

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

Introduction

As the days grow longer and the weather becomes warmer in the Netherlands, work does not slow down at the Permanent Bureau of the Hague Conference on Private International Law. April saw the launch of the new INCADAT website, the culmination of a comprehensive process of review and development which it is hoped will improve the experience of the database for our thousands of users. In the same month, during the Council on General Affairs of the Hague Conference, the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter 'the 2007 Protocol') was signed and ratified by the EU. Whilst the 2007 Protocol has yet to enter into force, this important step by the EU signifies its strong support for the instrument. In May, the Hague Conference's presence in Latin America was strengthened as a result of the signing of two important agreements. These agreements will underpin the work of the Hague Conference's Regional Office in Argentina. Lastly, the warm breezes of June brought with them a record number of experts and States to the Hague for the Third Meeting of the Special Commission to review the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, 'the 1993 Hague Intercountry Adoption Convention'). Some of these events are described in more detail below but, as usual, please visit our website www.hcch.net for further information on Hague Conference matters.

The Launch of the New INCADAT Website

What is INCADAT?

The International Child Abduction Database – INCADAT (www.incadat.com) was established by the Permanent Bureau in 1999 in order to ensure that leading decisions rendered by national courts in respect of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, 'the 1980 Hague Child Abduction Convention') were accessible to judges, Central Authorities, practitioners and other interested persons. INCADAT has already contributed to the promotion of the effective operation of the 1980 Hague Child Abduction Convention by encouraging mutual understanding and consistency in interpretation between the 82 States Parties. INCADAT is also used by non-Contracting States, thus facilitating the promotion of the Convention to a

wider audience. INCADAT also contains a small number of non-Convention abduction cases.

INCADAT currently contains summaries of more than 850 decisions from 40 jurisdictions in English, French and, to a large extent, in Spanish. The success of INCADAT can be measured by the increasing number of visits to the INCADAT website. From 1 February 2009 to 31 January 2010 the INCADAT website had more than 20,000 visits from 154 different countries/territories.

The New INCADAT

After 10 years, it was decided that the INCADAT website and maintenance tool needed to be adapted to modern standards and to be modified to cope with the growing number of summaries. This was seen as an ideal occasion for a complete review of INCADAT. The new INCADAT website, launched on 30 April 2010, gives users access to a completely revised and modernised database of case law. The various improvements for INCADAT users include: more user-friendly website navigation, enhanced functionality of the case law search, as well as the introduction of a new 'Case Law Analysis' section, written by Professor Peter McEleavy (University of Dundee). This new 'Case Law Analysis' section provides users with a comprehensive case law commentary on key topics of the 1980 Hague Child Abduction Convention. As users will recall, case law commentaries existed before but they were only accessible via the separate case summaries. Now the commentaries are available in an easy to access 'folder system', sorted by legal topic. The Permanent Bureau is very grateful to Professor Peter McEleavy for his work on this new section.

Looking to the future, the Permanent Bureau is constantly working on the enlargement of INCADAT's coverage in co-operation with its consultants and contributors from different Contracting States. In particular, the Permanent Bureau hopes to increase the coverage of INCADAT in Contracting States which are, as yet, unrepresented on INCADAT.

The Hague Conference's Co-operation with, and Presence in, Latin America

In the context of implementing the strategic aim of the Hague Conference of reinforcing its co-operation with, and its presence in Latin America, on 7 May 2010 the Secretary General of the Hague Conference signed two agreements in Buenos Aires. The first agreement concerns co-operation with Mercosur and was co-signed by the Ministers of Justice of the

Members of Mercosur (Argentina, Brazil, Paraguay and Uruguay), as well as those of its Associate States (Bolivia, Chile, Ecuador and Peru). This agreement entered into force immediately. The second agreement, with the Government of Argentina, clarified and reinforced the position of the Liaison Legal Officer for Latin America, Mr Ignacio Goicoechea, and his office in Argentina. This agreement is subject to approval by the Parliament of Argentina. Both agreements are available on the Hague Conference's website under 'News and Events', then '2010'.

The Third Meeting of the Special Commission to Review the Practical Operation of the 1993 Hague Intercountry Adoption Convention

From 17–25 June 2010, the Third Meeting of the Special Commission to review the practical operation of the 1993 Hague Intercountry Adoption Convention took place at the Peace Palace in The Hague. More than 260 experts from 85 states met to discuss the practical operation of the Convention and to achieve consensus on the main elements of the *Guide to Good Practice No 2 on Accreditation and Adoption Accredited Bodies*. In relation to the

practical operation of the Convention, the following themes were discussed, amongst others:

- applying the safeguards of the Convention;
- intergovernmental and judicial co-operation in relation to the Convention;
- issues concerning Convention procedures; and
- learning from experience (including post-disaster relief).

The programme of the Special Commission also included a special session on the abduction, sale and trafficking of children in the context of intercountry adoption, which included presentations on:

- Global perspectives on trafficking (Professor David Smolin, USA) and an African perspective on trafficking (Dr Benyam Mezmur, Ethiopia); and
- The screening of a documentary on adoption abuses, 'Paper Orphans', introduced by Mr Joseph Aguetant, Terre des hommes Foundation, Nepal.

The Conclusions and Recommendations from the Special Commission are set out in full below:

**Special Commission on the practical operation
of the Hague Convention of 29 May 1993 on
Protection of Children and Co-operation
in Respect of Intercountry Adoption
(17-25 June 2010)**



Conclusions and Recommendations

Adopted by the Special Commission

ABDUCTION, SALE AND TRAFFIC IN CHILDREN AND THEIR ILLICIT PROCUREMENT IN THE CONTEXT OF INTERCOUNTRY ADOPTION

1. Concerned to prevent, in the context of intercountry adoption, the abduction, sale and traffic in children and their illicit procurement, the Special Commission draws the attention of States to the following as essential features of a well regulated system:

- a) effective application of Hague Convention procedures and safeguards including, as far as practicable, in relation to non-Convention adoptions;
- b) independent and transparent procedures for determining adoptability and for making decisions on the placement of a child for adoption;
- c) strict adherence to the requirements of free and informed consent to adoption;
- d) strict accreditation and authorisation of agencies, and in accordance with criteria focussing on child protection;
- e) adequate penalties and effective prosecution, through the appropriate public authorities, to suppress illegal activities;
- f) properly trained judges, officials and other relevant actors;
- g) prohibition on private and independent adoptions;
- h) clear separation of intercountry adoption from contributions, donations and development aid;
- i) regulated, reasonable and transparent fees and charges;
- j) effective co-operation and communication between relevant authorities both nationally and internationally;
- k) implementation of other relevant international instruments to which States are parties;
- l) public awareness of the issues.

2. The Special Commission acknowledged the generous contribution of the Government of Australia for making possible the special day on the abduction, sale and traffic in children and their illicit procurement, which raised awareness of the nature and extent of the problem. An informal group co-ordinated by the Australian Central Authority with the participation of the Permanent Bureau will consider the development of more effective and practical forms of co-operation between States to prevent and address specific instances of abuse. The result of this work will be circulated by the Permanent Bureau for consideration by Contracting States.

DRAFT GUIDE TO GOOD PRACTICE ON ACCREDITATION

3. The Special Commission gave its general endorsement to the draft Guide to Good Practice No 2 entitled *Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice* (hereinafter the draft Guide to Good Practice No 2) prepared by the Permanent Bureau. The Special Commission requested the Permanent Bureau to make revisions to the text, in particular Chapters 9 and 10, in the light of discussions within the Special Commission. This will include revision of the summaries of each chapter, some re-ordering of material (e.g.,

to avoid repetition), a check on correspondence between English and French texts as well as on the Spanish text, and the drawing up, on the basis of the text, of accreditation criteria. This work will be carried out in consultation with the Chair and Vice-Chairs of the Special Commission and the Working Group which assisted the Permanent Bureau in preparing the draft Guide. The revised text will be circulated to all Contracting States, Members of the Hague Conference and States and organisations represented at the Special Commission for their comments. The final version will then be prepared for publication by the Permanent Bureau.

4. The Special Commission recommended that the Permanent Bureau examine the feasibility of posting on the Hague Conference website tables indicating for each Contracting State the costs associated with intercountry adoption and the charges imposed on prospective adoptive parents (see table 1 and table 2 of Annex 9B of the draft Guide to Good Practice No 2).

REVIEW OF THE PRACTICAL OPERATION OF THE CONVENTION

Guide to Good Practice No 1

5. The Special Commission underlined the value of the Guide to Good Practice No 1 entitled *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention* to existing and future Contracting States.

Mutual support and assistance in applying the safeguards of the Convention

6. Receiving States are encouraged to consider ways in which to assist and support States of origin in the performance of their functions and in the application of safeguards under the Convention, including by means of capacity-building and other programmes.

7. States of origin and receiving States are encouraged to provide each other with a full description of the manner in which they apply the safeguards under Articles 4 and 5 respectively. This information should also be included in their Country Profile posted on the website of the Hague Conference. States are encouraged to update this information regularly.

Selection, counselling and preparation of the prospective adoptive parents

8. States of origin may assist receiving States in establishing their criteria for the selection of prospective adoptive parents by providing information about the characteristics and needs of adoptable children. This information will also contribute to the development of preparation materials on intercountry adoption directed to prospective adoptive parents, and to the management of their expectations.

9. The Special Commission emphasised the need for country specific preparation and for prospective adoptive parents to have some knowledge of the culture of the child and his or her language in order to communicate with the child from the matching stage.

10. The Special Commission recommended that the Permanent Bureau, in consultation with Contracting States and non-governmental organisations, collect information on the selection, counselling and preparation of prospective adoptive parents, with a view to the possible development of the Guide to Good Practice No 3. This may include a discussion on good practices in dealing with failed adoptions and the period of validity of the "home study" report.

Scope of the Convention

11. The Special Commission emphasised that all intercountry adoptions falling within the scope of the Convention under Article 2(1), including in-family adoptions and adoptions by nationals of the State of origin, are subject to Convention procedures and safeguards.

12. Where an adoption falling within the scope of the Convention has been processed in a Contracting State as a non-Convention adoption, the Central Authorities concerned are strongly recommended to co-operate in efforts to address the situation in a manner which respects Convention procedures and safeguards, and to prevent these situations from recurring.

Co-operation issues

Intercountry adoption in the context of globalisation and international mobility

13. Where the habitual residence of the prospective adoptive parents is uncertain the concerned Central Authority should provide advice on their particular situation before they proceed with an adoption application.

Co-operation (development aid) projects

14. The Special Commission emphasised the need to establish, in all cases, a clear separation of intercountry adoption from contributions, donations and development aid.

Issues concerning Convention procedures

Certificate of conformity under Article 23

15. The Special Commission noted with concern the high number of States that have not designated a competent authority for the purpose of issuing a certificate of conformity under Article 23.

16. The Article 23 certificate is essential to allow the automatic recognition of adoptions made under the Convention and should be issued promptly where the requirements of the Convention have been met.

17. Where a certificate under Article 23 is incomplete or defective, States should co-operate to regularise the situation.

Recognition and effects of adoption (Arts 23 and 24)

18. The Special Commission underlined that no additional procedure may be imposed as a condition of recognition.

19. The Special Commission reaffirmed Recommendation No 17 of the Meeting of the Special Commission of September 2005:

"17. The Special Commission recommends that the child be accorded automatically the nationality of one of the adoptive parents or of the receiving State, without the need to rely on any action of the adoptive parents. Where this is not possible, the receiving States are encouraged to provide the necessary assistance to ensure the child obtains such citizenship. The policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless."

20. Central Authorities should co-operate in the completion of any formalities necessary for the acquisition by the child of the nationality, where appropriate, either of the receiving State or of an adoptive parent.

21. The question of whether nationality will be granted to the child may, where appropriate, be a relevant factor when a State of origin is considering co-operation with a particular receiving State.

Private and independent adoptions

22. Adoptions which are arranged directly between birth parents and adoptive parents (*i.e.*, private adoptions) are not compatible with the Convention.

23. Independent adoptions, in which the adoptive parent is approved to adopt in the receiving State and, in the State of origin, locates a child without the intervention of a Central Authority or accredited body in the State of origin, are also not compatible with the Convention.

24. It was strongly recommended that training be provided for judges and other authorities or persons exercising functions under the Convention. This training should address in particular the problems surrounding private and independent adoptions, as well as other possible ways in which the procedures and safeguards of the Convention are circumvented.

International surrogacy and intercountry adoption

25. The Special Commission noted that the number of international surrogacy arrangements is increasing rapidly. It expressed concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. It viewed as inappropriate the use of the Convention in cases of international surrogacy.

26. The Special Commission recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.

Learning from experience

Post-adoption issues

27. The Special Commission reaffirmed Recommendation No 18 of the Meeting of the Special Commission of September 2005:

"18. The Special Commission recommends to receiving States to encourage compliance with post-adoption reporting requirements of States of origin; a model form might be developed for this purpose. Similarly, the Special Commission recommends to States of origin to limit the period in which they require post-adoption reporting in recognition of the mutual confidence which provides the framework for co-operation under the Convention."

28. It was recommended that receiving States and States of origin preserve adoption records in perpetuity. The record must contain the information referred to in Article 16 and, to the extent possible, any other information or personal items relating to the child or his or her birth family.

29. It was recommended that receiving States and States of origin provide different forms of assistance and counselling for different stages of the child's development to adulthood, including preparation for origin searches and reunions of the adoptees with members of their biological families.

Statistics

30. The Special Commission underlined the importance for States Parties of submitting general statistics on an annual basis to the Permanent Bureau using the forms contained in Preliminary Document No 5 of April 2010.

31. It was recommended that consultations should continue on options for the future collection of statistical data by the Permanent Bureau.

Technical assistance programme and other training programmes

32. The Special Commission recognised the great value of the Intercountry Adoption Technical Assistance Programme (ICATAP), which has already provided technical assistance and training for several States.

33. The Special Commission acknowledged the limited resources available to the Permanent Bureau to maintain ICATAP and urged all States to consider making financial and / or in-kind contributions to secure the continuity of the programme.

34. Contributions of some States and international organisations, such as UNICEF, have been crucial to the success of ICATAP. In this regard, the horizontal co-operation between States of origin is particularly beneficial.

35. The work undertaken to support the effective implementation of the Convention under the aegis of the International Centre for Judicial Studies and Technical Assistance should be regarded as essential for the proper functioning of the Convention.

Dealing with non-Convention countries

36. The Special Commission reiterated the recommendation that Contracting States, in their relations with non-Contracting States, should apply as far as practicable the standards and safeguards of the Convention.

37. For this purpose attention is drawn in particular to:

- a) Articles 4, 5 and 17;
- b) the requirements of Chapter III of the Convention;
- c) the guarantees concerning recognition;
- d) the child's right to enter and reside in the receiving State; and,
- e) the requirements concerning the suppression of improper financial or other gain.

Response to disaster situations

38. The Special Commission recognised that, in a disaster situation, efforts to reunite a displaced child with his or her parents or family members must take priority. Premature and unregulated attempts to organise the adoption of such a child abroad should be avoided and resisted.

39. No new adoption applications should be considered in the period after the disaster or before the authorities in that State are in a position to apply the necessary safeguards.

40. The Special Commission also recognised the need for a common approach on the part of Central Authorities in dealing with such situations and for Central Authorities to discuss and review actions taken in response to, and lessons learned from, disaster situations.

The 1996 Convention on Protection of Children

41. The Special Commission reiterated the value of the 1996 Convention on the International Protection of Children in the context of cross-border placement of children as well as other international child protection situations.

The 1961 Apostille Convention

42. The Special Commission stressed the usefulness of linking the application of the Hague Adoption Convention of 1993 to the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (the Apostille Convention). In the light of the high number of public documents included in a typical adoption procedure, the Special Commission recommended that States Parties to the Adoption Convention but not to the Apostille Convention consider the possibility of becoming a party to the latter.