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RAPPORT SUR LES TRAVAUX DE LA COMMISSION SPÉCIALE D'AVRIL 1989 SUR LE FONCTIONNEMENT DES CONVENTIONS DE LA HAYE DU 15 NOVEMBRE 1965 RELATIVE À LA SIGNIFICATION ET LA NOTIFICATION À L'ÉTRANGER DES ACTES JUDICIAIRES ET EXTRAJUDICIAIRES EN MATIÈRE CIVILE OU COMMERCIALE ET DU 18 MARS 1970 SUR L'OBTENTION DES PREUVES À L'ÉTRANGER EN MATIÈRE CIVILE OU COMMERCIALE

établi par le Bureau Permanent

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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

Drawn up by the Permanent Bureau

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Introduction

1. In the Final Act of the Sixteenth Session of the Hague Conference on private international law, signed 20 October 1988, among the Decisions set out on page 13 is the following:

“The Sixteenth Session,

Having regard to the proposals and suggestions advanced within the First Commission –

....

6 Instructs the Secretary General to convene a Special Commission 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.”

2. Pursuant to this instruction, the Secretary General convened during the period of 17-20 April 1989 a Special Commission, in which were invited to participate not only the Member States of the Hague Conference on private international law, but also all other States which were Parties to one or both of the international Treaties mentioned above, as well as certain intergovernmental and non-governmental international organizations having an interest in the subject-matter of these Treaties. Twenty-two States participated, all of which were Members of the Hague Conference.
3. The organizations represented by observers were the Commonwealth Secretariat, the International Bar Association and the International Union of Bailiffs and Law Officers. All participants were furnished with Preliminary Document No 1 of March 1989, “Checklist for the discussions of the Special Commission of April 1989 on the operation of the Hague Conventions on the Service of Process Abroad and on the Taking of Evidence Abroad”, drawn up by Mr Adair Dyer, First Secretary at the Permanent Bureau, and with English translations of certain decisions made by the Supreme Court of the Netherlands applying the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”) and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Evidence Convention”) respectively.
4. Mr J.C. Schultsz, President of the Netherlands Standing Government Committee on private international law, opened the meeting and welcomed all participants. Mr Gustaf Möller, Expert of Finland, was unanimously elected to serve as Chairman of the Special Commission, and Mr Justice Ronan Keane, Expert of Ireland, was unanimously elected to serve as Vice-Chairman.
5. The questions set out in Preliminary Document No 1 were adopted in principle as the agenda for the meeting, it being understood that additional points could be raised in the course of discussions and that at the end of the meeting a discussion would be held on the content and utility of the Practical Handbooks edited by the Permanent Bureau in loose-leaf format for the Hague Service Convention and the Hague Evidence Convention, respectively.

I. HAGUE SERVICE CONVENTION

Scope of the Convention as to its subject-matter

Question A: Have any problems arisen as to the scope of the term "in civil or commercial matters" employed in the title and in Article 1 of the Convention?

6. There had been apparently no reported court decisions concerning the interpretation of this term in the Hague Service Convention although, as pointed out in Preliminary Document No 1, at page 20, two significant decisions had been handed down by the highest courts of different States Parties (the Netherlands and the United Kingdom) concerning the scope of the same expression used in the Hague Evidence Convention.
7. Nonetheless, some requests for service of process had been refused by the Central Authority in one of the German *Länder* involving law suits filed in the courts of the United States of America asserting claims for civil damages – for example arising from products liability – to which large claims for "punitive" damages were joined. The theory of this regional Central Authority, which was not necessarily shared by the Ministry of Justice in Bonn or by the Central Authorities of the other *Länder*, apparently was that *excessive* claims for punitive damages were penal rather than civil or commercial in nature.*
8. The discussions showed that a number of experts thought:
 - a that it was for the requesting State to characterize the claim in respect of the substantive scope of the Convention;
 - b that, since the Convention provided assistance in judicial proceedings, a liberal attitude should be taken – especially as the rules concerning recognition of foreign judgments would be used as the obvious means of counteracting procedural deficiencies at the time of service;
 - c that, to the extent that it is established by the pleadings that "punitive damages" are to be paid to the plaintiff and not to the requesting State, it seems difficult to characterize such damages as other than an element of a civil or commercial action; and
 - d that it is impossible to characterize such an action as other than civil or commercial on the basis of the amounts claimed, since a civil or commercial action does not alter according to the amount of damages sought.
9. In addition, it was pointed out:
 - e that the service of documents abroad does not presuppose their validity in international litigation;
 - f that the aim of the Convention is to inform the defendant rapidly of proceedings against him; and
 - g that refusal to apply the Convention leads to the application of the domestic rules of procedure of the requesting State which is often disadvantageous to the defendant.
10. Finally it was recalled, as pointed out in Preliminary Document No 1 at page 2, that the Special Commission which met in November 1977 to consider the operation of the Hague Service Convention concluded that claims for punitive damages fall within the scope of the Convention (see the Report of the Special Commission in *Proceedings*, Fourteenth Session, Tome IV, *Judicial Co-operation* at pp. 381-382; *Practical Handbook*, page 30).
11. Discussions of the court cases decided under the Hague Evidence Convention concerning the scope of the words "civil or commercial matters" were deferred.

* *Note by the Permanent Bureau:* It should be mentioned here that subsequently to the Special Commission, on 9 May 1989, the *Oberlandesgericht* of Munich rejected this theory and characterized punitive damages as civil in nature (decision published in part in *RIW* 1989, Heft 6, p. 483).

Thereafter, certain conclusions concerning the subject-matter scope of the Hague Service and Evidence Conventions were included among the "Conclusions on the most important points considered by the Special Commission" adopted at the April 1989 meeting. For these, please refer to paragraphs nos 25-27, below, or to the Annex.

Procedural scope of the Convention

Question B: Under what circumstances may a company with limited liability or other corporate entity be considered to be present within the jurisdiction of a country for purposes of service upon it of a judicial or extrajudicial document within the territory of that country?

12. This question was posed as indicated in the Checklist by two cases decided by the highest courts in two different countries involving service upon the purported agent of a foreign incorporated company within the territory of the respective country: *Schlunk v. Volkswagen Aktiengesellschaft*, decided by the Supreme Court of the United States, 15 June 1988 and *Segers and Rufa BV v. Mabanaft GmbH*, decided by the *Hoge Raad* of the Netherlands on 27 June 1986. The *Schlunk* case involved service upon a wholly owned domestic subsidiary of the foreign company which was deemed to be an agent to receive service of process on behalf of the parent company, even though it had not been expressly so designated. The *Mabanaft* case involved the question of whether procedural rules adopted by the Netherlands to make a lawyer a continuing agent for his client who had elected domicile at his office to receive service of process in later (appellate) stages of a legal proceedings were intended to apply when the person to be served resided abroad, thus rendering the Convention inapplicable to notice of appeal to the intermediate appellate court or the *Hoge Raad*. The courts in both cases had started from the assumption that it was for the court before which the proceeding was pending to decide whether there was "occasion" to transmit documents abroad for service.
13. The principle that the forum is to decide this question under its own law was broadly accepted, although the danger of permitting domestic service upon a person who had not been expressly designated as an agent to receive service of process was recognized. Such service might not fulfill the purposes of the Convention which were to assure timely notice of the legal action to the person to be served. It was pointed out that courts of certain countries such as the United Kingdom would be more reluctant to "pierce the corporate veil" between a foreign parent company and its wholly owned domestic subsidiary than the courts of the United States of America had been, because of the lack of a "safety net" such as that offered by the clause of the United States Constitution's Bill of Rights guaranteeing "due process of law".
14. Some opinion was expressed 'that the practical impact of the *Schlunk* decision on future cases in the United States of America would probably be rather limited. Thus a wait-and-see attitude seemed appropriate. The *Mabanaft* case offered no problem since the *Hoge Raad* had concluded that the domestic rule change did not have the effect of rendering the Convention inapplicable.

Methods of service

Question C: Have any problems arisen with requests for particular methods of service made under Article 5 b of the Hague Service Convention?

15. No problems were raised in connection with this question.

Question D: Have there been any court decisions in your country interpreting Article 10 a of the Hague Service Convention which reads as follows:

"Provided the State of destination does not object, the present Convention shall not interfere with –

a the freedom to send judicial documents by postal channels directly to persons abroad ... "

16. It was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10 *a* in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, **certain courts in the United States** of America in opinions cited in the "Checklist" **had concluded that service of process abroad by mail was not permitted under the Convention.**
17. The Japanese delegation explained that their Government wished the following statement of position to be made known:

"Japanese position on Article 10 a of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters:

Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessarily imply that the sending by such a method is considered valid service in Japan; it merely indicates that Japan does not consider it as infringement of its sovereign power."

It was understood that the Japanese position as expressed in this statement would be included in the next revision of the Practical Handbook on the Hague Service Convention.

Question E: *Have any problems arisen under Article 10 b or c of the Hague Service Convention?*

18. The application of these provisions had not given rise to any problems. Service of documents forwarded by one process server to another occurred rather seldom in practice, probably because this option was not sufficiently known. On the other hand, the forwarding of documents by lawyers to foreign process servers for direct service was a frequent practice in the Netherlands, Belgium and France.
19. A case decided by the United States District Court for the Eastern District of Missouri, *Tax Lease Underwriters v. Blackwall Green*, dealing with a civil action and not with a tax matter, was found to constitute a precedent accepting the validity of service of process effected in England through direct service by an English solicitor.

Forwarding authorities

Question F: *Have any issues arisen concerning the authority of persons forwarding judicial or extrajudicial documents to Central Authorities abroad?*

20. The delegation of the United States of America mentioned that certain problems had appeared concerning the interpretation by requested States of Article 3 of the Convention. In particular certain States – the United Kingdom and Israel – had refused to accept requests for service of documents when such requests were forwarded by attorneys from the United States of America. It appeared that other States, notably the Federal Republic of Germany, had shown a more liberal attitude in that the German authorities would accept a request for service emanating from any person competent under the laws of the requesting State, provided that the authority of such person was sufficiently specified in the request: for example, by reference to the law or rule of court granting this authority to an attorney licensed to practice law in the requesting State.
21. The delegation of the United Kingdom indicated that in view of the observations by the American delegation it would institute further consideration as to whether the United Kingdom's practice under Article 69 of the Rules of the English Supreme Court was wholly consistent with its obligations under the Hague Service Convention. However, the United Kingdom delegation expressed the hope that service under Article 10 of the Convention might be used in preference to forwarding documents to the Senior Master.

Costs

Question G: Have any issues arisen concerning financial charges made for service requested through a Central Authority under the Convention?

22. From the discussions it appeared that no State Party to the Convention would levy any taxes or costs for normal service made by its authorities. In some countries, notably Belgium, France and the Netherlands, delivery of the document to an addressee who accepts it voluntarily as described in the second paragraph of Article 5 of the Convention, was considered to be the normal method of service. If personal service in a formal manner upon the addressee was required then this involved the employment of a professional process server (referred to as a *huissier* in the French language or a *deurwaarder* in the Dutch language) and the fees of this professional were considered to be payable or reimbursable by the applicant under the second paragraph of Article 12.

Protective provisions – for defendants

Question H: Have any court decisions been rendered in your country concerning the application of Article 15 or Article 16 of the Hague Service Convention?

23. The Commission's attention was drawn to the importance and novelty of Article 15 which prevents the courts from rendering a judgment if the conditions of Article 15 have not been fulfilled. With respect to the writ of summons, Article 15 is of special importance in Europe because under Article 20 of the Brussels Convention of 27 September 1968 drawn up within the European Economic Community and the exactly similar Article 20 of the Lugano Convention of 16 September 1988 drawn up jointly by the Member States of the European Economic Community and those of the European Free Trade Association as between countries which are parties to one of those Conventions and to the Hague Service Convention, a judgment will not be enforced if the conditions of the Hague Convention's Article 15 have not been met.

The delegates of certain countries indicated that decisions under Article 15 of the Hague Service Convention had been rendered by their courts and the Permanent Bureau renewed its request that copies of such decisions or relevant extracts therefrom be forwarded by the national authorities to the Permanent Bureau.

24. At the end of the discussion it was observed that Article 14 of the Hague Service Convention does not prevent Central Authorities from resolving among themselves difficulties arising in connection with the Convention's application and that it is not always necessary to use diplomatic channels first.

II. HAGUE EVIDENCE CONVENTION

Scope of the Convention as to its subject-matter

Question J: Have any issues arisen in your country as to the scope of the term "civil or commercial matters" as employed in Article 1 of the Hague Evidence Convention?

25. As pointed out in the Checklist, there had been two significant decisions rendered by the highest courts of two different States Parties to the Convention concerning the scope of the concept "civil or commercial matters". For this reason, the full discussion on this point had been deferred to the discussion on the Hague Evidence Convention (see no 11 of this Report *supra*).
26. This discussion ultimately lent itself to the drafting of conclusions on the "scope of the two Conventions as to their subject-matter" which were included among the "Conclusions on the most important points considered by the Special Commission" as adopted on the final day of the meeting. These Conclusions, so far as they deal with the interpretation of the term "civil or commercial matters" are set out below:

Scope of the two Conventions as to their subject-matter

a *The Commission considered it desirable that the words "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.*

b *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 this concept.*

c *In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.*

d *However, nothing prevents Contracting States from applying the Conventions in their mutual relations to matters of public law, though not necessarily in an identical manner for both Conventions.*

Question K: Have any issues arisen in your country concerning the expression "to obtain evidence" as employed in the first paragraph of Article 1 of the Hague Evidence Convention?

27. The Permanent Bureau considered that the following were the essential questions:
 - i) could a person be compelled to submit to a blood test or other test to establish paternity?
 - ii) did recent technological developments have implications for the operation of the Convention?
28. The delegation of the United States of America noted that its Central Authority frequently received requests for tests to establish paternity from the Federal Republic of Germany. As far as was known, in most cases submission to a test under compulsion had been permitted. More rarely, the requesting authority had been asked to support its request with *prima facie* evidence of a kind that would enable the courts of the requested State to assess the request in full possession of the facts.

Procedural scope of the Convention

Question L: What is the appropriate relationship between the provisions contained in the Hague Evidence Convention and the provisions relating to the "discovery" or the obtaining of evidence in civil or commercial matters contained in the domestic procedural rules of a Contracting State?

29. This question gave rise to the most extensive discussions of the Special Commission's meeting, involving as it did the scope of application of the procedures provided for in Article 1 of the Hague Evidence Convention and their relationship to the reservation permitted under Article 23 of the Convention. Article 23 permitted an important part of the procedures used for the obtaining of documents under the domestic procedural rules of some States to be blocked out from use under the Convention. In a 1987 decision, the Supreme Court of the United States had ruled that the Convention did not preclude a State Party from invoking such domestic procedures in order to obtain evidence physically located abroad or to examine certain witnesses residing abroad when the party possessing such documents or identified with such witness was subject to the personal jurisdiction of the court in question.
30. The views expressed on this point were varied; some delegations taking the view that the Convention occupied the field and therefore excluded application of domestic procedural rules whenever the evidence was physically located or the witness was physically residing abroad, others taking the view that the Convention offered facilities which were parallel and complementary to procedures offered by the domestic rules in each Contracting State.
31. Some delegates thought that the use of the facultative verb "may" rather than the imperative "must" at the beginning of each chapter and the arguments drawn from Articles 23 and 27 of the Convention were insufficient to support the United States Supreme Court's conclusion that the Convention's procedures were optional. Moreover, the historical review made by the court was seen as being one sided, concentrating on American sources. Other delegations pointed out that, given the principles of the independence of the courts and the strict separation of powers which were embodied in the constitutions of certain countries, detailed criticism of a superior court's reasoning in a body such as the Special Commission was inappropriate.
32. Article 23 was one of the keys to the issues which had arisen. This reservation had been introduced at a late stage of the negotiations in 1968 and certain delegations felt that its breadth and importance had not been understood at the time when it was adopted. This was reflected in the declarations which had been made by a number of countries limiting the scope of their reservations taken under Article 23.
33. In the view of certain delegations the original failure to understand the breadth of Article 23 was joined with a failure to take sufficient account in the Convention of the question of indirect compulsion. Chapter 1 of the Convention provided an international framework for the application of direct measures of compulsion in order to obtain evidence. Some domestic rules of civil procedure offered wide means of indirect compulsion.
34. In the end, as a chapter of its "Conclusions on the most important points considered by the Special Commission" (a copy of which is attached as an Annex to this Report), this group adopted a balanced statement concerning the Convention on the Taking of Evidence Abroad expressed as follows:
 - a *The Special Commission stressed that one of the principal objects of the authors of the Convention was to create a link between the system of taking of evidence of the civil law and that of the common law.*
 - b *The Special Commission took note of the fact that opinions remain divided as to whether or not the Convention is of exclusive application.*
 - c *However, having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.*
 - d *With a view to facilitating the resort to the Convention as a matter of priority, the Commission encouraged any States which have made or contemplate making the reservation under Article 23 to limit the scope of such reservation.*

e Where nonetheless the judicial authorities of a Contracting State resort to measures of compulsion under their domestic rules of procedure for the purpose of obtaining documentary evidence located in another Contracting State, the Commission expressed the wish that such judicial authorities respect the spirit of a limited Article 23 reservation made by such other State.

35. In practice, the cases decided by the lower courts in the United States of America since the Supreme Court's opinion in the 1987 *Aérospatiale* case had brought on differing results, the trial courts sometimes ordering resort to the Hague Convention's procedures, other times permitting resort to the domestic rules of procedure even when documents sought for evidentiary purposes were physically located abroad. The Permanent Bureau, as well as other interested commentators, had collected and monitored such court decisions up to the date of the April Special Commission meeting and this process was expected to continue in the context of the revision of the "Practical Handbook" on the Hague Evidence Convention. It was recognized that the results in the trial courts depended very much on the advocacy of lawyers representing the parties and could be influenced by the submission of *amicus curiae* briefs by the authorities of the interested countries. Both judges and lawyers in the United States of America had become increasingly sensitized to the abuse of discovery procedures in civil and commercial cases and appropriate efforts at an early stage of a legal proceeding to obtain a protective order from the court concerning discovery, and have the discovery process included in an overall timetable for the case, could enhance the likelihood that requests for documentary evidence or for the deposition of witnesses residing abroad would be channelled through the Hague Convention.
36. Practical suggestions addressed to legal counsellors of foreign parties involved in court proceedings in the United States included the following:
- a* by taking part in the proceedings early, such as at the pre-trial conference envisaged by the Federal Rules of Civil Procedure, they can more effectively advocate the use of the Evidence Convention and have its use incorporated into a planned timetable for discovery;
 - b* use of the Convention is largely dependent on the efforts of the Parties, but foreign governments can assist by making their position clear in an *amicus curiae* brief;
 - c* a protective order procedure is available if an attorney makes discovery requests that are overboard, harassing or require confidential information to be disclosed;
 - d* the 1983 amendments to the Federal Rules make provision for fines and other sanctions under Articles 11 and 26 *g* where attorneys act in bad faith or otherwise abuse discovery procedures. These sanctions had not made their presence felt prior to the 1985 Special Commission meeting but are beginning to have a considerable effect;
 - e* although some decisions since *Aérospatiale* did not lead to the application of the Convention, courts in the US are undergoing a process of education, and many reported and also unreported instances of its use should be emphasized. Several courts had been most impressed by alterations made in the laws of civil law countries to accommodate American procedural methods;
 - f* it is arguable that since the Evidence Convention was seen by the US Supreme Court as operating alongside the Federal Rules, the burden of proof should be on the party wishing to resist application of the Convention.
37. Canada, which was considering accession to the Evidence Convention and had consulted practitioners in its Provinces concerning the application of the Convention, raised queries about the following three points and received the replies indicated:
- 1) the extension of the Convention to arbitration;

- 2) its use in connection with witnesses who were not parties to the action; and
- 3) the experience of other jurisdictions in interpreting the expression "other judicial act" in Article 1.

As to 1), the matter had been discussed in 1985 and it was felt there was no demand for making such an extension. The laws of some countries did however provide for judicial assistance in obtaining evidence for arbitration, and the Convention could then possibly be used to obtain evidence located abroad. Although the wording of the English text of Article 1, paragraph 2, of the Convention seemed to exclude this possibility, the French text was more general.

As to 2), the Convention was certainly applicable in respect of witnesses who were not parties to the action.

As to 3), "other judicial act" referred to any act which had legal effect. An example might be the need to obtain an official consent to a marriage from a party residing abroad.

Methods of taking of evidence

Question M: Have any issues arisen from requests for special methods or procedures for the taking of evidence?

38. Particular methods or procedures for taking evidence which had been requested included video evidence, and the opportunity for cross-examination of witnesses. Most delegations did not envisage problems with requests for video recordings, but the representatives of Luxembourg, Denmark and Sweden considered that there would be difficulties with such requests under their laws.
39. Cross-examination was not felt to raise any legal problems. Several States Parties to the Convention had changed their domestic law to allow for it. Practical problems were foreseen, however, owing to the inexperience of lawyers of civil law countries in such matters. Because of this it was important that all Parties should be clearly informed of the relevant rules of procedure prior to cross-examination.

Question N: Have any issues arisen concerning the costs of carrying out requests for evidence made under the Hague Evidence' Convention?

40. The question of reimbursing costs had caused few problems. The restrictive interpretation of Article 14 by the United Kingdom was questioned, and it was noted that the United States Central Authority charged for use of letters of request, but not for taking of evidence by commissioners.

Protective provisions for witnesses

Question P: Have any issues arisen in respect of privileges or duties to refuse to give evidence asserted under Article 11 of the Hague Evidence Convention?

41. The Netherlands delegation clarified the position under Netherlands law regarding privileges or duties to refuse to give evidence. The declaration of the Netherlands Government reported in the Practical Handbook was too general. It was possible for persons in receipt of confidential information, such as doctors, lawyers and government officials, to invoke the defence of privilege.
42. The American delegation noted that often provisions of foreign law concerning privilege were attached to requests for evidence. Since they were frequently not translated into English this created difficulties for American attorneys.

III. SYNTHESIS OF ISSUES UNDER THE TWO CONVENTIONS

Question Q: Is there a particular type of litigation which tends particularly to provoke controversy under one or both of these Conventions?

43. It was felt that requests for evidence arose in many types of cases and that products liability could not be singled out for special attention.

IV. PRACTICAL HANDBOOKS

44. The preparation of Practical Handbooks was strongly supported. It was often difficult for lawyers to obtain the relevant information elsewhere. Delegates hoped that it would prove possible to circulate the Handbooks more widely in the future and pressed for the completion of new editions.
45. The Permanent Bureau indicated that it would give priority to revision and updating of the Practical Handbook on the Hague Service Convention. It intended to send out to the Central Authorities designated under Article 2 requests for any changes or corrections to the information concerning their country's practice under the Convention as set out in the Handbook when it was originally published in 1983 or as corrected in the supplement of March 1985. The States which had ratified or acceded to the Convention since March 1985 would be asked as necessary to furnish the relevant information so that it could be included in the new edition.

**CONCLUSIONS ON THE MOST IMPORTANT POINTS CONSIDERED BY THE
SPECIAL COMMISSION**

as discussed and adopted by the Special Commission on 20 April 1989

Scope of the two Conventions as to their subject-matter

a The Commission considered it desirable that the words "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.

b 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 this concept.

c In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.

d However, nothing prevents Contracting States from applying the Conventions in their mutual relations to matters of public law, though not necessarily in an identical manner for both Conventions.

Convention on the Taking of Evidence Abroad

a The Special Commission stressed that one of the principal objects of the authors of the Convention was to create a link between the system of taking of evidence of the civil law and that of the common law.

b The Special Commission took note of the fact that opinions remain divided as to whether or not the Convention is of exclusive application.

c However, having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.

d With a view to facilitating the resort to the Convention as a matter of priority, the Commission encouraged any States which have made or contemplate making the reservation under Article 23 to limit the scope of such reservation.

e Where nonetheless the judicial authorities of a Contracting State resort to measures of compulsion under their domestic rules of procedure for the purpose of obtaining documentary evidence located in another Contracting State, the Commission expressed the wish that such judicial authorities respect the spirit of a limited Article 23 reservation made by such other State.