Articles

When two worlds collide: the 1970 Hague Evidence Convention and the 1980 Hague Child Abduction Convention

Dr Onyója Momoh, *Barrister, 5 Pump Court Chambers*

International family law barrister, leading junior in the Legal 500 UK for children law and lecturer in private international law. Extensively published in research and academia, case reports, expert opinions and delivering lectures and training around the world. Presentations and advocacy initiatives have included the UK House of Lords Justice and Home Affairs Committee, the European Commission, the HCCH, and Federal and State Government Ministries.

International family cases are rarely straightforward. Even so, experienced practitioners will have garnered a level of deftness in addressing its many complexities. For instance, it is not unusual to see treaties go hand in hand, a perfectly healthy example would be the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention') and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Hague Convention'). In our post-Brexit world, the marrying of these two treaties has become second nature. So, what does one make of invoking the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[1] ('the Evidence Convention'), specifically in the context of an application under Art 21 of the 1980 Hague Convention where the process of the taking of evidence from a foreign state is introduced into proceedings on securing effective rights of access? The latter matter inevitably engages the legal framework of national law, that being the 1989 Children Act and amongst others, its welfare principles (s 1(3)).

The Conventions in summary

The Evidence Convention's core objectives in both civil and commercial matters is to engage a more favourable and less restrictive approach to the securing or obtaining of evidence internationally. Ensuring also that once such evidence is procured, it is not only 'utilizable' in the forum (State) requiring it but that 'tolerable' practice via the internal rules and procedures of the State providing the evidence has taken place. In replacing large parts of previous Conventions,[2] the Evidence Convention seeks to increase the powers of consuls and improve the system for 'Letters of Request'. As per Art 1 of the Convention, the request to 'obtain evidence, or to perform some other judicial act' may occur pursuant to the law of the requesting State. It is of note that matters concerning the service of judicial documents, the execution or enforcement of judgments and orders, or measures of protection does not fall under 'other judicial act' – practitioners with a keen eye will easily identify applicable laws under the 1996 Hague Convention and its role in some of these areas.

Article 1 of the Evidence Convention provides that:

> 'In civil or commercial matters, a judicial authority of a Contracting State

1 The UK ratified the 1970 Evidence Convention in 1976.
2 Replacing Arts 8–16 of the 1905 and 1954 Conventions.

may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2:

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.'

It is noteworthy that the HCCH Special Commission[3] explored the distinction between 'civil' or 'commercial' and 'administrative' matters but found that the operation of law across jurisdictions made it complicated to offer clarity, nor did it appear that the precise scope of eg, 'civil' proceedings could be defined. It being a matter of interpretation and discretion for State parties. Although unconvinced, this is perhaps yet another compelling reason for this article not to definitively rule out the possibility that there are just reasons for the Conventions to cross paths, after all areas of law and practice regularly intersect.

The 1980 Hague Convention, on the other hand, is a very familiar international family law treaty that is perhaps better known for its remedial provisions in cases of child abduction. A further objective of the 1980 Hague Convention, becoming increasingly relevant post-Brexit, is the utility of Art 21 of the Convention. This is because, previously, similar cases would have operated under the Brussels IIbis Regulation[4] regime (now succeeded by the Brussels IIter Regulation)[5]. Given the context surrounding the drafting of the Convention, at a time when the phenomenon of unilateral parental child abductions was of great concern, the provisions contained therein do well to seek out the protection of rights of access, protecting what is usually a pre-existing relationship disrupted. For completeness, Art 21 of the 1980 Hague Convention provides that:

'Chapter iv – rights of access

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

3 Permanent Bureau, Report on the Work of the Special Commission of May 1985 on the Operation of the Convention, HCCH, September 1986 p 2–3.

4 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1, see in particular Arts 2(10) and 9.

5 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereafter 'the Recast Regulation'), see in particular Arts 2(10) and 8.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.'

Hypothesis

When the 1980 Hague Convention came into play 10 years after the Evidence Convention, it was not envisaged that to give full effect to the procedural aspects of 1980 Hague cases, whether abduction or contact, that the provisions under the Evidence Convention would need to be utilised. Nor has subsequent HCCH Children Conventions raised the issue. It must be the case that, where possible, bureaucratic hurdles that stand in the way are avoided. In fact, one of the very purposes of Central Authorities in 1980 Hague cases is to assist in the exchange of information to give effect to the full objectives of the Convention (see Art 7), as is reiterated by paragraph 3.7 of the Central Authority Guide to Good Practice where the taking and admission of evidence including from experts is anticipated.[6]

Notwithstanding that one would expect variances amongst jurisdictions as to what constitutes "evidence",[7] the taking/hearing of evidence from abroad in 1980 Hague Convention cases is commonplace. Although the Convention does not deal with the jurisdiction for this procedural aspect, there is no doubt a mutual practice amongst Contracting States to expect and to entertain inter-jurisdictional evidence giving, including oral evidence from abroad (whether lay clients or experts).

Example: an Article 21 contact case involving Poland

Case X concerned two sets of proceedings consolidated and subsequently listed for a composite fact-finding and final hearing. The court was concerned with proceedings under the 1989 Children Act (s 8) and under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Art. 21). At the heart of the case was a little girl, X, habitually resident in the UK, with three half siblings resident in Poland. The section 8 CA 1989 proceedings concerned the father's application for contact, whereas the application under Art 21 1980 Hague Convention concerned proceedings to secure effective rights of access between the half siblings. Almost half of the witnesses relating to the fact-finding allegation lived in Poland, the alleged incident having occurred in that jurisdiction.

Whether intentional or not, circumstances within case X[8] instigated the Evidence Convention protocol, setting in motion[9] a Letter of Request to a Contracting State, in this instance, Poland. The process is initially organised by a State's Central Authority, and in accordance with its own law. However, Art 27 of the Evidence Convention makes way for the transmission of the Letter of Requests (to the relevant judicial authorities) through other channels other than a Central Authority platform. For example, a solicitor firm with conduct. This may well explain why Art 2 does not explicitly suggest that the Letter of Requests be transmitted via a Central Authority; simply rather to a Central Authority. In parentheses, despite the intertwining of Conventions (1980 and 1970), there remains a distinction in their practical operation. The 2025 President's

6 1980 Hague Convention (Central Authority Guide to Good Practice) Paragraph 3.7: Manner of taking evidence: 3.7 Rules and practices concerning the taking and admission of evidence, including the evidence of experts, should be applied in return proceedings with regard to the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return. *Cf* with the 1996 Hague Convention, regarding Art 35(2). The HCCH 1996 Practical Handbook provides that an applicant seeking international access/ contact may request the Central Authority in the State in which he resides to gather information, evidence and to make findings before transmitting to the authority with jurisdiction on the application.

7 This could mean a distinction between documentary evidence and 'live' evidence. Countries may define the scope of evidence that qualify for the purposes of eg, the Evidence Convention. See also for example pursuant to declarations by Poland that requests for 'pre-trial discovery of documents' would not be executed.

8 'Case X': Reflecting on proceedings where I was instructed to represent three children through their mother in an application pursuant to Art 21 of the 1980 Hague Convention for effective rights of access in respect of their half-sibling. My instructions came after the application under the Evidence Convention had been set in motion.

9 See also Arts 15, 27 and 33 of the Evidence Convention.

Guidance on public law cases with an international element[10] highlights that ICACU[11] has no role to play in the operation of the 1970 Hague Convention and will not assist in the acquiring of evidence.[12] Of course, the Central Authority for England and Wales is only appointed in 1980 and 1996 Hague Children cases. However, where the two worlds collide (1980 and 1970), a question that bears considering is what forum should take precedence when the interests of a child are at stake, and the case imperilled by delay. It is of note that advancing the application under the Evidence Convention in case X appeared to involve no fewer than the following entities: the Polish Consulate at the Foreign Office, the Commonwealth and Development Office, the Premium Service Legislation Office, Taking of Evidence Unit within the FCDO and the Foreign Process Section within the RCJ (supporting the Senior Master).

Article 2 of the Evidence Convention further provides that the designated Central Authority in Poland will undertake to receive Letters of Request coming from a 'judicial authority'. This directive signposts that a Letter of Requests would need to incorporate in or be accompanied by an approved court order. This is on the basis that the court is the judicial authority on whose behalf an application is made (likely by the applicant's legal team). The Letter would need to have been translated into Polish, though English or French is also acceptable if an objection to the same is not identified pursuant to Art 33.[13] Further, any translation would need to be certified by a sworn translator or other person authorised; this may also be by a diplomatic officer or consular.

Of note, Poland's entry on the Hague Conference's ('HCCH') Evidence section includes the following declarations:

> '13-02-1996
> Article 8 – The Authority designated to issue a prior authorization shall be the Ministry of Justice.
>
> Article 23 – the Republic of Poland declares that it will not execute Letters of Request issued for the purpose of obtaining "pre-trial discovery of documents" as known in common law countries.
>
> Article 33 – the Republic of Poland excludes the application on its territory of:
> a) the provisions of Article 4, paragraph 2,
> b) the provisions of Chapter II, excluding the provisions of Article 15.'

Should one find themselves navigating circumstances where both Conventions have been engaged as in case X, and the practicalities for the taking of evidence via video-link, video conferencing or other means is being explored, the Evidence Convention's *Guide to Good Practice on the use of Video-Link*[14] provides good grounding on the way forward. Of course, in an ideal world, the formulaic foundation of the Convention calls for the assistance of relevant judicial and administrative authorities to expedite the request, but the reality can often be further from the aspirations held by all concerned. Poland, like many other jurisdictions, have particular requirements for witnesses giving evidence. It is within Poland's authority to determine how evidence from their jurisdiction will be taken. The 1970 Evidence Convention enables that autonomy and thus, so far as the Polish Authorities are concerned,

10 President's Guidance of 21 January 2025: Public law children cases with an international element. Available at <https://www.judiciary.uk/wp-content/uploads/2025/01/PFD-ICACU-Guidance.pdf>

11 The international Child Abduction and Contact Unit (ICACU) for England and Wales.

12 2025 President Guidance, p3. Note that ICACU as designated in 1980 and 1996 Hague children cases is distinguishable from the appointed 'Central Authority' in 1970 Hague Evidence Convention cases. For England and Wales, it is the Senior Master at the Foreign Process Section (RCJ) <https://www.hcch.net/en/states/authorities/details3/?aid=526

13 Amongst other provisions, Art 33 provides that: A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

14 Permanent Bureau, 'Guide to Good Practice under on the use of Video-Link under the Evidence Convention', HCCH 2020. Available at <https://assets.hcch.net/docs/569cfb46-9bb2-45e0-b240-ec02645ac20d.pdf>

heeding the exceptions such as Arts 4 and 15, Poland dictates specific procedures to seek permission and if achieved, procedures for the taking of evidence. So, on the latter point for example, pursuant to Art 2 whereby each State shall effectively organise and execute its duties in accordance with its own law, the taking of evidence may be facilitated by stricter conditions such as by a judge in a courtroom.

In addition, the Family Procedure Rules 2020 is relevant here (FPR, r 22.3). PD 22A paragraphs 17(1), and paragraphs 5 and 17 of Annex 3 (reflecting CPR 32PD and PD 32A in the civil jurisdiction). In particular, PD 22A Annex 3 [5] and [17] provides that:

> 'PD22A Annex 3 [5] It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome.
>
> ...
>
> PD22A Annex 3 [17] Some countries may require that any oath or affirmation to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in England and Wales.'

Insights from the Employment Tribunal

Further, the now familiar decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 286 (IAC) may provide some insight generally. In summary, the observations in *Agbabiaka* reflects on the importance of mutual respect between States in seeking to exercise powers of its courts within the territory of the other, such as the taking of evidence. The lawfulness of any such action must be at the forefront of the relevant stakeholders, ensuring a balance so as not to risk damaging diplomatic relations with a foreign State while protecting the interests of justice. So, when might such guidance on the taking of evidence be relevant or useful in a family law context? Notably, the Employment Tribunal Presidential Guidance dated 27 April 2022 (England and Wales, and Scotland) reflects on how to deal with delays or refusals. In essence, it is a matter of judicial discretion whereby examining alternatives to oral evidence from abroad may reveal options in case management. This may include exploring the relevance of the person's evidence to the issues to be decided; whether another witness located within the United Kingdom could give evidence; whether the evidence could be given in writing; whether the evidence of the person abroad can be taken at a later date or by adjusting the timetable for the hearing; and whether the person can travel either to the United Kingdom or to a third country where it is known there are no diplomatic objections to the giving of oral evidence. As at the time of formulating this presidential guidance, it was anticipated that the FCDO would in the long term publish and maintain a list on the internet of the foreign states that have indicated that they permit the giving of oral evidence to United Kingdom Tribunals from within their territory. The Presidential Guidance has since been updated[15] to include eg, reflecting on the role of the ToE Unit.

Discussion

It is suggested that the arguably or potentially bureaucratic Evidence Convention process bears no benefit to family law proceedings under the 1980

[15] See for example Guidance updated on 25 July 2022.

Hague Convention or even within other children act proceedings under the 1989 Act. Respectfully, the use of the Evidence Convention in such matters is arbitrary. Inter-jurisdictional evidence exchange was always anticipated in 1980 Hague cases, and in all the circumstances it could not have been the intentions of the drafters and subsequent Special Commission reviews that the Evidence Convention is engaged in such proceedings. As such, neither the 1980 Hague nor the 1985 Child Abduction and Custody Act or Practice Directions[16] explicitly deal with the need to seek permission via diplomatic channels or a separate treaty[17] in furtherance of the implementing of the Convention itself (where evidence is concerned). The ordinary practice in proceedings under the 1980 Hague Convention is that where oral evidence is permitted, where possible efforts are made to facilitate the hearing of that evidence wherever it is located. 1980 Hague Convention cases are cross-border in nature, evidence often leaves a trail with origins in at least one other country. The same frequently applies in children proceedings under the inherent jurisdiction (see CA Practice Direction, and President's Practice Guidance on Case Management March 2023).[18] As such, there would have been scope to hear oral evidence within eg case X under the auspices of the 1980 Hague Art 21 application.

Nevertheless, in circumstances where the court finds itself with the Evidence Convention already in motion, as in case X, the court would need to be satisfied that the application has met all the formal requirements for the Polish authorities to process the same. In so far as the anticipated FCDO list of foreign states that have indicated permission for oral evidence to be given from their territory is concerned, the list with commentary is now available.[19] Should the case enter a period of considerable delay (or potential rejection), the court may be assisted by the Presidential Guidance emanating from the *Agbabiaka* decision, incorporating developments since and setting out rules in Employment Tribunals (these are largely similar to those adopted within family law proceedings, such as approaching the ToE Unit, though in family cases assistance will come from the Foreign Process Section at the RCJ).

Conclusion

The Evidence Convention and the 1980 Hague Convention ought not to cross paths. Not least because the cross border exchange of evidence is almost always anticipated in 1980 Hague Convention proceedings. Shored up by Practice Directions, Rules and other guidance, it is commonplace to handle evidence from abroad, whether documentary or oral evidence via eg video link. Further, inevitable delays to proceedings should be avoided; after all, given the expeditious nature of 1980 Hague Convention cases, given the spirit of the Convention, such pace may well extend to Art 21 cases in so far as is reasonable. Nevertheless, should circumstances arise where the Evidence Convention protocol has been initiated, it would seem that once the ball starts rolling, you roll with it.

16 See also President's Practice Guidance on Case Management March 2023 - https://www.judiciary.uk/wp-content/uploads/2023/03/Presidents-Practice-Guidance-on-Case-Management-and-Mediation-of-International-Child-Abduction-Proceedings.pdf

17 In exception is the 1996 Hague Convention, but their practicalities compliment both treaties.

18 https://www.judiciary.uk/wp-content/uploads/2023/03/Presidents-Practice-Guidance-on-Case-Management-and-Mediation-of-International-Child-Abduction-Proceedings.pdf

19 As of 13 January 2024: https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad. The entry for Poland reads as follows: Individuals in Poland can give evidence in Poland by video link in UK civil and commercial tribunals only (either as a witness or when appealing a case). For other tribunals contact the relevant tribunal.

MARCH 2025 ◆ VOLUME 55 ◆ PAGES 259–408

FAM LAW

Family Law

The title of reference and record in the field of family law since 1970

LexisNexis®

Family Law