

**Seventh Meeting of the Special Commission
on the practical operation of the 1980 Child Abduction Convention
and of the 1996 Child Protection Convention – October 2017**

Document	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 8 of August 2017
Title	Briefing note: legal basis for direct judicial communications within the context of the International Hague Network of Judges (IHNJ)	
Author	Permanent Bureau	
Agenda item	No 5	
Mandate(s)	Conclusion and Recommendation No 69 of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions (1-10 June 2011), and Conclusions and Recommendations Nos 78 and 79(c) of Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions (25-31 January 2012)	
Objective	To provide information on legal bases for direct judicial communications in Contracting States to the 1980 and 1996 Conventions	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/>	
Annexes	Annex I: States reporting a domestic legislative basis for direct judicial communications Annex II: Practical information on conducting direct communications and the use of the IHNJ	
Related documents	"Note on the Desirability and Feasibility of a Potential Legal Instrument Providing a Basis for Direct Judicial Communications", Prel. Doc. No 3 D of December 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention	

A. Introduction: Sixth Meeting of the Special Commission conclusions on legal basis for direct judicial communications

1. Part I of the 2011-2012 Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and 1996 Hague Child Protection Convention concluded that:

“69. Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the Special Commission invites States to take the necessary steps to ensure that such a legal basis exists.”¹

2. For consideration at Part II of the Special Commission was “the desirability and feasibility of binding [international] rules in this area, including legal basis.”² In preparation for this discussion at Part II of the Special Commission, the Permanent Bureau drew up Preliminary Document No 3 D, a “Note on the Desirability and Feasibility of a Potential Legal Instrument Providing a Basis for Direct Judicial Communications.”³ The document provided: information on legal bases offered by existing international instruments; a summary of responses concerning direct judicial communications to a Questionnaire on the desirability and feasibility of a protocol to the 1980 Child Abduction Convention; relevant Contracting State responses to the Country Profile for the 1980 Child Abduction Convention; relevant Conclusions and Recommendations of judicial conferences; a summary of discussion on legal basis which took place during Part I of the Special Commission; and possible forms and content of an international legal instrument providing a basis for direct judicial communications. Readers of this Note are invited to consult Preliminary Document No 3 D for supplementary background information.

3. As a result of discussions at Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions⁴ it was decided not to proceed with an international legal instrument on the topic at this time, and it was rather concluded that:

“78. The Special Commission supports that consideration be given to the inclusion of a legal basis for direct judicial communications in the development of any relevant future Hague Convention.

79. In relation to future work, the Special Commission recommends that the Permanent Bureau:

- (a) promote the use of the *Emerging Guidance and General Principles on Judicial Communications*;⁵
- (b) continue to encourage the strengthening and expansion of the International Hague Network of Judges; and

¹ Conclusion and Recommendation No 69 of Part I (1-10 June 2011) 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, available on the Hague Conference website at < www.hcch.net > under “Child Abduction” then “Special Commission meetings.”

² *Ibid.*, Conclusion and Recommendation No 70.

³ “Note on the Desirability and Feasibility of a Potential Legal Instrument Providing a Basis for Direct Judicial Communications”, Prel. Doc. No 3 D of December 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available at *ibid.*

⁴ Part II of the Sixth Meeting of the Special Commission was held from 25-31 January 2012. A summary of discussions held at Part II of the Special Commission can be found in the document “Conclusions and Recommendations of Part I and Part II of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention and a Report of the Meeting,” April 2012, at pp. 11-13, available at *ibid.*

⁵ Permanent Bureau, “Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges”, The Hague, 2013 (hereinafter the “General Principles”), available on the Hague Conference website at < www.hcch.net > under “Child Abduction”. The General Principles were developed in consultation with a group of experts, the majority of whom were members of the International Hague Network of Judges (IHNJ).

- (c) maintain an inventory of domestic legal bases relating to direct judicial communications.

4. This note responds in particular to Conclusion and Recommendation No 69 of Part I of the Sixth Meeting of the Special Commission, and Conclusion and Recommendation No 79(c) of Part II of the Sixth Meeting of the Special Commission.

B. Existing bases for judicial communications within Contracting States to the 1980 Child Abduction Convention

5. Currently, most Contracting States to the 1980 Child Abduction Convention which have provided information on the topic of legal basis for direct judicial communications⁶ have indicated affirmatively that judges in their State can engage in direct judicial communications in the absence of a legislative basis.

6. Of the 49 States that have completed the Country Profile and have designated a judge to the International Hague Network of Judges (IHNJ), in 35 States⁷ it is possible for judges to engage in direct judicial communications in the absence of a legislative basis, and in seven States⁸ it is reported as not possible.⁹

7. Of the 62 States that have completed the Country Profile, eight have indicated that they have a legislative basis in their domestic law upon which judges can engage in international direct judicial communications; all eight of these States¹⁰ have designated a judge to the IHNJ. Of the remaining 54 States, 50 States have indicated that they do not have such a legislative basis.¹¹

8. As illustrated by the above analysis of the Country Profiles, over the last almost 20 years judicial communications under the 1980 Child Abduction Convention have developed "organically," with many States taking a pragmatic and flexible approach to direct judicial communications, often without formalising such practices in legislation. At Part II of the Sixth Meeting of the Special Commission, a number of States expressed the view that it was premature to discuss binding international rules in this area (some with the view that this was

⁶ As of 2 August 2017, 62 States had completed their Country Profile for the 1980 Child Abduction Convention (all Country Profiles can be accessed on the Hague Conference website at < www.hcch.net > under "Child Abduction" then "Country Profiles"): Argentina, Armenia, Australia, Austria, Belgium, Brazil, Bulgaria, Burkina Faso, Canada (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan), Chile, China (Hong Kong SAR), Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Lithuania, Malta, Mauritius, Mexico, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Kingdom, United States of America, Uruguay and Venezuela. In the Country Profile, Contracting States to the 1980 Convention are invited to answer the following three questions: "21.a) Has a member of the International Hague Network of Judges been designated for your State? Yes, name(s), or No; 21.b) Is there a legislative basis upon which judges in your State can engage in direct judicial communications? Yes, please specify how legislation can be accessed (e.g., website) or attach a copy, or No, go to question c); 21.c) In the absence of legislation, can judges in your State engage in direct judicial communications? Yes, or No."

⁷ Argentina, Australia, Austria, Belgium, Canada, Chile, China (Hong Kong SAR), Cyprus, Denmark, Dominican Republic, Estonia, Finland, France, Germany, Ireland, Italy, Japan, Latvia, Lithuania, Malta, Mexico, Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland, Turkey, United Kingdom, United States of America, Uruguay and Venezuela.

⁸ Brazil, El Salvador, Honduras, Israel, Panama and South Africa.

⁹ Of the 10 States that have completed the Country Profile and have not yet designated a judge to the IHNJ, in two States (Armenia and Greece) it is possible for judges to engage in direct judicial communications in the absence of a legislative basis in domestic law, and in seven States it is not (Burkina Faso, Georgia, Guinea, Mauritius, Montenegro, Russian Federation and Ukraine).

¹⁰ Canada (British Columbia), Czech Republic, El Salvador, Hungary, Netherlands, Spain, Switzerland and United States of America. Please see Annex I for a list of reported domestic legislative bases. For example, in the United States of America the legislative basis is found in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In the case of Switzerland the legislative basis is found in the Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults which provides in its Art. 10(1), "The court shall cooperate as required with the authorities of the state in which the child had his or her habitual residence before abduction."

¹¹ Four States did not respond to this question.

properly a matter for domestic law) and that a lack of formalism allowed important flexibility in this area, particularly in the light of the diversity among legal systems globally. Other States expressed the potential benefits of an international legal basis for judicial communications, which could, for instance, oblige Contracting States to engage in direct judicial communications, ensuring reciprocity among States, and also add more clarity to the scope and substance of direct judicial communications.¹²

C. Focus on non-legislative bases for direct judicial communications

9. As concluded by Part II of the Special Commission, a legal basis for direct judicial communications in the development of any relevant future Hague Convention may be given consideration. In the meantime, the Permanent Bureau is tasked with promoting the use of the General Principles, encouraging the strengthening and expansion of the IHNJ, and keeping an inventory of domestic legal bases relating to direct judicial communications.

10. In the light of this ongoing work, a short e-mail survey was circulated to members of the IHNJ in December 2011 and re-circulated in June 2013, inviting Network Judges to briefly explain “the non-legislative bases upon which [...] direct judicial communications can take place in their respective States” (hereinafter, the “Survey”).¹³ This informal consultation was addressed principally to States which had indicated on their Country Profile that it is possible for judges to engage in direct judicial communications in the absence of a legislative basis. Judges from 15 States¹⁴ responded to this short Survey. Members of the IHNJ were also consulted on the occasion of the 11 to 13 November 2015 meeting of the Network held in Hong Kong.¹⁵

11. A summary of the responses received is set out below, following the main types of “non-legislative bases” (which are often overlapping and / or interdependent) described by those responding, in no order of importance. Responses received from a number of States that currently possess a legislative basis under domestic law are set out in Annex I.

1. Legal tradition: under the common law

12. In a number of common law jurisdictions, it would seem that the ability of judges to engage in direct judicial communications may be considered an activity which generally falls within the discretion of holders of judicial office, subject to approval by an appropriate authority within the judiciary. The proceedings of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions¹⁶ note that:

“An expert from the United Kingdom explained that in common law jurisdictions [the ability to undertake direct judicial communications] was a matter of judicial deployment and that it was the discretion and responsibility of the Chief Justice to allocate direct judicial communication powers to judges.”¹⁷

13. Indeed, it would seem that in a range of predominantly common law jurisdictions which responded to the Survey, direct judicial communications are reported to be possible without a

¹² See further details of the discussion in the Report of Part II of the Sixth Meeting of the Special Commission, *supra*, note 4.

¹³ All quotations below, unless otherwise specified, are drawn from the responses from IHNJ judges received by e-mail to the informal Survey.

¹⁴ Argentina, Australia, Canada, China (Hong Kong SAR), the Dominican Republic, Ecuador, France, Mexico, Morocco, New Zealand, Paraguay, Switzerland, the United Kingdom, the United States of America and Uruguay.

¹⁵ See: < <https://www.hcch.net/en/news-archive/details/?varevent=440> >.

¹⁶ “Conclusions and Recommendations and Report of Part I 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 (1-10 June 2011),” Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available *supra*, note 1, at p. 48 (para. 203).

¹⁷ An Australian Network Judge also noted in response to the Survey that, because of *de facto* concentration of jurisdiction for international child abduction matters at the relevant Australian family court, it is relatively easy to “effect and implement [...] any direction or guideline within [the] court in relation to direct judicial communication,” with the approval of the Chief Justice who has “direct responsibility for allocation of judges and resources for the court within which all abduction matters are determined.”

legislative basis.¹⁸ It has been observed that the development, through judicial practice, of “adjectival laws [*i.e.*, procedural laws] that the common law judges have regarded as within their province,”¹⁹ has featured prominently in the elaboration of positive international norms relating to cross-border judicial co-operation.

14. China (Hong Kong SAR) reported in its Country Profile that direct judicial communications are possible in the absence of legislation, and it was reported in the informal Survey that “from the cases in other common law jurisdictions on judicial communications, it seems that under common law, judicial communications may be permissible.” However, the Chinese (Hong Kong SAR) Network Judge noted a 2001 Court of Appeal Decision that had potentially raised some concerns of permissible types of cross-border judicial communications, albeit not those directly between judges.²⁰ A 2013 decision from the Hong Kong SAR Court of Appeal, dealing with potential conflicting decisions arising from proceedings in Singapore, included the following favourable commentary with respect to the use of direct judicial communications in cross-border family law cases:

“[...] there is much room and need for judicial co-operation in cross-border matrimonial disputes, particularly in respect of matters pertaining to children. [...] [I]n the interests of the children, there should be ways in which the courts of different jurisdictions should co-operate with each other instead of being dictated by the parties in cases like the present in order to achieve a sensible and prompt resolution of issues relating to the welfare of children.”²¹

15. Subsequently, in 2014, a China (Hong Kong SAR) court-issued Practice Direction providing guidance for direct judicial communications was published (see Section 5, below).

16. It is important to note that it may be somewhat artificial to consider that common law practices are in clear contrast to civil law approaches,²² as a broad array²³ of civil law jurisdictions report that direct judicial communications are possible without a legislative basis.

2. General legal and constitutional order, general principles of law

17. Several of those responding to the Survey described how direct judicial communications were possible given a more general legal and / or constitutional order in their State.

¹⁸ Australia, Canada, China (Hong Kong SAR), New Zealand, the United Kingdom (England and Wales) and the United States of America. While the UCCJEA is in force in most States of the United States of America (see *supra*, note 10), the Country Profile of the United States of America also reports that additionally, in the absence of legislation, judges can engage in direct judicial communications.

¹⁹ The Hon Justice Baragwanath, “Who Now is My Neighbour? Cross-Border Co-Operation of Judges in the Globalised Society,” *The Inner Temple* (June 2004), pp. 22-36, at p. 26. Justice Baragwanath also notes that issues of access to justice are of particular salience in the cross-border context, suggesting that judges should feel an affirmative duty to play a responsible role in the globalisation process by involving themselves in procedural and other reforms to grapple with the new reality (p. 24).

²⁰ The case noted is *D v G* (CACV 3646 of 2001, Judgment dated 7 December 2001 [INCADAT cite: HC/E/HK 595]), summarised in the Survey response as follows: “In *D v G*, the Judge made enquiries directly with the Swiss Central Authority (which was described as an ‘executive authority’ by our Court of Appeal), and then with his brother-in-law, who was a Swiss psychiatrist. Thus, the communications were not between a judge and another judge. There has been much debate on the comments made in *D v G* by our Court of Appeal, and it may be arguable that the comments made therein were obiter and confined to the facts of that particular case. However, since *D v G*, there have been no other judgments from our Court of Appeal where the issue of ‘judicial communications’ was raised or discussed. In Hong Kong, Court of Appeal decisions are binding on the Court of First Instance of the High Court and the Family Court. Faced with the comments in *D v G*, our colleagues naturally have been very cautious and reluctant to communicate with judges in other jurisdictions on any matter in relation to a specific case.”

²¹ *LN and SCCM* (CACV 62 of 2013), Hon Lam JA at paras 43 and 44. Hon Lam JA went on to note that “[p]erhaps the ways in which judicial co-operation may be achieved in similar cases is an area where the Hague Conference on Private International Law might wish to consider” (para. 45).

²² For instance, in discussions at Part II of the Sixth Meeting of the Special Commission (see *supra*, note 4) one expert noted that in civil law countries the rules of procedure are strict, making direct judicial communications difficult.

²³ For example see, among others, the Country Profiles of Argentina, Austria, Belgium, France, Germany, Italy, Mexico and Paraguay.

18. A Network Judge from Mexico shared the view that there are “reasonable grounds” found in a number of sources of law within the Mexican legal system that enable Mexican judges to undertake direct judicial communications. Firstly, a recent reform to Article 1 of the Mexican Constitution has made Mexico’s international human rights obligations under various treaties parallel to human rights provisions of the national Constitution. Secondly, Article 14 of the Mexican Constitution states that decisions in civil trials may be resolved on general principles of law (in the absence of specific law or legal interpretation), opening the possibility of applying “general principles” of law to the resolution of a case, such as those enshrined or recognised by the Mexican Constitution. The Network Judge notes that the UNCRC,²⁴ with its emphasis on the best interests of the child, implies that the full exercise of children’s rights should be considered a guiding principle for the development and implementation of standards in all matters relating to the child’s life. In the context of the 1980 Child Abduction Convention, the best interest of the child, according to the Network Judge, translates into the child not being deprived of his or her habitual residence, and the need to return the child as soon as possible if an abduction has taken place (an objective served by direct judicial communications).

19. The Mexican Network Judge additionally noted a number of provisions found in the Federal Civil Code (Art. 14) and the Civil Code of the Federal District (Art. 14) which expressly empower a judge to seek necessary information in order to correctly apply foreign law (without specifying the means of seeking such information), and in the Code of Civil Procedure of the Federal District (Arts 278 and 279), which allow a judge to make use of any person (not excluding foreign authorities, administrative or judicial), thing or document which is considered appropriate and conducive to the seeking of the truth, subject to certain safeguards, including respect for the rights of the parties to the proceedings.²⁵

20. The Network Judge from the United Kingdom (England and Wales) reported that the fundamental division between the executive and the judiciary in the national constitutional order formed a basis for judicial communications and IHNJ functions. The Network Judge described “[j]udicial activism [e.g., engaging in direct judicial communications in international proceedings] as a modern phenomenon [...] visible in a number of specialisations²⁶ where the achievement of the ends of justice in trans-national litigation would otherwise be thwarted.”

21. The current United Kingdom (England and Wales) Network Judge was appointed as the “Head of International Family Justice” in April 2005 by the Lord Chief Justice (judiciary) and Lord Chancellor (executive), in connection with the expanding duties which were implied in such an office and the corollary need for additional resources, illustrating an example of positive collaboration of the executive and judicial branches in the service of (international) family justice.²⁷ However, matters concerning the Network Judge and the office of the Head of International Family Justice are considered primarily matters for the judiciary. For example, operation of the office and discretion with respect to use of funds illustrates the “extent to which the separation of powers has been fulfilled. The extent of judicial activism is for judges to determine and judges exercise the discretion as to its funding.”

22. The Network Judge of the Dominican Republic noted that direct judicial communications at the national level are in accordance with the 1980 Child Abduction and 1996 Child Protection Conventions, as well as “ethical principles, general principles, due process and common sense.”

3. Consent of the parties

23. An Australian Network Judge responding to the Survey reported that in Australia “the basis of direct judicial communications in matters under the 1980 Convention is the prior consent of all parties to the proceedings.” The Network Judge went on to add:

²⁴ 1989 United Nations Convention on the Rights of the Child. Mexico is a Party to this Convention, as are most States in the world.

²⁵ See also a domestic legislative bases described in Annex I.

²⁶ Legal specialisations such as crime, insolvency, commercial, and, of course, family proceedings were cited.

²⁷ It was noted that this appointment was made in the “period of transition towards constitutional reform,” (towards the Constitutional Reform Act 2005), that would implement more transparent separation of powers between the executive and the judiciary. It is noted that the designation of a successor Network Judge will be entirely a matter for the judiciary and not the executive branch.

"If there is no consent then the communication cannot occur. All parties are and must be accorded procedural fairness with the result that the whole process is transparent. The responses to a request for information are not determinative inasmuch as a party could adduce other evidence in relation to those matters if he / she wished to do so."

24. It was noted that in Australia, direct judicial communications are considered "more of an administrative function in furtherance of our judicial function rather than an exercise of judicial power per se," and details of the general operation of direct judicial communications were helpfully described in the Survey response.²⁸ Additionally, it was noted and specified how judicial communications and / or the IHNJ might be employed to facilitate cross-examination in a foreign jurisdiction, when necessary and appropriate.²⁹

25. Other jurisdictions responding to the Survey, while not reporting party consent as a basis in itself, also emphasised that the consent, inclusion or other safeguards of the parties were fundamental considerations in relation to direct judicial communications.³⁰

4. National Judicial Council and National Network of Contact Judges Guidelines

26. In Canada, it was reported that the non-legislative basis upon which direct judicial communications can take place is the Canadian Network of Contact Judges (est. 2007), formally approved by the Canadian Judicial Council as part of the Trial Courts Committee Family Law Subcommittee. The Canadian Network of Contact Judges has, as part of its mandate, the promotion of direct judicial communication subject to the safeguards approved at Special Commissions to review the 1980 Child Abduction and 1996 Child Protection Conventions. In furtherance of this mandate, the Canadian Network of Contact Judges developed the document "Recommended Practices for Court-to-Court Judicial Communication" in 2009, setting out a checklist to be followed for direct judicial communications. It was noted that great care was taken in this document to implement safeguards "to protect due process in direct communication," and to clarify that judges should avoid discussion of the merits of a case. Another document was developed by the Canadian Network of Contact Judges in 2011, "How to Communicate with a Judge in Another Jurisdiction," explaining the national and international networks of judges, and giving specific procedures to facilitate judicial communications between Canadian and non-Canadian judges.

5. Court procedural order or practice direction

27. In Argentina it was reported that direct judicial communications take place on the basis of a "Procedural Order" (*Acuerdo Reglamentario*) of the Supreme Court of Justice of the Province of Córdoba.³¹ While this Procedural Order applies only to the Province of Córdoba and is specific to the post of the designated Network Judge, it was communicated to the National Supreme Court, to the Ministry of Foreign Affairs, International Trade and Worship, to the Central Authority and to other Argentinean courts.³² The new *National Civil and Commercial Code (Código Civil y Comercial de la Nación)* of Argentina, which entered into force on 1 August

²⁸ See details set out in Annex II.

²⁹ *Ibid.*

³⁰ For example, as indicated in Survey responses of Network Judges from Canada, Finland, Mexico, the United States of America and Uruguay. In the United States of America where a domestic legislative basis does exist under the UCCJEA (*supra*, note 10), the Network Judge noted that by statute "the court should allow the parties to participate in the communication. Even if they do not directly participate in the communication, they must be allowed to present facts and legal arguments before a decision about exercising jurisdiction is made. An electronic recording or transcription by a court reporter which creates a verbatim memorialization of the communication must be made, and the parties must be given access to that record. The parties need not be informed of a judicial communication which is about schedules, calendars, or court records. [...] Although the Act provides that the parties shall be allowed to participate in the communication, the comment [to the Act] recognizes that this may be impracticable when there is a significant time difference between the two tribunals or scheduling is otherwise difficult."

³¹ *Acuerdo Reglamentario No 1055 Serie A*, Supreme Court of Córdoba Province.

³² The Argentinean Network Judge also noted that "there is no specific [national] provision [authorising direct judicial communications], but since it is not forbidden and does not go against domestic procedural laws or even the [...] Constitution, there is no impediment to do so." Since this comment was received, a clear legislative basis has been provided (See Annex I).

2015, has subsequently provided a legislative basis enabling direct judicial communications in Argentina (see Annex I).

28. In Canada (British Columbia), it was reported that the British Columbia Supreme Court Civil Practice Direction "Court to Court Communication in Cross Border Cases"³³ enables direct judicial communication. The Practice Direction (effective 2010/07/01)³⁴ confirms the Supreme Court's adoption of the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the "Guidelines"), to be followed "in all cross-border actions requiring court-to-court communications including, but not limited to, insolvency and family proceedings." It is noted that the adoption of the Guidelines does not alter any requirement to comply with rules and procedures applicable to proceedings in British Columbia. The Guidelines (subtitled "Principles of Cooperation Among the NAFTA Countries") were developed by the American Law Institute during and as part of its Transnational Insolvency Project.

29. In China (Hong Kong SAR), the Court of First Instance of the High Court issued a Practice Direction, effective 28 April 2014, providing guidance on the conduct of direct judicial communications.³⁵ This *Guidance on Judicial Communications in International Family Disputes Affecting Children* largely follows the General Principles published by the Permanent Bureau.³⁶

6. Considered to be of an informal or logistical nature and / or not subject to *prima facie* legal barriers

30. A number of Network Members responding to the Survey shared the view that direct judicial communications were informal or oriented towards logistical matters, and for this reason could proceed without an explicit legislative basis. A Network Judge from New Zealand noted that "communications are *ad hoc* and proceed on an informal basis."³⁷ The Network Judge from Finland noted that many cross-border matters are "issues that the Central Authority best deals with" and a judge would "engage in direct judicial communication mainly in order to get information about the process in the foreign jurisdiction, for example concerning the schedule of the case and the possibility of expedited hearings." (See also the response of an Australian Network Judge, above, under Section 3, characterising direct judicial communications as predominantly of an "administrative" character.)

31. The Network Judge from Uruguay reported that direct judicial communications had occurred nationally in the area of criminal law, but more commonly and in a more procedurally developed form in relation to international child abduction matters by the Network Judge. It was noted that there had been no objections to the legality of such direct judicial communications, nor did the Network Judge see any "*prima facie*" obstacles that would prevent the communications.³⁸ It was noted that nothing in the procedural system prevented direct judicial communications so long as fundamental principles of due process in such communications are respected, giving full regard to the rights of the parties including the opportunity to comment and challenge the content of the communications. It was also reported that in Uruguay a draft law was being considered which would provide for the Supreme Court

³³ Available at:

< http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/civil_practice_directions.aspx >.

³⁴ Available at:

< http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf >.

³⁵ Available at: < <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PDSL7.htm&lang=EN> >, or via

< www.judiciary.gov.hk > by clicking on "Judgments & Legal Reference," and then "Practice Directions", and then scroll down to PDSL 7.

³⁶ See *supra*, note 5.

³⁷ It should be noted that in New Zealand, Rule 1.22 of the New Zealand High Court Rules (which apply to that court alone, *i.e.*, not to the New Zealand courts possessing first instance jurisdiction for international child abduction matters) formalises the practice of judicial communications with foreign courts. The rule regulates, rather than authorises, judicial communications with foreign courts, ensuring, for instance, that the consent of parties is obtained and that the laws of the foreign jurisdiction are respected. Such provisions are therefore not considered a necessary legal basis in order that direct judicial communications may take place (but indeed, their existence affirms the established practice).

³⁸ See also comments by the Argentinean Network Judge, *supra*, note 32.

to designate a Network Judge, whose functions would include the undertaking and facilitation of cross-border direct judicial communications.³⁹

7. Within the frame of a Contracting State's obligations under the 1980 Convention or 1996 Convention

32. A number of respondents to the Survey, as reflected in part by the response of the Mexican Network Judge and the Network Judge from the Dominican Republic (see above, under Section 2), shared their views that direct judicial communications were implied or enabled by the 1980 Child Abduction Convention and / or the 1996 Child Protection Convention in themselves. The Network Judge from France noted this approach, stating that the engagement in direct judicial communications was based on the provisions of the 1980 Child Abduction Convention and according to the recommendations for its implementation (*i.e.*, presumably those set out at Special Commissions, in Guides to Good Practice, etc.). The Network Judge responding for France noted that apart from this guidance, direct judicial communications is left to the discretion of the competent court.

33. The Network Judge responding for the United Kingdom (England and Wales) noted that "at the root of Convention proceedings lies the need to protect children from abuse and to promote their welfare [...] the foundation of the Convention is international co-operation [...] I would argue that there is an implied obligation on states party to the Conventions to contribute to the development and operation of the Hague International Judicial Network."

D. Conclusion

34. In detailing the array of approaches taken among diverse jurisdictions, it is hoped that such a description of practices and bases will assist judges and others in various jurisdictions with examples as to how they might domestically enable direct judicial communications, in the service of improved cross-border administration of justice in the interests of children and families, and to further the aims of relevant Hague Children's Conventions. As concluded by the Sixth Meeting of the Special Commission, States are recommended to take the necessary steps to ensure that a legal basis exists, where there may be concern as to such a basis. As the information collected reveals, a great number of jurisdictions have taken a range of approaches to enabling direct judicial communications.

³⁹ Indeed, since the Survey response by the Uruguayan Network Judge was received, such a law has been passed. See *Ley No 18895* (22/05/2012), Art. 28 (see Annex I).

A N N E X E S

STATES REPORTING A DOMESTIC LEGISLATIVE BASIS FOR DIRECT JUDICIAL COMMUNICATIONS

Argentina

The new *National Civil and Commercial Code (Código Civil y Comercial de la Nación)* of Argentina,¹ which entered into force on 1 August 2015, includes a provision enabling direct judicial communications:

“Article 2612 - International procedural assistance. Without prejudice to obligations arising under international conventions, communications directed to foreign authorities must be made by letters rogatory. When the situation so requires, Argentinian judges are authorised to engage in direct communications with foreign judges who accept the practice, provided due process is observed. Procedural and evidentiary measures requested by foreign judicial authorities should be carried out, provided that such orders do not impinge upon principles of public policy under Argentinian law. Letters rogatory must be processed ex officio and without delay, according to Argentinian law, notwithstanding the judge’s authority to order the appropriate measures with respect to the costs incurred in providing assistance.”²

Ecuador

The Network Judge from Ecuador reported a domestic legal basis for direct judicial communications in Ecuador, found in the *Child and Adolescent Code (Código de la Niñez y Adolescencia)*, enabling competent authorities to take necessary measures for the return of a child, and judges to communicate with foreign judges for the same purposes:

“Article 121 – Return of the child – When a child or adolescent has been removed abroad in violation of the provisions of the present Code or of a judicial decision on the exercise of parental authority and rights of custody, the competent State authorities shall promptly take all necessary measures for the return of the child. To the same end, the judge will contact the competent judges in the State where the child or adolescent is located.”³

Spain

The Spanish legislation, *Law on International Legal Cooperation in Civil Matters (Ley de cooperación jurídica internacional en material civil (BOE-A-2015-8564))*⁴ of 30 July 2015, among other things, defines direct judicial communications and enables Spanish judges to engage in them. Article 4 stipulates:

“Article 4. Direct judicial communications. Spanish courts are authorised to engage in direct judicial communications, provided the laws in force in each State are respected. Direct judicial communications are understood as those that take place between national and foreign courts without any intermediation. Such communications shall not affect or compromise the independence of the courts involved or the rights of the parties.”⁵

In addition, Articles 35 and 36 of the law, relevant to obtaining information on foreign law, include references to direct judicial communications as possible means to access to the relevant information.

¹ Available at: < http://www.saij.gob.ar/docs-f/codigo/Codigo_Civil_y_Comercial_de_la_Nacion.pdf >.

² Translation provided by the Permanent Bureau.

³ Translation provided by the Permanent Bureau.

⁴ Available at: < http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8564 >.

⁵ Translation provided by the Permanent Bureau.

Switzerland

A Network Judge from Switzerland reported the following domestic legislative bases for direct judicial communications:

"In Switzerland, there is a legal basis for direct judicial communications found in Article 10, paragraph 1 of the Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults (LF-EEA)⁶ which reads as follows:

'The court shall cooperate as required with the authorities of the State in which the child had his or her habitual residence before abduction.'

In addition, Article 296, paragraph 1 of the Federal Code of Civil Procedure of 19 December 2008 (CPC)⁷ provides that in procedures applicable to children in family law cases, the court shall ascertain the facts of its own motion. This covers all kinds of procedural measures that may be useful to establish the facts in the interest of the welfare of the child."

United States of America

A Network Judge from the United States of America reported the following domestic legislative basis for direct judicial communications:

"The Uniform Child Custody Jurisdiction and Enforcement Act specifically requires that when a court which has been requested to make a determination concerning child custody learns that a simultaneous related proceeding is pending in another state, the court must stay its action and communicate with the other court so that each court may determine which court is the more appropriate forum to determine child custody.

The Act specifically provides that foreign countries are to be treated as states for purposes of the Act. The UCCJEA, now in force in 49 of the 50 United States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, added a section that expressly permits judges in different states or countries to communicate concerning related domestic relations proceedings involving children. The uniform statute provides that the court should allow the parties to participate in the communication. Even if they do not directly participate in the communication, they must be allowed to present facts and legal arguments before a decision about exercising jurisdiction is made. An electronic recording or transcription by a court reporter which creates a verbatim memorialization of the communication must be made, and the parties must be given access to that record. The parties need not be informed of a judicial communication which is about schedules, calendars, or court records.

The Commissioners' comment to the Act states that American judges are to communicate with judges in foreign countries and tribal courts, as well as other states within the United States. Recognizing the use of technology, the comment further indicates that communications may be made not only by telephone, but also by internet, or other electronic means. Although the Act provides that the parties shall be allowed to participate in the communication, the comment recognizes that this may be impracticable when there is a significant time difference between the two tribunals or scheduling is otherwise difficult."

⁶ Available at: < <http://www.admin.ch/opc/fr/classified-compilation/20091488/index.html> >.

⁷ Available at: < <http://www.admin.ch/opc/fr/classified-compilation/20061121/index.html> >.

Uruguay

Uruguayan Act No 18,895, *Return of Illegally Removed or Retained Minors under Sixteen Years of Age (Restitución de Personas Menores de Dieciséis Años Traslada o Retenidas Ilícitamente)*,⁸ adopted on 11 April 2012, enables direct judicial communications and the designation of a Member of the IHNJ. The relevant Article reads:

“Article 28. Direct judicial communications — The Supreme Court of Justice shall designate a Liaison Judge for the purpose of facilitating direct judicial communications between foreign and national courts in relation to cases under this Act which are pending before the courts.

Consultations between courts may be reciprocal, they shall be made through the Liaison Judge and recorded in the respective case files, and the parties shall be notified thereof.”⁹

⁸ Available at: < <https://legislativo.parlamento.gub.uy/temporales/leytemp466515.htm> >.

⁹ Translation provided by the Permanent Bureau.

PRACTICAL INFORMATION ON CONDUCTING DIRECT JUDICIAL COMMUNICATIONS AND THE USE OF THE IHNJ

1. Description of practical experience of direct judicial communications

A Network Judge from Australia shared the following information on the practical operation of direct judicial communications in Australia:

"I think it is useful [...] to provide some context of how direct judicial communication is used in Australia. What follows is drawn from my own experience as a Hague Network Judge who regularly determines matters under to the 1980 Convention at first instance. It is confined to cases which are initiated to seek a child's return to a contracting state after an alleged wrongful retention or removal ('an abduction case'), rather than access cases under the 1980 Convention or cases under the 1996 Convention.

The substance of the communication between judges is first agreed to in Court with the parties. Ultimately, I compose the letter requesting information or assistance which usually includes some neutrally expressed history of the matter by way of context.

Direct judicial communications are effected in writing, usually by email. This serves us very well having regard to international time zones. Emails are copied to the parties after any addresses and contact details and the name of the network judge from the other jurisdiction has been deleted.

The emails between myself and the other Network judge become evidence in the proceeding by being marked as an exhibit.

Communications are usually directed to matters of procedure. Communications are not usually directed to issues of law or to what outcome is likely if relevant matters were to be litigated in the state of habitual residence. Direct judicial communication is more of an administrative function in furtherance of our judicial function rather than an exercise of judicial power per se. An enquiry may be to ask when a matter could be listed for hearing and determination in the state of habitual residence. That might be a determination after a contested hearing in the state of habitual residence or to coordinate a court in the state of habitual residence considering and making orders which formalise a final or interim parenting arrangement for children to which the requesting parent and the taking parent have agreed. Members of the Network will appreciate that any agreement between parents usually needs to be capable of enforcement contemporaneously in both contracting states. Any delay after one set of orders is made, during which a party could change their mind about having the agreement perfected in their own state, is to be avoided. Where the 1996 Convention is not in operation, a fairly high degree of coordination is necessary to obtain orders which can operate between two contracting states from and at the same time.

[...]

Relevantly, in Australia, determination of abduction matters under the 1980 Convention is confined to the Family Court of Australia. Our court comprises 31 justices of whom 8 are permanently assigned to the Appeal Division but who can also hear matters at first instance. There is no legislative basis for the concentration of jurisdiction to our superior court and away from the lower trial court which otherwise determines about 85% of all family law matters. This effective concentration of jurisdiction has come about as a matter of protocol settled between our court, through our Chief Justice, Diana Bryant, and the Chief of the trial court. The effect is that our Chief Justice, who is the other Hague Network Judge, has direct responsibility for allocation of judges and resources for the court within which all abduction matters are determined at first instance and on (intermediate) appeal. It follows that any direction or guideline within our court in relation to direct judicial communications between Hague Network judges is relatively easy to effect and implement. A request for direct judicial communications would need to be effected through me or through my Chief Justice. It has been some time since I have been asked by one of my colleagues to initiate contact with a judge from another contracting state. However, direct judicial communication arises in most abduction cases which come before

me. In my experience, direct judicial communications are a very valuable tool. My impression is that such communications also serve, in a general sense, to make the state of habitual residence seem more accessible to the parties to the proceedings in Australia as well as providing very specific and useful information."

2. A practical example of the use of the IHNJ to undertake cross-examination in a foreign jurisdiction

The Australian Network Judge also explained: "Another aspect of communications between contracting states is communications between my Chambers and other courts to facilitate cross examination where it is considered necessary. Leaving to one side the desirability (or undesirability) of cross examination in abduction cases under the 1980 Convention, the need to cross examine a left behind parent in an abduction case is now arising quite frequently in Australia. These communications are effected between [...] my associate and court administrators overseas, in writing. This correspondence is not put into evidence although it is conducted formally and no difficulty would arise if it was called for. I sit here in Melbourne out of court hours so as to fit in with the time zone in the other country. It usually works well. A hearing next week about four Somalian children allegedly wrongfully removed from England will involve us sitting at 7.00 p.m. (Melbourne time) to take evidence from the requesting parent at the Royal Courts of Justice at 8.00 a.m. (London time). Miss Victoria Miller of Lord Justice Thorpe's Office kindly supported our request to RCJ to permit access to the premises early in the day. Miss Miller will escort the requesting parent to a video conference room at RCJ. A court officer or tipstaff of RCJ will operate the video link from the London end. An interpreter will be available from this end. Our court will meet the costs associated with the video link. Whilst these communications are not between judges in two contracting states, it does seem to be an arrangement made under the auspices of international judicial communication which we discussed at the Permanent Bureau in July 2008."