

The Hague Conference on Private International Law

Rick Mitry

Nicole Rademeyer

I. INTRODUCTION

Private international law plays an integral role in governing and resolving cross border disputes. In a global community that is composed of vast and diverse judicial systems, the pursuit of justice and practical effectiveness in cross-border dealings has become increasingly complex. The historical divergence between civil and common law traditions, as well as the myriad of foreign legal systems within those traditions, has resulted in bodies of rules that are far from universal. This can pose a variety of challenges for the effective dispensation of justice and global dispute settlement, such as causing significant delays, costs and unjust outcomes.

Some of the most vexing challenges for individuals have arisen in cases involving international child abduction committed by one parent in violation of a court order issued in a particular State; cross-border adoption; the costs and delays incurred with respect to international legalisation of public documents; and the unenforceability of judgments obtained in foreign jurisdictions. An important aspect of private international law is the effective facilitation of international trade, investment and commerce. As technology advances and the swift exchange of information, ideas and assets becomes more attainable, individuals and companies encounter greater legal complexity and uncertainty.

As will be discussed below, the Hague Conference on Private International Law has been highly successful in responding to these challenges and continues to be influential in the domain of private international law.

II. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

In order to address and overcome numerous cross-border challenges with respect to private legal matters, the Hague Conference on Private International Law (HCCH) was established in 1893, under the leadership of Tobias M.C Asser,¹ to develop an international framework of negotiated multilateral legal rules that govern private international law.² Diplomatic Conferences were convened every few years on an ad hoc basis and resulted in the adoption of several influential Conventions.³ It was not until 1955, however, that the Conference was transformed into a permanent organisation with a Permanent Bureau, following the implementing Statute's entry into force.⁴ Meetings took place (and still do) at the Peace Palace located at The Hague and the working languages of the organisation, since the 1960s, are English and French.⁵

¹ Hans Van Loon, 'The Hague Conference on Private International Law' (2007) 2 *Hague Justice Journal* 3, 4.

² Ibid 3.

³ Ibid 4.

⁴ Ibid 5.

⁵ Ibid 10.

The HCCH is the only intergovernmental organisation in The Hague tasked with a legislative mission,⁶ which is to achieve the ‘progressive unification’ of private international law rules.⁷ Its work is concerned with providing individuals and companies a high degree of legal security by bridging the gaps between foreign legal systems in numerous areas of private international law.⁸ These areas include, but are not limited to, international legal cooperation and civil litigation, jurisdiction and enforcement of foreign judgments, international commercial and finance law, and international family and property relations.

All Conventions include one or more of the following elements of private international law:⁹

- Which State’s jurisdiction should be invoked to determine an international dispute;
- Which State’s laws should be applied to deal with the dispute;
- How a decision rendered in one State can be enforced in another State;
- Facilitation of cooperation between foreign legal systems and authorities.

As a legislative organisation, complaints of a State’s non-compliance with Hague Conventions cannot be brought to the Conference, as the Conference does not have a policing or judicial function.¹⁰ Its role is confined to negotiating, adopting and monitoring Conventions, as well as assisting Member States with their implementation of the Conventions.¹¹ The Conference seeks to preserve States’ legal and cultural diversity by only providing uniform rules relating to procedure as opposed to substantive law.¹² Furthermore, the Hague Conventions co-exist with regional and bilateral agreements so that the best means for securing a desired outcome can be pursued.¹³

Although having 83 Members, the Hague Conference interacts with over 150 States from around the world due to the growing number of non-Member States choosing to become parties to the Conventions. There are many advantages to becoming a Member of the Hague Conference. For instance, Members are able to determine the legislative and non-legislative projects of the Conference by attending the yearly meeting of the Council on General Affairs and Policy. Members are also invited to attend and participate at the meetings of the Council of Diplomatic Representatives to determine financial and budgetary priorities, as well as the meetings of the Special Commissions that negotiate Conventions. Members are also afforded priority over non-Members to receive training and technical assistance with respect to their implementation of Hague Conventions.

III. SIGNIFICANT INSTRUMENTS

a) Apostille Convention

The *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* is the most frequently invoked Hague Convention and has the highest number of contracting parties, which is presently 117 States.¹⁴ This Convention facilitates the use and reliance

⁶ Ibid 3.

⁷ Statute of the Hague Conference on Private International Law (entered into force 15 July 1955) art 1.

⁸ HCCH, ‘About HCCH: A World Organisation’ < <https://www.hcch.net/en/about> >.

⁹ Dr Christophe Bernasconi, ‘The Hague Conference on Private International Law (HCCH): Building Bridges for Global Leadership’ (presented at International Legal Forum, Saint Petersburg, June 2014).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Hague Conference on Private International Law, *Succinct Overview of Some of the Core Conventions and Other Instruments Adopted Under the Auspices of the HCCH* (October 2018) 1, 1.

upon public documents in foreign States by establishing a uniform process of authentication of documents that is simpler and more efficient than its predecessor, which required diplomatic or consular legalisation.¹⁵ The types of public documents that fall under this Convention include documents issued by a State authority or official connected with courts or tribunals, administrative documents, notarial acts and official certificates placed on documents that are signed by individuals in their personal capacity.¹⁶ Excluded from the operation of the Convention are documents executed by diplomatic or consular agents and administrative documents dealing directly with commercial or customs operations.¹⁷

Under the current framework, authentication only requires a designated Competent Authority in a document's State of origin to provide an authentication certificate known as an Apostille.¹⁸ Some of the most common documents requiring Apostilles include birth, marriage and death certificates, patents, court rulings and notarial attestations of signatures.¹⁹ Former Secretary-General Hans Van Loon described the Convention as being a blessing to many around the world who are required to produce official documents by reducing time delays and significant costs.²⁰ Mr Frank Poon, the Representative of the HCCH Regional Office for Asia and the Pacific, recently emphasised the benefits of the Convention, such as the reduced time and cost, greater accessibility and facilitation of private and commercial international exchanges.²¹ Moreover, the World Bank Group and International Chamber of Commerce have emphasised the value of the Convention in enabling foreign investment, international trade and commerce.²²

b) International Child Abduction Convention

The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is one of the most significant and successful Hague Conventions and currently has 99 Contracting Parties. Sandrine Alexandre-Hughes provided an excellent overview of this Convention in her 2016 Presentation 'From Cradle to the Grave: Practical Illustrations of Selected Hague Conventions Assisting International Families. She reiterates the purpose of the Convention, which is to provide a 'swift return mechanism' for a child who has been abducted by their parent from one State to another and serves as a deterrent to parents who may contemplate relocation to another State with their child without the consent of the other parent.

The Convention seeks to protect children from the harm and negative consequences caused by international abductions executed by their parents. Sandrine Alexandre-Hughes highlights the conditions set out in the Convention that must be met before the return mechanism can be invoked.²³ These conditions are that the child was habitually resident in the State from which they were abducted;

¹⁵ Ibid

¹⁶ *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, art 1.

¹⁷ Ibid.

¹⁸ Hague Conference on Private International Law, *Succinct Overview of Some of the Core Conventions and Other Instruments Adopted Under the Auspices of the HCCH* (October 2018) 1, 1; Hague Conference on Private International Law, *Outline: Hague Apostille Convention*, < <https://assets.hcch.net/docs/80d0e86f-7da8-46f8-8164-df046285bcdd.pdf>>.

¹⁹ Hague Conference on Private International Law, *Outline: Hague Apostille Convention*, < <https://assets.hcch.net/docs/80d0e86f-7da8-46f8-8164-df046285bcdd.pdf>>.

²⁰ Hans Van Loon, 'The Hague Conference on Private International Law' (2007) 2 *Hague Justice Journal* 3, 10.

²¹ Frank Poon, 'HCCH – The Apostille Convention in the Asia Pacific Region and The Hague Judgment Project' (Paper presented at The Australian and New Zealand College of Notaries 2018 Conference, Singapore, 19 October 2018) slide 16.

²² Ibid slide 15.

²³ *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, art 3.

the abduction is executed in violation of the non-abducting parent's parental rights; and the non-abducting parent exercised those rights. It is important, however, that both the State from where the child is removed, and the State to which the child is taken, must be parties to the Convention. Moreover, the Convention does not address the criminal aspects of international child abduction but rather focuses on its civil aspects by prescribing the procedure for enabling the return of abducted children.

c) Adoption Convention

The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* is a contemporary example of the HCCH's success in resolving cross-border disputes. With 99 contracting State parties, this Convention facilitates intercountry adoptions by establishing safeguards and procedures that recognise the best interests of the child, respect the child's fundamental rights and prevent the abduction, sale or traffic of children.²⁴ The Convention recognises the importance of growing up in a happy, loving and understanding family environment and its contribution to a child's full and harmonious development of personality.²⁵ Intercountry adoption offers children the opportunity to have a permanent family if they do not find one in their State of origin and the Convention enables those adoptions to be automatically recognised in Contracting States.²⁶ Automatic recognition is a highly satisfactory feature of the Convention, as it negates the need for a procedure for recognising orders or re-adoption in receiving States.²⁷ The Convention facilitates cooperation between Central Authorities in the host and receiving States and encourages increased security, predictability and transparency in intercountry adoption procedures.²⁸

IV. CURRENT PROJECTS

Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

In today's globalised and interconnected world where State borders no longer prevent the exchange of ideas, information, resources and technology, the necessity for a uniform framework for the recognition and enforcement of foreign judgments has become more pressing. The resolution of cross-border disputes relating to commercial and civil matters can be rendered meaningless if judgments are unable to be enforced abroad.

The HCCH's Council on General Affairs and Policy established a Working Group in 2012 to develop proposals for a new Convention with respect to the recognition and enforcement of civil and commercial judgments.²⁹ A proposed draft text was completed in 2016 and was referred to a newly set up Special Commission for the negotiation and preparation of a draft Convention.³⁰ Following the Special

²⁴ *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, art 11; Hague Conference on Private International Law, *Outline: Hague Intercountry Adoption Convention*, < <https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf>>.

²⁵ *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Preamble.

²⁶ *Ibid* art 1.

²⁷ Hague Conference on Private International Law, *Outline: Hague Intercountry Adoption Convention*, < <https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf>>.

²⁸ *Ibid*.

²⁹ HCCH, 'The Judgments Project: Special Commission on the Judgments Project' < <https://www.hcch.net/en/projects/legislative-projects/judgments>>.

³⁰ *Ibid*.

Commission's 4 meetings over the last 2 years, the 2018 Draft Convention was produced in May 2018.³¹ The final negotiations and adoption of the Convention are scheduled to take place in June 2019.³²

This proposed Convention is a significant legislative initiative that will be of great benefit to the global community in securing greater uniformity, practical effectiveness and access to justice in the context of recognising and enforcing foreign judgments. The two primary objectives of this Convention are to promote trade and investment and to enhance access to justice.³³

This Convention will serve as an effective mechanism for overcoming key judicial differences between the civil and common law systems that have on occasion resulted in unenforceable judgments and therefore unjust outcomes.

V. CONCLUSION

The HCCH has been and continues to be highly effective in addressing cross-border disputes through its establishment of an international framework of negotiated multilateral and uniform rules that govern private international law. In a global community that is composed of vast and diverse judicial systems, the HCCH bridges the gap and facilitates the effective dispensation of justice while reducing costs and delays. Some of the organisation's most successful Conventions relate to Apostilles for the authentication of public documents, international child abduction, intercountry adoption and the highly anticipated Convention on the enforcement of foreign judgments. The increasing number of States that have become parties to the Hague Conventions and Members of the HCCH is a testament to the organisation's continued efficacy, necessity and value.

³¹ Ibid.

³² Ibid.

³³ Frank Poon, 'HCCH – The Apostille Convention in the Asia Pacific Region and The Hague Judgment Project' (Paper presented at The Australian and New Zealand College of Notaries 2018 Conference, Singapore, 19 October 2018) slide 35.