

Title	Update on the work done by the HCCH regarding the recognition of domestic adoptions
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Author	PB and the Chair of the EG PISA
Agenda Item	Item 19
Mandate(s)	C&R No 11 of CGAP 2019
Objective	To report to the Special Commission on the work done on the recognition of domestic adoptions since the 2015 SC meeting
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input checked="" type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annexes	N/A
Related Documents	Prel. Doc. No 12 of December 2018 - Report on the cross-border recognition of domestic adoptions

Contents

1.	Background	3
2.	Preliminary issue: Distinguishing between domestic and intercountry adoptions.....	3
3.	The recognition of domestic adoptions.....	3
3.1.	General work on the recognition of domestic adoptions until 2019	3
3.2.	Work of the Experts' Group on the PISA Project on the recognition of domestic adoptions since 2019	5
4.	The importance of not undermining the 1993 Intercountry Adoption Convention	6
5.	In preparation for the 2022 SC Meeting.....	7

1. Background

1. The *Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993 Intercountry Adoption Convention) applies to *intercountry* adoptions. However, there are no international instruments governing the recognition of *domestic* adoptions.¹
2. In order to address this situation, in the past years, the HCCH has been studying the desirability and feasibility of including the recognition of domestic adoptions in a possible future instrument on legal parentage. This Document aims at informing the Special Commission (SC) on the practical operation of the 1993 Intercountry Adoption Convention about the work done in this area since the last meeting of the SC in 2015.

2. Preliminary issue: Distinguishing between domestic and intercountry adoptions

3. One challenge faced by States is to distinguish in practice when an adoption is *intercountry* (and thus falling under the scope of the 1993 Intercountry Adoption Convention) or *domestic* (and thus not falling under the scope of the 1993 Intercountry Adoption Convention). Along these lines, in 2015, the SC on the practical operation of the 1993 Intercountry Adoption Convention “noted with concern reports of persons moving to, or moving children from, Contracting States in order to undertake a domestic adoption in another Contracting State in an effort to deliberately circumvent the Convention”.²
4. In response to this challenge, discussions on the determination of habitual residence – the criterion used to determine whether an adoption is intercountry or domestic (Art. 2(1)) – were held at the 2015 meeting of the SC.³ Following those discussions, in 2018 the HCCH published the Note “Habitual Residence and Scope of the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption”.⁴

3. The recognition of domestic adoptions

3.1. General work on the recognition of domestic adoptions until 2019

5. Following the discussions at the 2015 SC, it was suggested that preliminary work be undertaken to identify whether there was a need to do work on the cross-border recognition of domestic adoptions.⁵ The Council on General Affairs and Policy of the HCCH (CGAP) agreed at its 2016 meeting that, resources permitting, the Permanent Bureau (PB) should undertake some preliminary work on this matter.⁶
6. Thus, in 2016, the PB published a Questionnaire to National Organs and Contracting Parties to the 1993 Intercountry Adoption Convention on the recognition of domestic adoption in other States.⁷ This 2016 Questionnaire aimed to identify the depth and extent of the issue at the global level.

¹ In accordance with the 1993 Intercountry Adoption Convention, an adoption is considered *intercountry* when the child in need of adoption is habitually resident in one State and the prospective adoptive parents are habitually resident in a different State (Art. 2 (1) of the 1993 Intercountry Adoption Convention). For the purpose of this document, an adoption is thus considered *domestic* when both the child and the prospective adoptive parents are habitually resident in the same State. Nationality is not relevant to qualify an adoption as domestic or intercountry.

² 2015 SC, C&R No 24.

³ 2015 SC, C&R No 24-25.

⁴ Available at: <https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf>.

⁵ See “Work in the adoption area following the Special Commission meeting of June 2015”, Prel. Doc. No 4A of February 2016, discussed at CGAP 2016.

⁶ See Conclusions & Recommendations of CGAP (15-17 March 2016), C&R No 30.

⁷ See Questionnaire on the Recognition of Domestic Adoptions in Other States: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6524&dtid=33>.

7. At the same time, the HCCH Experts' Group on the Parentage / Surrogacy (PISA) Project was discussing the feasibility of one or more instruments on legal parentage, including, for example, a possible private international law instrument on legal parentage in general ("draft Convention on Legal Parentage"), and another possible future private international law instrument on legal parentage established as a result of an international surrogacy arrangement specifically. The Experts' Group has had some discussions on the desirability and feasibility of including the recognition of domestic adoptions in a possible draft Convention on Legal Parentage:
- "16. The Group considered that it may be appropriate for some adoption decisions (such as second parent adoptions) to be recognised under any future instrument. The Group acknowledged, however, that this issue would need to be very carefully thought through including, but not limited to, consideration of the 1993 Hague Intercountry Adoption Convention"⁸ (3rd meeting, February 2018).
 - "41. There was an initial discussion on the possible inclusion of domestic adoptions (where both the child and the (prospective) adoptive parents are habitually resident in the same State),⁹ including second parent adoptions. Most Experts agreed that it would be appropriate to recognise such cases under a possible future instrument on legal parentage. Furthermore, some Experts recommended that if the recognition of domestic adoptions were included, it should be based on grounds for non-recognition / conditions for recognition corresponding to basic safeguards in the adoption procedure"¹⁰ (4th meeting, September 2018).
8. Based on the responses to the 2016 Questionnaire and the work of the Experts' Group on the PISA Project, the PB published a report in 2018¹¹ in which it recommended that:
- "57. In view of the current recommendation of the Experts' Group on the Parentage / Surrogacy Project that it may be appropriate to recognise the legal parentage flowing from a domestic adoption under any possible future international instrument on legal parentage, and with a view to avoiding the duplication of work and ensuring the efficient use of HCCH resources, it is recommended that Council confirm that the Experts' Group on the Parentage / Surrogacy Project should continue with its study and consideration of this issue. If needed, this Experts' Group may request further information regarding the degree and frequency of the problems in practice in this specific area.
 - 58. It is suggested that Council may wish to invite the Experts' Group to report back to it on this matter as part of its general reporting on the progress being made in terms of assessing the feasibility of a future international instrument on legal parentage."

⁸ 3rd Experts' Group Report (February 2018 meeting): <https://assets.hcch.net/docs/75f52918-063d-4232-81c7-ca7cd37e5af6.pdf>.

⁹ Domestic adoptions in this Report [are] to be understood in comparison with intercountry adoption as defined in Art. 2 of the 1993 Hague Intercountry Adoption Convention (a child habitually resident in one State has been, is being, or is to be adopted by spouses or a person habitually resident in another State). For more information on this, please see HCCH, *Habitual Residence and the Scope of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*, The Hague, 2018 and the HCCH, *Report on cross-border recognition of domestic adoptions*, [Prel. Doc. No 12 of December 2018 (HCCH Report Recognition Domestic Adoptions)].

¹⁰ 4th Experts' Group Report (September 2018 meeting): <https://assets.hcch.net/docs/c25b558d-c24e-482c-a92b-d452c168a394.pdf>.

¹¹ [See HCCH Report Recognition Domestic Adoptions, *supra* note 9].

9. Following this, in 2019, CGAP “[...] acknowledged that recognition of domestic adoptions raises many important issues and challenges. While not a priority for the HCCH at this time, the topic could be addressed by the Experts’ Group on the Parentage / Surrogacy Project at a later stage.”¹²

3.2. Work of the Experts’ Group on the PISA Project on the recognition of domestic adoptions since 2019

10. Following CGAP 2019, the Experts’ Group on the PISA Project continued its discussions on the matter:

“9. While discussing the scope of the [possible draft] Convention [on Legal Parentage], the Group acknowledged that domestic adoptions (where both the child and the (prospective) adoptive parents are habitually resident in the same State),¹³ are a means by which legal parentage can be established. Given the overarching aims of the Convention, most Experts agreed that it would be appropriate to include domestic adoptions within its scope”¹⁴ (6th meeting, November 2019).

“6. In addition, with respect to the Convention, the Experts’ Group noted the need to further discuss a number of matters, including:

- [...]
- the possible inclusion or exclusion of legal parentage established as a result of domestic adoptions”¹⁵ (7th meeting, October 2020).

“2. The Experts’ Group discussion focused on the scope of the possible draft Convention on legal parentage (draft Convention) [...]. The Group discussed, in particular, the desirability and feasibility of including:

- domestic adoptions in the scope of the draft Convention; [...].

3. With regard to domestic adoptions, the Experts’ Group discussed the following aspects:

- a possible definition of “adoption” and of “domestic adoption” and the need to ensure that if domestic adoptions are included within the scope of the draft Convention, only adoptions which create a permanent legal parent-child relationship be recognised;
- whether the rules in the draft Convention (*i.e.*, on the recognition of judicial decisions and possible uniform applicable law) would be appropriate for domestic adoptions and / or whether different or additional rules would be necessary;
- whether safeguards framed as conditions for recognition and / or grounds for non-recognition (or other) of domestic adoptions would be necessary and, if so, how they should be verified;
- whether domestic adoptions finalised by means other than a judicial decision (e.g., an administrative decision) should also fall under the scope of the draft Convention; and

¹² 2019 CGAP Meeting (5-8 March 2019), para. 13: <https://assets.hcch.net/docs/c4af61a8-d8bf-400e-9deb-afcd87ab4a56.pdf>.

¹³ [See *supra* note 9].

¹⁴ 6th Experts’ Group Report (November 2019 meeting): <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf>.

¹⁵ 7th Experts’ Group Report (October 2020 meeting) – *Aide-mémoire*: <https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf>.

- whether the legal effects of domestic adoptions should be addressed, in particular with regard to domestic adoptions that do or do not terminate the pre-existing legal parent-child relationship in the State where they were made.
- 4. The Group [...] also discussed how concerns in relation to illicit practices and / or abuses and illegal domestic adoptions could be addressed”¹⁶ (9th meeting, July 2021).
- 11. The Experts’ Group on the PISA Project is set to publish its final report in advance of the 2023 CGAP Meeting in which it will reflect its final view on this matter.

4. The importance of not undermining the 1993 Intercountry Adoption Convention

- 12. While exploring the desirability and feasibility of having an international instrument that will cover the recognition of domestic adoptions, the importance of not undermining the 1993 Intercountry Adoption Convention has been underlined several times by both CGAP and the Experts’ Group:
 - “11. [CGAP] decided that intercountry adoptions, including those within the scope of the 1993 HCCH Intercountry Adoption Convention, should be excluded from the scope of the Parentage / Surrogacy Project. [CGAP] emphasised the importance of not undermining the 1993 Intercountry Adoption Convention” (CGAP 2019).
 - “23. The Group agreed that matters covered in other [HCCH] Conventions, such as [...] intercountry adoption [...] should be excluded”¹⁷ (2nd meeting, January 2017).
 - “16. [...] The Group considered it essential that [the 1993 Intercountry Adoption] Convention is not undermined in any way by a new instrument. Whilst the 1993 Hague Intercountry Adoption Convention has a very specific scope (Art. 2) – applying only to intercountry (and not domestic) adoptions – it would be crucial that the new instrument could not be used as a tool to avoid the obligations pertaining to intercountry adoptions established by the 1993 Hague Intercountry Adoption Convention”¹⁸ (3rd meeting, February 2018).
 - “42. [...] The Group reaffirmed [...] that it is essential that the 1993 Hague Convention, and its aims of ensuring that adoptions take place in the best interests of children and preventing illicit practices, are not undermined in any way by a new instrument. It would be crucial that any new instrument is not used as a tool to avoid the safeguards under the 1993 Hague Convention and that it not discourage States from joining the 1993 Hague Convention. It was agreed that this issue required further discussion and careful consideration”¹⁹ (4th meeting, September 2018).
 - “9. The Group agreed [...] that provisions relating to the recognition of legal parentage flowing from domestic adoptions would require further discussion because of the challenges that can arise in distinguishing between domestic

¹⁶ 9th Experts’ Group Report (July 2021 meeting) – *Aide-mémoire*: <https://assets.hcch.net/docs/a29ca035-f4d9-469f-9ff9-cd9fca1918c8.pdf>.

¹⁷ 2nd Experts’ Group Report (January / February 2017 meeting): <https://assets.hcch.net/docs/8b00d3a1-6c2d-4b8b-b3d9-7db43f9bb025.pdf>.

¹⁸ 3rd Experts’ Group Report (February 2018 meeting): <https://assets.hcch.net/docs/75f52918-063d-4232-81c7-ca7cd37e5af6.pdf>.

¹⁹ 4th Experts’ Group Report (September 2018 meeting): <https://assets.hcch.net/docs/c25b558d-c24e-482c-a92b-d452c168a394.pdf>.

adoptions and intercountry adoptions, and the need to ensure that the proposed Convention does not undermine in any way the 1993 HCCH Intercountry Adoption Convention²⁰²¹ (6th meeting, November 2019).

- “4. The Group discussed these aspects in light of the importance of not undermining the HCCH 1993 Intercountry Adoption Convention, as emphasised by CGAP at its 2019 meeting.²² It also discussed how concerns in relation to illicit practices and / or abuses and illegal domestic adoptions could be addressed”²³ (9th meeting, July 2021).

5. In preparation for the 2022 SC Meeting

13. Having regard to the foregoing, participants are invited to consider if the SC Meeting should also make a recommendation in line with what CGAP decided in 2019 (see para. 12 above). In addition, participants may also contact the PB in advance of the Meeting if they have comments or other ideas for discussion.

²⁰ See “Conclusions and Recommendations of the CGAP (5-8 March 2019)”, C&R No 13, available on the HCCH website at < www.hcch.net >, under “Governance” then “Council on General Affairs and Policy”.

²¹ 6th Experts’ Group Report (November 2019 meeting): <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf>.

²² C&R No 11 of CGAP 2019.

²³ 9th Experts’ Group Report (July 2021 meeting) – *Aide-mémoire*: <https://assets.hcch.net/docs/a29ca035-f4d9-469f-9ff9-cd9fca1918c8.pdf>.