
Hague Conference Update: Permanent Bureau of the Hague Conference on Private International Law

Introduction

A cold winter in The Hague did not prevent the Hague Conference on Private International Law from providing a warm welcome to the more than 240 experts and observers, from 67 States and 13 organisations, who attended Part II of the Sixth meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (the 2012 Special Commission (Part II)) from 25 to 31 January 2012. This briefing focuses primarily on the 2012 Special Commission (Part II) and provides an overview of the topics discussed, as well as the Conclusions and Recommendations reached. The documentation prepared for the meeting can be found on the Hague Conference website, www.hcch.net, along with the full Conclusions and Recommendations (under 'Child Abduction section', then 'Special Commission meetings on the practical operation of the Convention'). A full report of this meeting will be made available on the Hague Conference website.

In addition, readers may wish to refer back to the summary of the discussions of Part I of the Sixth meeting of the Special Commission (the 2011 Special Commission (Part I)), which took place from 1 to 10 June 2011, available in [2011] *International Family Law* 149 and the full report of that meeting, available on the Hague Conference website, under 'Child Abduction section', then 'Special Commission meetings on the practical operation of the Convention', then 'Preliminary Documents / Information Documents' (Prel Doc No 14 of November 2011).

This briefing also provides an update on some important aspects of the Hague Conference's work in the field of intercountry adoption, as well as the regular update regarding the status of the Hague Children's Conventions. As usual, for further information relating to the work of the Hague Conference on Private International Law please visit our website.

Part II of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

The 2011 Special Commission (Part I) addressed primarily the practical operation of the 1980 and 1996 Conventions, including the activities of Central Authorities, the revised draft Practical Handbook on the 1996 Convention, judicial communications and

networking and the draft Guide to Good Practice on Mediation under the 1980 Convention. It was initially decided that the 2012 Special Commission (Part II) would primarily consider the issue of the desirability and feasibility of a protocol to the 1980 Convention. However, as a result of the discussions at the 2011 Special Commission (Part I), as well as the responses of States to the questionnaire on the desirability and feasibility of a protocol to the 1980 Convention (circulated by the Permanent Bureau, Prel Doc No 2 of December 2010) and consultations with Members of the Hague Conference, it was decided that the 2012 Special Commission (Part II) should instead focus on three areas where there appeared to be substantial support for further work: cross border recognition and enforcement of mediated agreements; legal basis for cross border direct judicial communications; and allegations of domestic violence in the context of return proceedings. The agenda for the 2012 Special Commission (Part II) therefore focused on these specific areas, as well as on the matters originally scheduled for discussion at Part II of the meeting: that is, international family relocation, the future of the 'Malta Process' and the role of the Hague Conference in monitoring and supporting the 1980 and 1996 Conventions.

A brief summary of the discussions which took place regarding each of these topics, as well as the conclusions and recommendations reached, follows:

(1) The recognition and enforcement of mediated agreements

The Permanent Bureau introduced this topic to the meeting by reminding experts that the discussions at the 2011 Special Commission (Part I) had revealed certain practical challenges concerning the recognition and enforcement of agreements reached as a result of mediation (or other amicable dispute resolution process) in the context of international child disputes. Since such processes may result in agreements not only on the issue of the return of the child but also other issues such as custody or maintenance, these multiple issues may cause practical challenges when parties seek to render their agreement legally binding, particularly where it is necessary to render the agreement legally binding in more than one State. In this situation, difficult questions of jurisdiction may arise, as well as questions of recognition and enforcement. Although the 1996 Convention, as well as the 2007 Convention, may assist parents in achieving recognition of their agreed upon solution in all Contracting States, these Conventions may not offer a satisfactory solution where the agreement covers matters which fall outside the material scope

of one or both Conventions, or where the Conventions are not yet in force in the relevant States. Further, in some States, the recognition and enforcement of mediated agreements may be a lengthy, cumbersome and expensive process. There could therefore be a need to explore the desirability and feasibility of further work in this field.

A large number of experts at the meeting expressed their support for mediation and for further work on rendering mediated agreements (or agreements reached as a result of other amicable dispute resolution processes) legally binding, including cross-border. Some experts emphasised that mediation does not run counter to the objective of expeditious procedures set out in the 1980 Convention but, on the contrary, enables, in some cases, the timely resolution of conflicts. A few experts expressed some reservations regarding the possibility of engaging in further work on recognition and enforcement of agreements, indicating that the 1996 Convention should be given an opportunity to operate before a decision is taken to determine whether another binding instrument is necessary. States were accordingly encouraged to join the 1996 Convention.

The Special Commission ultimately recommended that exploratory work be undertaken to identify the legal and practical problems which may exist in the recognition and enforcement abroad of agreements, taking into account the implementation and use of the 1996 Convention. To this end, the Special Commission recommended that the Council on General Affairs and Policy of the Hague Conference consider authorising the establishment of an Expert Group to carry out further exploratory research which would include identifying the nature and extent of the legal and practical problems, specifically including the jurisdictional issues, and to evaluate the benefit of a new instrument in this area, whether binding or not (see paras 76 and 77 of the Conclusions and Recommendations of the meeting).

(2) A legal basis for cross-border direct judicial communications

The Permanent Bureau introduced this topic by highlighting that, over the last 15 years, direct judicial communications under the 1980 Convention have developed ‘organically’. The Permanent Bureau recalled that the 2011 Special Commission (Part I) had endorsed the General Principles for Judicial Communications (hereinafter ‘General Principles’). However, the General Principles do not include a legal basis for judges to engage in direct judicial communications. There had been an agreement to discuss at the 2012 Special Commission (Part II) whether there was an interest in developing a legal basis for such communications in a binding instrument. To assist with this discussion, the Permanent Bureau had prepared an overview of this topic in Preliminary Document No 3 D.

The Permanent Bureau outlined that there were four options: (1) a binding international instrument to provide for judicial communications between judges

in cases involving international child abduction; (2) a broader binding instrument which contains a basis for judicial communications and other matters concerning the international protection of children; (3) a binding instrument that would cover all legal issues related to communications, as well as the topics in the General Principles; and (4) a legal foundation only within domestic law. The Permanent Bureau recalled that during the 2011 Special Commission (Part I), experts had considered it premature to legislate with respect to the content of the General Principles, preferring to wait to see how these principles are implemented by States and used by judges.

Many experts indicated that there was no need for a binding international instrument at this time, stating that providing a legal basis for direct judicial communications was more properly a matter of domestic law. On the other hand, two experts emphasised the importance of an international legal basis for judicial communications. They stated that the inclusion of a provision in a future binding instrument that would oblige Contracting States to provide for direct judicial communications and would ensure international reciprocity could not be achieved through domestic law alone.

Many experts expressed support for the International Hague Network of Judges (IHNJ) and emphasised the need to strengthen and expand it. As at the 2011 Special Commission (Part I), support was also expressed for the General Principles, their further development and their prompt dissemination. In addition, many experts supported the development of soft law tools such as a ‘guide to good practice’ on direct judicial communications to assist judges.

The meeting concluded that there was no consensus to proceed at this time with the development of an internationally binding instrument on direct cross-border judicial communications but that there was support for consideration to be given to the inclusion of a legal basis in the development of any relevant future Hague Convention. There was agreement to promote the use of the Emerging Guidance and General Principles on Judicial Communications; to continue to encourage the strengthening and expansion of the International Hague Network of Judges; and to maintain an inventory of domestic legal bases relating to direct judicial communications (see paras 78 and 79 of the Conclusions and Recommendations).

(3) Allegations of domestic violence in the context of return proceedings

The Permanent Bureau recalled that the Conclusions and Recommendations of the 2011 Special Commission (Part I) affirmed support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Art 13(1)(b) of the 1980 Convention. These Conclusions and Recommendations also indicated that the discussion on three specific proposals concerning future work in this area was to be deferred to Part II. The first proposal included,

among other items, the drafting of a Guide to Good Practice on the implementation of Art 13(1)(b). The second proposal suggested establishing a Working Group, with experts drawn in particular from the International Hague Network of Judges, to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception. A third proposal suggested that a group of experts, in particular, judges, Central Authorities and experts on the dynamics of domestic and family violence, develop principles or a practice guide on the treatment of domestic and family violence allegations in the context of return proceedings.

The Permanent Bureau invited the 2012 Special Commission (Part II) to consider the following issues: (1) The scope of any future work – whether it should be limited to domestic and family violence within the context of Art 13(1)(b) or whether it would be beneficial to have a broader consideration of Art 13(1)(b); (2) who should be involved in any Working Group and how such a Working Group would be structured; and (3) if tools should be developed, at whom should they be aimed.

The experts at the meeting agreed that further work should be carried out to promote a consistent interpretation of Art 13(1)(b). Some experts noted that a consistent application of this exception is important to ensure the safety of the child. Following further discussion, the experts agreed that such work should take the form of a non-binding instrument. Certain aspects of the project were discussed, particularly the nature of any potential soft law tool, its objectives, its scope and the composition of the Working Group.

A suggestion was made by one expert that the three proposals deferred for consideration from Part I be ‘merged’ into one, with the recommendation that a Working Group could be tasked to produce a guide to good practice on the interpretation and application of the Art 13(1)(b) exception. The publication could be a ‘hybrid’ guide, serving multiple users, with a section directed to judges and a separate section directed to Central Authorities. This suggestion met with considerable support. The majority of experts considered that any future work should not be limited to allegations of domestic and family violence within the context of Art 13(1)(b) but should include all situations of ‘grave risk of harm’, such as mental illness, criminal behaviour or drug and alcohol abuse.

In relation to future work on this topic, the Special Commission recommended that, ‘the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Art 13(1)(b), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice’ (para 82 of the Conclusions and Recommendations). In addition, ‘that further work be undertaken to promote

consistency in the interpretation and application of Article 13(1) b including, but not limited to, allegations of domestic and family violence’ (para 81 of the Conclusions and Recommendations).

(4) International Family Relocation

The Permanent Bureau began by providing a brief description of how the subject of international family relocation emerged in the work of the Hague Conference: that is, in relation to transfrontier contact issues. Further, it stated that two Conclusions and Recommendations of the 2006 Special Commission meeting related to international family relocation, one of which encouraged ‘all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation’ (para 1.7.5 of the 2006 Conclusions and Recommendations, available at: www.hcch.net, then ‘Child Abduction section’, then ‘Special Commission meetings’). The Washington Declaration on International Family Relocation adopted at the conclusion of the International Judicial Conference on Cross-border Family Relocation (the Washington Declaration) in March 2010 (co-organised by the Hague Conference and the International Centre for Missing and Exploited Children (ICMEC)) had also been a significant step. The Permanent Bureau underlined that the discussion at this 2012 Special Commission meeting would be the first significant discussion of international family relocation during a Special Commission meeting.

The Permanent Bureau indicated that international family relocation was occurring more frequently in the international context as parents moved to follow jobs or relationships or return ‘home’. It noted that the growing trend in many countries towards separated parents having joint parental responsibilities and an active involvement in a child’s life even after the dissolution of a relationship, created further concerns when one parent wished to relocate to another country.

The Permanent Bureau stated that the initial research presented in Preliminary Document No 11 showed the diversity of approaches taken by national laws on the issue. The Permanent Bureau outlined that these differences related mainly to three areas: (1) the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child; (2) the differences between the procedures followed and the factors taken into account by the court seized; and (3) the approach taken by the court to guarantee and secure the contact rights of the remaining parent. The Permanent Bureau finally suggested that experts might want to consider the need for further comparative study to be undertaken and whether a working group should be established to consider the possible options for future work.

The majority of experts did not support the development of a binding instrument on the issue of international family relocation. Many experts

underlined that relocation was a matter of substantive domestic law and that a binding instrument would be outside the scope of the work of the Hague Conference. However, other experts suggested that although relocation is a domestic law issue, it has potential private international law implications. It was explained that relocation cases often raise the problem of the recognition and enforcement of contact agreements or decisions. In this respect, several experts recalled the importance of the 1996 Convention which notably provides for the advance recognition of parenting orders. Thus, many experts agreed that the 1996 Convention was the principle solution.

Many experts described the Washington Declaration and Preliminary Document No 11 as very valuable sources of guidance concerning the issue and encouraged their dissemination.

The Special Commission concluded that the Washington Declaration provides a valuable basis for further work and reflection. It also noted support for further comparative study being undertaken of the different approaches adopted in various legal systems to international family relocation in relation to private international law issues. Finally, the Special Commission recognised the use of the 1996 Convention in international family relocation and encouraged States that have not yet done so to consider ratification of, or accession to, the Convention (see paras 83 to 85 of the Conclusions and Recommendations).

(5) The future of the Malta Process

The ‘Malta Process’ is a dialogue between senior judges and high ranking government officials from Contracting States to the 1980 and 1996 Conventions and non Contracting States with Shariah based law. The Process is aimed at improving State co-operation in order to assist with resolving difficult cross-border family law disputes in situations where the relevant international legal framework is not applicable. In particular, the Process aims to improve child protection between the relevant States by: (1) ensuring support for the child’s right to have continuing contact with both parents (even though they live in different States); and (2) combating international child abduction. Further information regarding the Malta Process can be found on the Hague Conference website under ‘Child Abduction section’, then ‘Judicial Seminars on the International Protection of Children’.

The Permanent Bureau introduced the topic by recalling the history of the Malta Process as outlined in various Preliminary Documents prepared by it and the declarations issued by the three previous Malta Conferences. It also acknowledged the activities of the Working Party on Mediation in the context of the Malta Process and welcomed its ‘Principles for the establishment of mediation structures in the context of the Malta Process’ (available at: http://www.hcch.net/upload/wop/mediationprinc_e.pdf).

The Permanent Bureau noted some desire amongst States to explore whether the initial ‘building blocks’ in place to develop a ‘rule of law’ between States involved in the Malta Process could be further enlarged and developed outside of the context of mediation structures. Different views had been expressed concerning how to approach this: to create smaller regional groups, to involve more non Contracting States, to conduct projects relating to questions of jurisdiction and to examine other governmental structures. In this context, the Permanent Bureau sought input from States on how to move forward, taking into account the value of the three declarations issued by the previous conferences in Malta and the possibility of supporting a Fourth Conference, to be held in late 2012 or early 2013.

Several experts believed that the work to be undertaken should be more focused on assistance to particular States to address the problems between non Contracting States to the Conventions and Contracting States. To this end, experts emphasised the need for concrete results and more commitment on the part of governmental entities, not just the judiciary. A number of other experts proposed the designation of Central Contact Points, including their extension to States not yet involved. Finally, a great number of experts supported the organisation of a Fourth Malta Conference, which Malta kindly agreed to host.

The Special Commission therefore expressed its support for the general continuation of the Malta Process and a Fourth Malta Conference. It also suggested that future emphasis be placed on the involvement of government representatives in the Process (see para 86 of the Conclusions and Recommendations).

(6) The strategies and services provided by the Hague Conference on Private International Law in relation to the 1980 and 1996 Conventions

The Permanent Bureau introduced Preliminary Document No 12 which offered an overview of the services and strategies provided by the Hague Conference to support the practical operation of the 1980 and 1996 Conventions. It noted that some of these services had already been discussed during the 2011 Special Commission (Part I) and briefly recalled the Conclusions and Recommendations reached at that meeting. It then turned to the services which were not directly addressed during Part I, namely the organisation of Special Commission meetings, conferences, seminars and trainings, responding to requests for assistance, INCADAT, INCASTAT, iChild and a new question concerning the role of the Permanent Bureau in monitoring and ensuring compliance with the 1980 and 1996 Conventions. It invited experts to give their views particularly on the latter question, bearing in mind financial constraints and the limited resources available.

Many experts expressed their general appreciation for the work of the Permanent Bureau of the Hague

Conference, particularly in relation to the encouragement of co-operation between States and the promotion of accessions to the 1980 and 1996 Conventions. A significant number of experts supported the post Convention services provided by the Hague Conference, which aim to promote the effective implementation and practical operation of the 1980 and 1996 Conventions. Experts emphasised the importance of the Permanent Bureau's work in organising seminars, meetings, conferences and trainings at a national, regional and global level, especially between the judiciary. Several experts also expressed appreciation for the maintenance of the Hague Conference's website and the databases of INCADAT and INCASTAT. In relation to INCADAT, some experts emphasised the importance of ensuring the tool remains reliable and provides accurate information. In this regard, experts were reminded that continued enhancements to the database were being made but they were subject to available resources. One expert commented that the completed Country Profiles for the 1980 Convention were very useful tools (available on the Child Abduction section of the website of the Hague Conference). Various experts encouraged the continued work of the Latin American Regional Office of the Hague Conference. Other experts welcomed the proposed establishment of an Asia Pacific Regional Office.

In relation to the question of whether the Permanent Bureau should take a stronger role in monitoring compliance with the Conventions, several experts expressed their reservations regarding the idea, which they feared would have an impact on the traditional, neutral position of the Permanent Bureau.

The Special Commission therefore recommended that the Permanent Bureau continue its work in supporting the effective practical operation of the 1980 and 1996 Conventions. In particular, it was recommended that the Permanent Bureau should: (1) encourage regional activities, including conferences, seminars and trainings; (2) where requests for assistance are received from individuals, provide general information concerning the relevant competent authority(ies); and (3) consider ways to enhance the effectiveness of Special Commission meetings to review the practical operation of the 1980 and 1996 Conventions. It further supported the continued work of the Latin American Regional Office and the development of a Regional Office in the Asia Pacific region (see paras 87 to 92 of the Conclusions and Recommendations).

Intercountry Adoption Update

Guide to Good Practice No 2 on Accreditation and Adoption Accredited Bodies

The Permanent Bureau will publish, in Spring 2012, the Guide to Good Practice No 2 'Accreditation and Adoption Accredited Bodies'. This Guide, which was endorsed at the 2010 Special Commission on the practical operation of the 1993 Hague Convention, is

a collaborative work between the Permanent Bureau, the Central Authority of Quebec (Canada) and Adoptionscentrum, a Swedish accredited body. Contributions have also been made by several Central Authorities. The purpose of this guide is to have an accessible resource, expressed in plain language, which is available to Contracting States, accredited bodies, parents and all those other actors involved in intercountry adoption. The Guide analyses in detail adoption accredited bodies, which play a key role as intermediaries between the prospective adoptive parents, the various authorities of the receiving States and States of origin, and the children to be adopted. The Guide aims to clarify the Convention obligations and standards for the establishment and operation of accredited bodies; encourage acceptance of higher standards than the minimum standards of the Convention; identify and promote good practices to implement those standards; and propose a set of model accreditation criteria to achieve greater consistency in the professional standards and practices of their accredited bodies.

Working Group on abduction, sale, and traffic in children

Following the recommendations of the 2010 Special Commission, the Australian Central Authority coordinated a Working Group to develop effective and practical forms of co-operation between States to prevent and address specific instances of abuses and illicit practices in intercountry adoption. The Working Group drafted a Discussion Paper, under the lead of the Australian Central Authority, to encourage information sharing between States to prevent instances of abuses and building co-operation to resolve cases where abuse is alleged. The result of this work will be circulated for consideration by all Contracting States.

The Intercountry Adoption Technical Assistance Programme: an update

The Intercountry Adoption Technical Assistance Programme (ICATAP) provides technical assistance to targeted States (or groups of States) to improve the implementation and application of the 1993 Convention. Since September 2011, the Permanent Bureau has worked with the following States:

Cambodia – In the context of its continuing efforts to implement the 1993 Convention and following the adoption of new legislation aimed at protecting children deprived of parental care and regulating intercountry adoption, Cambodia has received technical assistance from the Permanent Bureau through the drafting of a Procedure Manual to assist Central Authority staff in applying the law and regulations to adoption cases. The Cambodian Government has decided to postpone the date that it will begin receiving adoption petitions to 1 January 2013. In the meantime, communications with the Cambodian Government will be maintained and the

need for assistance will be assessed at the request of the Cambodian authorities.

Haiti – The Permanent Bureau and UNICEF, assisted by a number of receiving States, have been working together to help Haiti build an effective child protection system. In December 2011, a member of the Permanent Bureau participated in a seminar to provide information to the Haitian authorities and other bodies regarding the 1993 Convention. This seminar was held in Haiti and was organised by the French and Quebec Central Authorities, with the participation of the Swiss and Chilean authorities. Meetings with the Haitian authorities and UNICEF were also organised to discuss the current situation and how the Permanent Bureau might best assist Haiti in the framework of a technical assistance plan. A proposal for technical assistance in preparation for Haiti's ratification of the 1993 Convention, drafted by Permanent Bureau, received the approval of the Haitian authorities and will be submitted for support to several States in the 'Group of Montreal' (a group of Central Authorities from receiving States which provide support to Haiti to assist in improving the guarantees and standards of the intercountry adoption system) in the coming weeks. The Proposal focuses on strengthening the adoption system, both legally and structurally, by offering technical support in areas such as the drafting of a Hague-compliant legislation and providing training to key stakeholders.

Mexico – Following the 'Report on the Fact-finding Mission on the Protection and Adoption of Children in Mexico', written by the Permanent Bureau in October 2010, a member of the Permanent Bureau participated in a workshop involving child protection and family law attorneys from 31 (out of 32) of the states of Mexico. All participants were trained on the objectives, principles, challenges and good practices in relation to adoption. The Mexican authorities also presented the major achievements which have been accomplished since the report was published in October 2010, among them, the approval of a law in the state of Veracruz which abolishes private adoptions and which makes compulsory the intervention of the Mexican public authorities (DIF) in all domestic and intercountry adoptions.

Nepal – During a meeting held in Rome from 31 March to 1 April 2011, Conclusions and Actions Points were agreed to guide Nepal in its efforts to develop a safe and ethical intercountry adoption system. The Permanent Bureau has maintained communications with officials in Nepal and has remained in close contact with UNICEF and the organisation, Terre des Hommes. After asking for

information from the Government of Nepal on recent developments regarding the situation of children deprived of their family, the Permanent Bureau has encouraged the Government of Nepal to share its views on the present need for assistance in light of Nepal's current situation.

The Hague Children's Conventions: status update

A number of States have recently ratified or acceded to the Hague Children's Conventions:

- On 1 October 2011, the 1980 Convention entered into force for the Russian Federation. Guinea acceded to the 1980 Convention on 7 November 2011 and the Convention entered into force for Guinea on 1 February 2012.
- The 1996 Convention has entered into force for several countries since the last Briefing: Demark (1 October 2011), Malta (1 January 2012) and Portugal (1 August 2011). Further, Greece ratified the 1996 Convention on 7 February 2012 and Montenegro acceded to this Convention on 14 February 2012. The 1996 Convention will enter into force for Greece on 1 June 2012 and for Montenegro on 1 January 2013.
- On 24 August 2011, Senegal acceded to the 1993 Convention, and the Convention entered into force for Senegal on 1 December 2011. Viet Nam ratified the 1993 Convention on 1 November 2011. This Convention entered into force for Vietnam on 1 February 2012. On 9 March 2012, Montenegro also acceded to the 1993 Convention, which will enter into force for Montenegro on 1 July 2012. Finally, Rwanda acceded to the 1993 Convention on 28 March 2012. The Convention will enter into force for Rwanda on 1 July 2012.
- In relation to the 2007 Convention, Albania signed this Convention on 21 October 2011.

Call for Papers: International Conference on Recovery of Maintenance (March 2013)

Finally, an International Conference on 'Recovery of Maintenance in the European Union and Worldwide' is to take place in Heidelberg, Germany from 5 to 8 March 2013. The Hague Conference on Private International Law is a partner in the conference. Family law practitioners and others working in the field of maintenance are invited to make paper or presentation submissions for the conference.

For more information, please visit: www.heidelberg-conference2013.de.