the Organisation's Member States.

certification of the outcome;¹³ whether it is a silent voting process; and, perhaps most importantly, the majority requirements.

15. The majority requirements that are to be (under express provision), or have been (under an *ad hoc* decision), applied to written voting procedures may be categorised as follows:

Prescribed written voting procedure			Ad hoc procedures	
<i>Article 2(2) Statute</i>	<i>Article 18(1) Fin Regs</i>	<i>Article 18(2) Fin Regs</i>	<i>Standard</i>	<i>Custom</i>
"a majority of the votes cast"	"a two-thirds majority of the Member States eligible to cast a vote"	"a two-thirds majority of the Member States eligible to cast a vote"	"two-thirds majority of Member States that cast a vote"	Members settle on a process best suited to the decision they need to make, including silent procedures

16. In relation to *ad hoc* procedures, the standard majority requirement has been most often used in recent times.¹⁴ This majority requirement most closely resembles the majority requirement that applies to in-person meetings if a vote is required. Then, Article 3 of the Rules of Procedure prescribes as majority requirement that:

*"Decisions of the Conference shall be made by a majority of the votes cast by delegations present at the time of the vote; abstentions shall not be counted as votes".*¹⁵

17. It is plain that in the case of a written voting procedure using the standard majority requirement as well as in the case of a vote taken under Article 3 of the Rules of Procedure, the two-thirds majority is measured against the actual number of votes cast by Member States.

18. Other majority requirements have been more customised and included, for example, the process applied by the Twentieth Session to amend the Procedural Rules. It required the Secretary General to declare that the amendments have been approved, once the "votes needed to constitute a two-thirds majority have been received."¹⁶

19. A customised process for a written voting procedure was also applied when Member States opted for a derivative of a "silent" written procedure, deciding that the Hague Principles and draft Commentary were to "be approved if no objection is raised within 60 days".¹⁷

D. A proposed framework: a Policy on a Written Voting Procedure

20. The discussion under section C above indicates that as part of the HCCH's decision making, written voting procedures:

- are well established;
- have been used:
 - when the Member States consensually agreed to follow such a procedure (whether under pre-existing provision or on an *ad hoc* basis), and
 - in relation to a wide range of decisions, including governance, but also normative decisions;

¹³ Certifications are used in written voting procedures concerning the admission of new Member States under Art. 2(2) of the Statute. The certification used in relation to the amendment of the Procedural Rules took the form of a *proces-verbal*, specifying the Member States that have cast their votes. See Final Act of the Twentieth Session, in *Ibid.*, p. 57. A similar certification also took place after the written voting procedure on the sale of Scheveningseweg 6 and for the written voting procedure on the approval of the new Staff Rules.

¹⁴ See the examples for 2015 and 2016 listed in the Annex.

¹⁵ Art. 3 of the Rules of Procedure.

¹⁶ See Final Act of the Twentieth Session, in *Ibid.*, p. 57.

¹⁷ See C&R No 2, *op. cit.* (note 11).

- regularly featured a high threshold, *i.e.*, a supermajority of two-thirds of Member States;
- varied in relation to how the supermajority was calculated;
- varied in relation to a number of process aspects, including whether certification was provided;
- were customised to cater to specific circumstances of a decision;
- featured in some instances certification of the result to the Member States.

21. These corner stones can serve as a basis for the development of a framework that applies to the written voting procedures, including process, and which preserves some of their key benefits: flexibility, cost efficiency, and high effectivity. This framework could take the form of the following Policy on a Written Voting Procedure:

Policy on Written Voting Procedures

General provisions

- (1) *The Hague Conference on Private International Law (HCCH) takes decisions through its relevant decision-making organs, including Sessions, as well as Council and Special Commission meetings.*
- (2) *In accordance with Article 8(2) of the Statute and Article 1A of the Rules of Procedure, these decision-making organs shall, to the furthest extent possible, operate on the basis of consensus. If it is not possible to attain consensus in a meeting, decisions shall be taken by a roll call at that meeting (Standard Voting Procedure).*
- (3) *In prescribed circumstances, the use of a voting procedure by written correspondence, including e-mail or a Note Verbale (Written Voting Procedure), may be available.*
- (4) *A Written Voting Procedure may be used by all decision-making organs, as well as by all bodies established by those organs, including Standing Committees and non-normative Working Groups (deciding body). The mandate establishing a deciding body must specify whether it is authorised to use such procedure.*
- (5) *A Written Voting Procedure shall be open to all Member States, unless a Member State has lost the right to vote under Article 11(4) of the 2016 Regulations on Financial Matters and Budgetary Practices of the Hague Conference on Private International Law.*
- (6) *Where a Written Voting Procedure is used, this Policy on Written Voting Procedures (Policy) applies.*

The use of a Written Voting Procedure

- (7) *In prescribed circumstances, a decision-making organ may decide to take a decision using a Written Voting Procedure. Prescribed circumstances include where:*
 - a. *the decision is time critical, and the next meeting of the decision-making organ will not take place for at least another two months;*
 - b. *the issue, and the accompanying explanatory material (if any), is so complex that the decision-making organ cannot take the decision at the meeting, but requires more time to consider the issue and material, and the next meeting of the decision-making organ will not take place for at least another two months;*

- c. *convening an additional meeting of the decision-making organ would cause additional meeting costs that have not been budgeted for in the respective Financial Year, and which cannot be absorbed otherwise; or*
 - d. *the relationship between the outcome of the decision sought, and the cost of organising a meeting to hold the vote, is, in the view of the decision-making organ, disproportionate.*
- (8) *Where a deciding body is authorised to decide to take a decision using a Written Voting Procedure, the exercise of the authority is, unless expressly specified otherwise, subject to the prescribed circumstances listed in Rule (7).*
- (9) *Where a Member State, or a group of Member States, asks the Secretary General to put a question for decision to the Membership, then the Secretary General may use a Written Voting Procedure, after having consulted the Chair of the relevant Council and by taking into consideration the prescribed circumstances listed in Rule (7).*

The process applicable to a Written Voting Procedure

- (10) *When deciding on using a Written Voting Procedure, the decision-making organ, deciding body or Secretary General must also decide on the process applicable to the Written Voting Procedure (applicable process).*
- (11) *The applicable process must include the following elements:*
- a. *the precise decision that Member States will take by using a Written Voting Procedure;*
 - b. *the applicable majority requirement;*
 - c. *the means by which votes must be cast, including the email address and any acceptable alternative means of communication;*
 - d. *any timeframe within which Member States must cast their vote, stating the exact time at which the vote closes; and*
 - e. *the timeframe within which the Secretary General must issue a Certificate that records the decision taken by the Written Voting Procedure.*

The applicable majority requirement

- (12) *The Standard Majority Requirement is a two-thirds majority of Member States that cast a vote.*
- (13) *Unless a decision-making organ or deciding body expressly agrees on a different majority requirement, the Standard Majority Requirement applies to Written Voting Procedures.*
- (14) *A different majority requirement may apply, if*
- a. *an existing rule or regulation provides a different majority requirement; or*
 - b. *the nature and purpose of the decision requires a deviation from the Standard Majority Requirement, and the decision-making organ or deciding body agrees on that deviation.*
- (15) *Where the Written Voting Procedure is taken in response to a request made under Rules (7) to (9), the Standard Majority Requirement applies. A different majority requirement may apply if:*

- a. *an existing rule or regulation provides a different majority requirement; or*
- b. *in case of an request made under Rule (9), in the view of the Secretary General, the nature and purpose of the decision requires a deviation from the Standard Majority Requirement.*

The timeframe within which to cast a vote

- (16) *The timeframe within which to cast a vote must stipulate the exact time at which the vote opens and closes. The times must be set using Central European Time (or Central European Summer Time).*
- (17) *The deadline must be set following this prescribed format: "The deadline for the vote on [the precise issue] is [time in am / pm] Central European [Summer] Time on [Day], [Date]."*
- (18) *Any vote that is received after the deadline is a late vote. Late votes:*
 - a. *do not count for the purposes of the Written Voting Procedure;*
 - b. *may count for the purposes of the Written Voting Procedure, if the casting Member State can prove that:*
 - aa. *it did cast the vote before the deadline for the vote; and*
 - ba. *the vote did not reach the Permanent Bureau in time due to a reasonable technical or other reason.*

The decision to use a Written Voting Procedure, including the process

- (19) *The decision to use a Written Voting Procedure, including the applicable process, is taken consensually. The relevant provisions of the Rules of Procedure apply accordingly.*

Miscellaneous

- (20) *The Certificate must include information relevant to the Written Voting Procedure and the decision, including by specifying the Member States that have cast their votes; how they cast their votes; and by stating the decision taken by the Member States.*
- (21) *A list of decisions taking by using a Written Voting Procedure, including the Certificates issued by the Secretary General, shall be kept by the Permanent Bureau. The Permanent Bureau shall provide for information the Council of Diplomatic Representatives and the Council on General Affairs and Policy with a list of those decisions taken in the preceding calendar year.*

22. This proposed Policy on a Written Voting Procedure has the potential to significantly improve the overall consistency in deciding when to use written voting procedures, and what process should apply. At the same time, it preserves a high level of flexibility which enables Members to use cost efficient and highly effective processes to reach decisions.

E. Conclusion

23. The use of written voting procedures are a well-established part of the HCCH's decision making. They have been used both under existing provisions and on an *ad hoc* basis, and in relation to a broad range of decisions. A Policy on a Written Voting Procedure can balance the need to retain a flexible written voting procedure with the requirement to be consistent. The proposed Policy can achieve this balance.

24. The Council on General Affairs and the Policy of the Conference is asked to consider, and approve, the Policy on Written Voting Procedures.

ANNEX

Written voting procedures in 2015

- L.c. A No 17(15): *Sale of the Building at Scheveningseweg 6, The Hague*

"There is no provision in the Financial Regulations or other Rules that explicitly address the sale of a major financial asset of the PRF, such as the building at Scheveningseweg 6. Following discussions at the Working Group meeting of 6 July 2015, the Permanent Bureau has decided to subject the voting procedure to a partially analogous application of Article 4 of the Financial Regulations. Thus, the sale of the building is to be approved by a **two-third majority of Member States that cast a vote.**"

- L.c. ON No 2(15): *Written procedure for the approval of the Hague Principles on Choice of Law in International Commercial Contracts*

"Council on General Affairs and Policy of the Hague Conference of April 2014 decided the following (Conclusion and Recommendation No 2):

'2. and finalise the Principles and the draft Commentary in both languages, where after the final version of the texts will be submitted to Members for approval in a written procedure. The Principles and draft Commentary will be approved if no objection is raised within 60 days.'

[...]

In line with the above mandate, the Permanent Bureau has the honour to inform the National and Contact Organs of the Members that the 60-day period will run until 19 March 2015. If no objections are received before that date, the instrument will be approved. It is hoped that the approval of this new Hague Conference instrument can be officially announced at the next meeting of the Council in March 2015."

- L.c. ON No 41(15): *New Regulations on Financial Matters and Budgetary Practices of the Hague Conference on Private International Law*

"As discussed at the last meeting of the Working Group, approval of the new Regulations and agreement on their entry into force are subject to a **two-thirds majority of Member States that cast a vote** (analogous application of Art. 18 of the draft Regulations)."

Written voting procedures in 2016

- 61498(16)CB/SP: *Exceptional meeting of Contracting States to the 1961 Apostille Convention (13 May 2016)*

"However, despite the significant operational and financial burden such an Extraordinary Meeting will pose, **the Permanent Bureau will facilitate the meeting if the majority of Contracting States that indicate their position are in favour of the initiative.**

The Permanent Bureau proposes this voting procedure in the absence of any explicit rules and an established precedence for the convocation of such an Extraordinary Meeting. It is analogous to other voting procedures, used by the Organisation in relation to non-budgetary decisions. Should a strong majority of Contracting States suggest a different voting procedure, then Contracting States are informed accordingly and the procedure may change within the voting period."

- L.c. ON No 62(16): *New Staff Rules of the Hague Conference on Private International Law*

"As discussed at the last meeting of the Working Group, approval of the new Staff rules is subject to a **two-thirds majority of Member States that cast a vote** (in analogy to Art. 18 of the Regulations on Financial Matters and Budgetary Practices)."

- L.c. ON No 4(17): *Reminder: New Staff Rules of the Hague Conference on Private International Law*

"The Permanent Bureau recalls that approval of the new Staff rules is subject to a **two-thirds majority of Member States that cast a vote** (this procedure is inspired by Art. 8(2) of the Regulations on Financial Matters and Budgetary Practices which establishes as relevant threshold "a two-thirds majority of the Member States present" at the meeting of the Council; in the present case, the vote takes place in lieu of the meeting, with the threshold remaining the same"). Please note that the reference to Article 18 in circular letter ON No 62(16) was a clerical error. The Permanent Bureau regrets this error and any misunderstanding this may have caused."