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## Table of Contents

I.	Introduction .....	2
II.	The historical evolution of the term “civil or commercial matters” .....	2
	A. The 1977 meeting of the SC .....	3
	B. The 1978 meeting of the SC .....	3
	C. The 1985 meeting of the SC .....	4
	D. The 1989 meeting of the SC .....	5
	E. The 2003 meeting of the SC .....	5
	F. The 2009 meeting of the SC .....	6
	G. The 2014 meeting of the SC .....	6
III.	Specific Categories.....	6
IV.	Conclusions and Recommendations .....	8

# Civil or Commercial Matters

## I. Introduction

- 1 Pursuant to the mandate of the Council on General Affairs and Policy (CGAP) at its 2021 and 2022 meetings,<sup>1</sup> in December 2022 the Permanent Bureau (PB) circulated two questionnaires on the practical operation of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention)<sup>2</sup> and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)<sup>3</sup> (together, Conventions). The questionnaires sought information from Contracting Parties to the Conventions and covered a range of topics, including the scope and operation of the Conventions, and potential issues to discuss at the upcoming meeting of the Special Commission (SC).
- 2 While analysing the responses to the 2022 Service questionnaire, the PB identified that 12, out of 47 respondents, have experienced difficulties in interpreting the scope of the Service Convention in the five-year period between 2017 and 2022.<sup>4</sup> In particular, these responses indicate that there have been issues regarding the interpretation of the term “civil or commercial matters” (Art. 1) and most respondents raising issues of difficulty considered there to be doubts as to whether administrative matters fall within the scope of the Convention. Likewise, 10, out of 42 respondents to the 2022 Evidence questionnaire, reported having the same difficulties when applying the Evidence Convention.<sup>5</sup> Some respondents stated that it would be useful to discuss the scope of “civil or commercial matters” at the upcoming meeting of the SC.
- 3 The topic of “civil or commercial” was discussed at length during the first meeting of the SC that reviewed the operation of the Service Convention in 1977. Since then, it has been on the agenda of every meeting of the SC from 1977 to 2014. This document summarises the discussions held at each meeting of the SC and the Conclusions and Recommendations (C&R) adopted therein to facilitate discussions at the upcoming meeting of the SC and to demonstrate, in certain circumstances, a broadening of the interpretation of the term “civil or commercial matters” over time. This document also includes further recommendations for the consideration of the meeting of the SC.

## II. The historical evolution of the term “civil or commercial matters”

- 4 The term “civil or commercial matters” has featured in HCCH Conventions dealing with cross-border civil procedures since the very beginning of the HCCH<sup>6</sup> and is used to delimit the substantive scope

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<sup>1</sup> C&D No 36 of CGAP 2021; C&D No 32 of CGAP 2022, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Governance” then “Council on General Affairs and Policy” then “Archive”.

<sup>2</sup> “Questionnaire relating to the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention)” Prel. Doc. No 1 of December 2022 (2022 Service questionnaire), available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Service Convention” then “Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions”.

<sup>3</sup> “Questionnaire relating to the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)” Prel. Doc. No 3 of December 2022 (2022 Evidence questionnaire) available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 3).

<sup>4</sup> 2022 Service questionnaire, question 5.

<sup>5</sup> 2022 Evidence questionnaire, question 6.

<sup>6</sup> See, e.g., *Convention of 14 November 1896 relating to Civil Procedure* (Arts 1 and 5), *Convention of 17 July 1905 relating to Civil Procedure* (Arts 1 and 8); and *Convention of 1 March 1954 on Civil Procedure* (Arts 1 and 8).

of some HCCH Conventions, such as the Service Convention, Evidence Convention, Access to Justice Convention,<sup>7</sup> Choice of Court Convention,<sup>8</sup> and the Judgments Convention.<sup>9</sup>

5 There are different interpretations of the term among the various Contracting Parties to the Conventions. In general, common law States tend to construe the term broadly to include all matters that are not criminal matters,<sup>10</sup> whereas some civil law States tend to construe the term more restrictively, drawing an additional distinction between private law and public law matters, the latter being neither civil nor commercial.

#### A. The 1977 meeting of the SC

6 The concept of “civil or commercial matters” was the subject of lively debate during the drafting of the Service Convention. The authors of the Convention eventually decided not to deal with this question, leaving the interpretation of the term to the Contracting Parties.<sup>11</sup>

7 During the 1977 meeting of the SC on the operation of the Service Convention, delegates realised that the interpretation of the term “civil or commercial matters” could diverge significantly from one legal system to another. For instance, several common law States do not make the civil law distinction between private and public law. For those States, any matter that is not criminal is civil or commercial. In civil law States, it is customary to exclude criminal, tax and administrative law from civil or commercial matters.

8 Differences also appeared regarding the question of which law should govern the characterisation of these matters, with some delegates referring to the law of the requesting State (State of origin), and others to that of the requested State (State of destination).

9 The delegates found that, in practice, Central Authorities were very liberal and willing to serve documents that they would not have been required to serve under the Service Convention, with the aim of assisting the addressees or recipients of the documents. However, delegates also identified that most Central Authorities had refused to serve, or to have served, documents dealing with criminal or tax matters.

10 Realising that it was not possible to recommend a uniform solution acceptable to all Contracting Parties, delegates limited themselves to expressing the wish that the Service Convention be applied in the most liberal possible manner in respect of the scope of its subject-matter.<sup>12</sup>

#### B. The 1978 meeting of the SC

11 In 1978, delegates from different jurisdictions met for the first time to review the operation of the Evidence Convention at a meeting of the SC. The delegates realised that some of the issues pertaining to the interpretation of the term “civil or commercial matters” were similar to those raised in connection with the operation of the Service Convention.

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<sup>7</sup> *Convention of 25 October 1980 on International Access to Justice* (Art. 1).

<sup>8</sup> *Convention of 30 June 2005 on Choice of Court Agreements* (Art. 1(1)).

<sup>9</sup> *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (Art. 1(1)).

<sup>10</sup> See Report of the Special Commission by P. Nygh and F. Pocar (hereinafter, “Nygh/Pocar Report”), in HCCH, *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 2017, at para. 27 (also available on the HCCH website).

<sup>11</sup> See Taborda Ferreira, “Rapport explicatif”, in HCCH, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification*, The Hague, Imprimerie Nationale, 1965, pp. 356-366, see also pp. 79-80, 159- 161, 166, 305 and 307 (also available on the HCCH website).

<sup>12</sup> See HCCH, Report on the work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, p. 3, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Service Section” then “Special Commissions”.

- 12 Delegates agreed that criminal matters were excluded from the substantive scope of the Evidence Convention. In addition, most delegates supported the characterisation of family and succession matters as civil.
- 13 Delegates had differences of opinion as to whether administrative and tax matters would fall within the scope of the Evidence Convention. Importantly, delegates concluded that while Central Authorities are generally more liberal when serving documents in relation to these matters, more rigorous controls were applied for the taking of evidence. This was mostly because the latter would involve the participation, directly or indirectly, of the authorities in the requested State in a proceeding unfolding abroad.<sup>13</sup>
- 14 In the course of the meeting, the delegates also questioned whether evidence obtained under the Convention in connection with a civil or commercial proceeding could subsequently be used in the requesting State for other purposes, including tax or criminal matters. The delegates agreed that the mere possibility that the evidence obtained might lead to a criminal or tax proceeding in the requesting State should not prevent the Evidence Convention from being applied. On the other hand, if the evidence sought in a Contracting Party in connection with a civil or commercial matter could be directly linked to a criminal proceeding underway in the requesting State, the requested State might refuse to execute the Letter of Request.<sup>14</sup>

### C. The 1985 meeting of the SC

- 15 The discussions about the term “civil or commercial matters” continued in 1985, when Contracting Parties met for the second time to review the operation of the Evidence Convention.
- 16 A question was raised as to whether a request for the taking of evidence emanating from a foreign bankruptcy court would fall within the scope of “civil or commercial matters”. It was noted that some States have special bankruptcy courts that deal with various aspects of bankruptcy. The delegates agreed that a distinction must be made between, on the one hand, criminal proceedings arising from fraud on the part of the bankrupt (or the officers of a bankrupt company), which would fall outside the scope of the Evidence Convention, and, on the other hand, regular bankruptcy proceedings which were considered by most of the States to be civil in nature, falling therefore within the scope of the Convention.<sup>15</sup>
- 17 Delegates also resumed discussions on the intersection between “civil or commercial” and “administrative” matters. Once again, they were not able to agree on a precise distinction between the two terms. One of the difficulties raised during the meeting was that a request for the taking of evidence could emanate from an administrative tribunal acting on matters of a civil nature or from a civil court at the instance of an administrative body which is a party to civil proceedings.
- 18 In addition, some delegates indicated that in practice their courts had accepted the characterisation of the matter as “civil or commercial” given by the requesting authorities in accordance with their own law. However, other delegates indicated, on the contrary, that this determination should be made in accordance with the views of the requested State.<sup>16</sup>

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<sup>13</sup> HCCH, Report of the work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter, “Report of the 1978 SC”), p. 2, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Evidence Section” then “Special Commissions”.

<sup>14</sup> *Ibid*, p. 3.

<sup>15</sup> HCCH, Report on the work of the Special Commission of May 1985 on the Operation of the Convention (hereinafter, “Report of the 1985 SC”), p. 2, available on the HCCH website at [www.hcch.net](http://www.hcch.net) (see path indicated in note 13).

<sup>16</sup> *Ibid*, p. 3.

#### **D. The 1989 meeting of the SC**

- 19 The 1989 meeting of the SC gathered delegates from different jurisdictions to discuss the practical operation of both the Service and Evidence Conventions.
- 20 With regard to the scope of the Service Convention, the discussions revealed a great difference of approach as to the characterisation of “punitive damages”. For some delegates, “punitive damages” had a distinctly penal character which would prevent the claim from being characterised as a “civil or commercial matter”. Conversely, for other delegates the concept of “punitive damages” would not affect the nature of the underlying proceedings, and a civil or commercial case would not alter its nature according to the amount claimed.
- 21 Several delegates suggested (i) that it was for the requesting State to characterise the claim in respect of the substantive scope of the Service Convention; (ii) that, as a Convention providing assistance in judicial proceedings, a liberal approach should be taken, especially as the rules concerning the recognition and enforcement of foreign judgments would be used as means of counteracting procedural deficiencies at the time of service; and (iii) that, to the extent that it is established that “punitive damages” are paid to the plaintiff, and not to the requesting State, it would be difficult to characterise them other than as an element of a civil or commercial case.
- 22 After a long discussion, the SC concluded in relation to both the Service and Evidence Conventions that the term “civil or commercial matters” should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively. Secondly, in the “grey area” between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of “civil or commercial matters”. Thirdly, and in contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not seem to be covered by the Conventions as a result of this evolution.<sup>17</sup>
- 23 Lastly, the SC noted that nothing would prevent Contracting Parties from applying the Conventions in their mutual relations to matters of public law, although not necessarily in an identical manner for both Conventions.
- 24 In this respect, the autonomous interpretation of treaties provided for under Article 31 of the *Vienna Convention of 23 May 1969 on the Law of Treaties*, a traditional principle of public international law, should be remembered.

#### **E. The 2003 meeting of the SC**

- 25 In the 2003 meeting of the SC, most delegates reinforced that tax matters would not fall within the scope of “civil or commercial matters” when discussing the Service Convention. However, delegates from one Contracting Party explained that, under their domestic law, the collection of taxes could take place in both public and private procedures. One other Contracting Party argued that some civil courts also deal with tax-related matters, which would call for a different interpretation. The Chair of the SC separately noted that there could be a crossover from criminal to civil matters, suggesting the possibility of recovering proceeds of crime through civil methods.
- 26 Following that discussion, some delegates suggested authorities should take a functional approach to the matter and consider the nature of the cause of action.

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<sup>17</sup> HCCH, Report on the work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Report of the 1989 SC), p. 12, available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Service Section” or “Evidence Section then “Special Commissions”.

27 In the end, the SC emphasised the need for a broad interpretation of the term “civil or commercial matters” and reaffirmed the C&R adopted at the 1989 meeting of the SC. In addition, the SC took note of the fact that while in some Contracting Parties tax issues were considered as falling within the scope of the Service Convention, in others this was not the case. The SC also noted that the Convention had been applied in proceedings relating to the recovery of proceeds of crime.<sup>18</sup>

#### **F. The 2009 meeting of the SC**

28 In 2009, the SC once again resumed the discussions on the scope of the Service and Evidence Conventions. Some delegates noted that specific areas remained unclear as to whether they would fall within the scope of “civil or commercial matters”, such as social security, taxation, regulation of financial markets and stock exchange, and proceeds of crime.

29 Many delegates and other experts noted that whether a particular matter fell within the scope of the term “civil or commercial matters” often depended on the nature of the action. Some delegates stressed the importance of establishing a communication channel between the authorities of the requesting and requested States to resolve any difficulties or doubts in relation to the characterisation of a particular matter.

30 The SC then recalled the C&R of previous meetings and noted that, while interpreting the term “civil or commercial matters”, authorities should have regard to the nature of the cause of action and take into account that the Service and Evidence Conventions do not expressly exclude any particular matter from their scope. The SC encouraged Central Authorities to communicate with the requesting Authority when problems of interpretation arise. In addition, Contracting Parties were encouraged to include in their requests, information about the nature of the cause of action, in particular where a request may give rise to doubts as to whether it falls within the scope of the Convention.<sup>19</sup>

#### **G. The 2014 meeting of the SC**

31 As in previous meetings, the SC recommended that the term “civil or commercial matters” be interpreted liberally and in an autonomous manner. Importantly, and noting that some Contracting Parties tend to construe the term more strictly in relation to the Evidence Convention, the SC recommended that the terms be applied consistently across both the Service and Evidence Conventions.

32 The SC also welcomed the flexible practice reported by Contracting Parties, by not refusing to execute requests based solely on the entity making the request but focusing instead on the substantive nature of the matter referred to in the request.<sup>20</sup>

### **III. Specific Categories**

33 At its meeting in 1989, the SC noted a “historical evolution” in the scope of the term “civil or commercial matters”, suggesting that as judicial cooperation between Contracting Parties expands, there will be greater consensus among Contracting Parties as to the specific categories of matters that fall within the scope of the Conventions.<sup>21</sup>

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<sup>18</sup> C&R Nos 69-71 of the 2003 SC.

<sup>19</sup> C&R Nos 13-14, and 46 of the 2009 SC.

<sup>20</sup> C&R Nos 40-41 of the 2014 SC.

<sup>21</sup> Report of the 1989 SC (*op. cit.* note 17), para. 26.

- 34 There appears to be support among Contracting Parties that bankruptcy and insolvency matters,<sup>22</sup> insurance matters,<sup>23</sup> employment matters,<sup>24</sup> and consumer protection matters are “civil or commercial” in nature.
- 35 It is widely accepted that family law matters, personal status matters,<sup>25</sup> and intellectual property matters are “civil” in nature. There is also broad support among Contracting Parties that anti-trust (competition) matters are “civil or commercial” in nature, although some Contracting Parties may consider certain anti-trust (competition) proceedings to be public or criminal in nature, and therefore outside the scope of the Convention.<sup>26</sup> This is particularly the case where the proceedings are brought by a Contracting Party acting in a regulatory capacity. Where proceedings are brought by a private party, they are generally considered to be “civil or commercial matters”. Similarly, proceedings for collective redress (class actions) brought by private parties would fall within the scope of “civil or commercial matters”, even though in some Contracting Parties such proceedings would be brought by the Contracting Party acting in a regulatory capacity.<sup>27</sup>
- 36 Criminal matters are *not* “civil or commercial matters”. This has been confirmed by the SC<sup>28</sup> as well as in case law. This exclusion does not apply to proceedings brought by a private person for compensation arising from a criminal act. However, based on the responses to the 2008 questionnaire,<sup>29</sup> there is broad support among Contracting Parties for the view that proceedings in respect of legislation on proceeds of crime are not “civil or commercial” in nature,<sup>30</sup> although the SC has noted that at least some Contracting Parties do apply the Convention to such proceedings.<sup>31</sup>
- 37 Opinion remains divided among Contracting Parties as to whether taxation matters fall within the scope of the Conventions. A similar division exists in relation to administrative matters, customs matters, social security matters, as well as matters relating to the regulation of markets and stock

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22 At its meeting in 1985, the SC drew a distinction between criminal proceedings arising from fraud on the part of the bankrupt person or officer of the bankrupt company, which were considered outside of scope, and “regular bankruptcy proceedings”, which were “everywhere considered to be civil in nature”: Report of the 1985 SC (*op. cit.* note 15), Part I, § 1(A)(1). At its meeting in 1989, the SC appeared to take one step back when it concluded that bankruptcy matters “*might* fall within the scope” of the term “civil or commercial matters”: Report of the 1989 SC (*op. cit.* note 17), para. 26 (emphasis added). Since then, bankruptcy and insolvency matters have been treated as civil or commercial matters in the work of the HCCH in other areas of civil procedure: see, e.g., Nygh/Pocar Report (*op. cit.* note 10), para. 25. This view is also supported by case law in several States.

23 At its meeting in 1989, the SC concluded that insurance matters “might fall within the scope” of the term “civil or commercial matters”: Report of the 1989 SC (*op. cit.* note 17), para. 26.

24 At its meeting in 1989, the SC concluded that employment matters “might fall within the scope” of the term “civil or commercial matters”: Report of the 1989 SC (*ibid.*).

25 Report of the 1978 SC (*op. cit.* note 13), Part I, § 1. At the 1978 meeting of the SC, the Egyptian delegation pointed out that it did not view personal status matters as civil matters, whereas such matters fell within the scope of the Convention in all other States represented.

26 This matter was discussed at length by the SC at its meeting in 1985, which observed that: (a) “[c]ertain States make a clear distinction between unfair competition law, which is characterised as a civil or commercial matter and therefore falls within the Convention, and antitrust law, characterised as administrative or penal and therefore falling outside the scope of the Convention”; and (b) “[i]n certain States antitrust proceedings may be brought either by public authorities or by individuals or private companies”: Report of the 1985 SC (*op. cit.* note 15), Part III.

27 At its meeting in 2009, the SC noted that the Service Convention is applicable to a request for service upon a defendant in proceedings for collective redress, although it did not specifically address the issue from the standpoint of whether such proceedings were “civil or commercial” in nature: C&R No 17.

28 Report of the 1978 SC (*op. cit.* note 13), Part I, § 1.

29 “Questionnaire of July 2008 relating to the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention)”, Prel. Doc. No 2 of July 2008; and “Questionnaire of May 2008 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)”, Prel. Doc. No 1 of May 2008. A synopsis of the responses to the questionnaires is available on the HCCH website at [www.hcch.net](http://www.hcch.net) under “Service or Evidence Section” then “Questionnaires and Responses”.

30 Compare this to the Nygh/Pocar Report (*op. cit.* note 10), which states that “civil claims for compensation for victims of crime brought by them or on their behalf in conjunction with criminal proceedings should not for that reason be denied a civil character”.

31 C&R No 71 of the 2003 SC.



exchanges.<sup>32</sup> In some Contracting Parties, these matters may be beyond the competence of the judicial authorities that are authorised to execute Letters of Request under the Evidence Convention.

38 The PB considers that, in view of the liberal interpretation of the term “civil or commercial” recommended by the SC, Contracting Parties should endeavour to apply the Conventions to the abovementioned matters to the greatest extent possible. Where a request is considered by the requested State to fall outside the substantive scope of the Conventions, the Central Authority should inform the requesting authority of any alternative devices available for the service of documents or the taking of evidence, noting that many Contracting Parties have entered into bilateral and multilateral arrangements for cooperation in administrative, criminal, customs and taxation matters.

39 Further, in a response to the 2022 questionnaire, it was suggested that all Contracting Parties to the Conventions might develop a list of all civil and commercial matters that are accepted in their jurisdiction. However, as has been noted by another Contracting Party in an earlier meeting of the SC, it is important to adopt a functional approach to interpreting “civil or commercial matters”. For example, just because the word “tax” appears on a document, it should not mean a request is automatically rejected. Based on this same reasoning, it is suggested that a case-by-case approach may result in a broader application of the Conventions. Central Authorities have shown a willingness to address issues that may arise with the characterisation of a particular matter by way of direct communication with the relevant authorities of the requesting State, a practice that is encouraged by the SC.<sup>33</sup>

#### IV. Conclusions and Recommendations

40 The absence of a supranational court as “guardian” of the uniform interpretation of the Service and Evidence Conventions emphasises the crucial importance of communication and exchanges between the authorities in charge of the Conventions’ application; such interaction is a basic condition to secure, as far as possible, a harmonious implementation of the Service and Evidence Conventions. Autonomous interpretation remains the best way of achieving this goal.

41 In this regard, the PB invites the SC to note the following existing C&R:<sup>34</sup>

- a. The SC recalls its former C&R on the term “civil or commercial matters” and recommends that this term be interpreted liberally and in an autonomous manner, and applied consistently across both the Service and Evidence Conventions;<sup>35</sup>
- b. The words “civil or commercial matters” should be interpreted in an autonomous manner, without reference exclusively to either the law of the requesting State (or State of origin), or to the law of the requested State (or State of execution), or to both laws cumulatively;<sup>36</sup>
- c. The SC takes the view that a liberal interpretation should be given to the phrase “civil or commercial matters”. In doing so, one should focus on the nature of the cause of action and keep in mind that the Convention does not expressly exclude any particular subject matter from the scope of “civil or commercial matters”. The SC invites States Parties to encourage their Central Authority to communicate with the forwarding authority when problems of

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<sup>32</sup> Most Contracting Parties responding to the 2008 questionnaire stated that social security matters do fall within the scope of “civil or commercial matters”.

<sup>33</sup> C&R No 9 of the 2014 SC. See also C&R No 44 of the 2009 SC, and C&R No 44 of the 2003 SC.

<sup>34</sup> The SC will be asked to consider restating a broader set of C&R which will also include other C&R on the nature of “civil or commercial”.

<sup>35</sup> C&R No 40 of the 2014 SC.

<sup>36</sup> Report of the 1989 SC (*op. cit.* note 17), para. 26 (a).

interpretation arise. It recommends that States Parties encourage forwarding authorities to include in their requests for service some information about the nature of the cause of action, in particular where a request may give rise to doubts as to whether it falls within the scope of the Convention.<sup>37</sup>

- 42 The PB also invites the SC to consider recommending that rather than Contracting Parties developing a list-based approach to identify the scope of “civil or commercial matters”, Contracting Parties consider requests on a case-by-case basis, with the aim of providing the broadest possible cross-border judicial cooperation.
- 43 Contracting Parties are encouraged to swiftly communicate with each other using Information Technology to resolve queries about whether a request is a “civil or commercial” matter.

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<sup>37</sup> C&R No 14 of the 2009 SC.