

Regional Perspectives⁵⁵

The views expressed are those of the authors, not of the Permanent Bureau or the Hague Conference or its Member States.



The Work of the Hague Conference on Private International Law and its Relevance for the Caribbean Region and Bermuda

Hamilton, Bermuda, 21-24 May 2012

From 21 to 24 May 2012, 125 representatives from more than 20 States and overseas territories, international organisations as well as members of the Permanent Bureau of the Hague Conference on Private International Law (the Hague Conference) met in Bermuda to learn about the Hague Conference in general and some of the multilateral treaties that have been concluded under its auspices (Hague Conventions), as well as to discuss the relevance of these instruments to the Caribbean Region and Bermuda.

The seminar was organised by the Government of Bermuda, in collaboration with the Permanent Bureau, and with the support of the Commonwealth Secretariat.

The seminar covered each of the main areas of private international law addressed by Hague Conventions, namely (i) child protection, family and property relations, (ii) legal cooperation and litigation, and (iii) commercial, torts and financial law.⁵⁶

⁵⁵ The Permanent Bureau welcomes comments and different viewpoints.

⁵⁶ The following Conventions were discussed: Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (Form of Wills Convention); Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention); Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Process Convention); Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Taking of Evidence Convention); Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention); Convention of 25 October 1980 on International Access to Justice (Access to Justice Convention); Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (Trust Convention); Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (Succession Convention); Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Intercountry Adoption Convention); Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention); Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Securities Convention); Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention); Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (Child Support Convention); and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Protocol to the Child Support Convention).

Participants appreciated the opportunity to learn, exchange information and experiences and benefited from the participation of recognized international experts such as Lord Justice Mathew Thorpe, Head of International Family Law, Court of Appeal of England & Wales; Professor David McClean, University of Sheffield (UK); Justice David Hayton, Caribbean Court of Justice, and Justice Wade Miller from the Supreme Court of Bermuda and President of the Commonwealth Magistrates' and Judges' Association.

The Regional Conference proved successful in promoting the Hague Conference work and demonstrated the usefulness of Hague Conventions to jurisdictions in the Caribbean Region. The Regional Conference unanimously adopted some useful conclusions, which are reproduced here below (also available at: <http://www.hcch.net/upload/concl2012bermuda.pdf>).

Conclusions and Recommendations

NOTING the diversity of legal traditions in the Region;

RECOGNISING that greater economic and social integration in the Region has led to an increase in cross-border transactions and cross-border movements of families and children in particular, as well as the resulting interactions between legal systems;

RECOGNISING that the Hague Conventions reinforce legal certainty and predictability, as well as the protection of individual rights and legitimate commercial interests;

RECOGNISING that 12 of the 16 Caribbean Community (CARICOM) jurisdictions are members of the Commonwealth, the participants invite the Commonwealth Secretariat to assist and support networking between the Commonwealth jurisdictions in the region in order to facilitate the cross border protection of children and families, to promote legal certainty and predictability in commercial and financial matters, and to encourage judicial and administrative co-operation through the Hague Conventions;

ACKNOWLEDGING the great benefit of co-operation between the Hague Conference and the Commonwealth in areas of common interest, as confirmed by the present seminar;

RECOGNISING the valuable opportunity that the seminar afforded to participants to:

- a) gain a better understanding of the Hague Conventions and their relevance, implementation and practical operation in the Region;
- b) appreciate how the Hague Conventions serve as a basis for furthering co-operation, communication and co-ordination between legal systems;
- c) understand the interactions between the Hague Conventions and the implementation of international human rights, as well as the promotion and facilitation of international trade and investment;
- d) exchange experiences and ideas with respect to the Hague Conventions and their relevance in the region; and

EXPRESSING the wish for similar seminars to be convened in the Region on a regular basis in the future;

The Participants

In relation to the Seminar and the Hague Conference in general:

1. Resolved to share information obtained from the Bermuda Conference with the relevant authorities of the States in the Region, as well as regional and international organisations and professional associations;
2. Recommended that each State in the Region consider becoming a member of the Hague Conference;
3. Acknowledged that membership greatly enhances the possibility of receiving technical assistance from the Permanent Bureau in relation to the implementation and practical operation of the Hague Conventions;
4. Welcomed the fact that a number of States in the Region have already become Contracting States to various Hague Conventions, and that a number of these Conventions apply to overseas territories in the Region by way of extension;
5. With respect to Conventions which are not yet applicable, encouraged each jurisdiction to actively consider the merits and assess the means of joining the Conventions by way of ratification or accession, or by having them extended to the jurisdiction, and in that respect were pleased to hear that a number of States are in the process of finalising internal procedures to join some of the Conventions discussed;
6. Encouraged each State in the Region that is a Contracting State to a Hague Convention to promote the acceptance of that Convention among other States in the Region, and, where applicable, to co-operate with the Hague Conference in its periodic reviews of the Conventions' practical operation; and
7. Encouraged Contracting States, as well as overseas territories to which Conventions apply, to share experience and harmonise the operation of these Conventions, with a view to further increasing their efficiency.

In relation to the Child Abduction Convention and Child Protection Convention:

8. Reaffirmed the relevance of these Conventions in the Region and the importance of international co-operation for the protection of children moving across borders;
9. With respect to the Child Abduction Convention, emphasised the need for swift proceedings in order to meet the Convention's objectives and ensure the safe return of children;
10. With respect to the Child Protection Convention, acknowledged the complementary nature of this instrument to the Child Abduction Convention; and
11. Recognised the value of the Hague International Network of Judges in facilitating the practical operation of both Conventions, and encouraged States and territories which have not yet done so to designate members of the Network; in this respect, the participants were delighted to hear about the upcoming formal designation of the

Hon. Mrs. Justice Norma Wade-Miller of the Supreme Court of Bermuda and President of the Commonwealth Magistrates' and Judges' Association, as member of the Network; participants also encouraged direct judicial communication among courts in the Region to the furthest possible extent.

In relation to the Inter-country Adoption Convention:

12. Recognised that intercountry adoption should only occur in accordance with the subsidiarity principle and only in the best interests of the child, and be seen as a shared responsibility of the 'States of Origin' and the 'Receiving States', to ensure the successful operation of the Convention;
13. Noted the importance of the Convention in combating the abduction, sale, and trafficking of children; and
14. Acknowledged the importance of the Convention as the appropriate legal and administrative framework for intercountry adoption.

In relation to the Child Support Convention and its Protocol:

15. Recognised the importance of the Convention as the appropriate administrative and legal framework for the recovery of child support and other forms of family maintenance; and
16. Acknowledged the role of the Convention in inviting reforms to existing systems for the recovery of child support and other forms of family maintenance.

In relation to the Form of Wills Convention:

17. Acknowledged that the Convention helpfully provides for rules favourable to upholding the formal validity of wills (*favor testamenti*) and that it enables a testator to dispose of his/her estate in a single will (i.e. avoiding the need to execute multiple wills depending on the location of property);
18. Also acknowledged that the Convention addresses the need for uniformity in decisions on the formal validity of wills across different States; and
19. Recognised the importance of the Convention as an important and relevant treaty in international estate planning.

In relation to the Succession Convention:

20. Recognised that the Convention represents an important international and mutual accommodation of both civil law and common law and practice, and that it offers pragmatic and workable solutions; and
21. Recognised that the Convention allows for effective succession planning.

In relation to the Apostille Convention:

22. Recognised that the Convention greatly facilitates the fast and efficient authentication of public documents emanating from one Contracting State to be produced in another Contracting State;

23. Recognised the role of the Convention in establishing a regulatory environment that is more conducive to foreign direct investment, as highlighted by the World Bank;
24. Recognised the increasing acceptance and use of electronic Apostilles (e-Apostilles) and electronic registers of Apostilles (e-Registers) as part of the electronic Apostille Program (e-APP), and encouraged newly acceding States as well as other Contracting States to implement this program as a means to further enhance the secure and effective operation of the Convention; and
25. Encouraged Contracting States as well as other interested States in the Region to participate in the next meeting of the Special Commission on the practical operation of the Apostille Convention, which is scheduled for 6-9 November 2012.

In relation to the Service of Process Convention and Taking of Evidence Convention:

26. Noted that these Conventions greatly simplify and expedite the transmission of requests for service of process and taking of evidence abroad, and facilitate the prompt execution of those requests;
27. With respect to the Taking of Evidence Convention, expressed the wish that relevant formalities be completed to bring the Convention into effect in all overseas territories of Contracting States; and
28. Recognised that the designation of Central Authorities is critical to the smooth and effective operation of each Convention.

In relation to the Access to Justice Convention:

29. Noted with interest the importance and broad application of the Convention to cross-border matters, including equal treatment of nationals and residents of Contracting States in respect of legal aid, security for costs, and the enforcement of cost orders.

In relation to the Trust Convention:

30. Acknowledged the importance of the Convention as an effective means to have both commercial and family trusts recognised abroad, in particular in jurisdictions where the concept of trusts is not part of domestic legislation.

In relation to the Choice of Court Convention and ongoing work on the recognition and enforcement of foreign judgments:

31. Acknowledged the benefits to cross-border business of respecting agreements to settle disputes, which arise from international commercial transactions, before the court chosen by the parties;
32. Acknowledged the importance of the Convention as an instrument to reinforce the international litigation system, in parallel to the international arbitration system, in particular the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
33. Acknowledged the importance of harmonised rules on

the recognition and enforcement of foreign judgments, at the regional and global level; and

34. Welcomed the decision to resume work at the Hague Conference towards common solutions on the recognition and enforcement of foreign judgments, and encouraged States in the Region to engage in this work to the furthest possible extent.

In relation to the Securities Convention:

35. Recognised the need for uniform conflict of laws rules that comport with the reality of how securities are held and transferred today (i.e., by electronic book-entry debits and credits to securities accounts);
36. Recognised further that the legal uncertainty as to the law governing the perfection, priority and other effects of transfers imposes significant friction costs on even routine transactions and operates as an important constraint on desirable reductions in credit and liquidity exposures; and
37. Acknowledged that the Convention reflects a pragmatic approach and provides legal certainty and predictability for cross-border securities transactions, thus facilitating the international flow of – and access to – capital.

The participants of the Bermuda Seminar recognised the event's success and acknowledged the exceptional organisation of the Seminar by the Government of Bermuda, in particular the Parliamentary Registry. They warmly thanked the Bermuda Government, the Permanent Bureau, and the Commonwealth Secretariat for their generosity and efficiency in staging this important and significant event. The participants also thanked the administrative and support staff for their untiring work and invaluable contribution to the success of this Seminar.

Intercountry Adoption in Africa

In just a few short years, the number of intercountry adoptions of African children has dramatically increased. Between 2003 and 2011, at least 35,000 children from Africa were adopted outside the continent, representing a 300% increase in an eight-year period.⁵⁷ These numbers are growing exponentially as other regions which were traditionally a "source" for children to adopt (Southeast Asia, the ex-USSR, Latin America) are reinforcing their legislation and encouraging national alternative care solutions for children deprived of family protection. The number of prospective adoptive parents who wish to adopt young and healthy children remains steady in the West. Being confronted with other countries' encouragement of intercountry adoption of special needs children, these candidates for adoption are turning to the African continent.

⁵⁷ See the report drawn up by the African Child Policy Forum: "Africa: The New Frontier for Intercountry Adoption", 2012. Available at < www.africanchildinfo.net > and Pr. Peter Selman (Newcastle University, UK) in "The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010", in J. Gibbons and K. Rotabi "Intercountry Adoption : Policies, Practices and Outcomes", 2012, Farnham, Ashgate.

In many African countries, child protection systems are comparatively weak and legislation is obsolete, incomplete and / or improperly implemented. This increases the difficulty in preventing and combating the abduction, sale of and traffic in children for the purposes of adoption. This calls for a greater vigilance and respect for the principles of international treaties, such as the 1989 United Nations Convention on the Rights of the Child, the 1990 African Charter on the Rights and Welfare of the Child, and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Measures aimed at reversing this trend and promoting respect for the rights and interests of children in intercountry adoption include providing better information to the biological families before obtaining their consent to adoption, and an improved implementation of the principle of subsidiarity, including the reinforcement of family preservation services, the development of domestic adoption and the implementation of the safeguards contained in the 1993 Convention.

The African actors are gradually reaffirming their will to deal with questions related to child protection in a manner that is congruent with their values and traditions, by promoting informal alternative care measures and by avoiding systematic recourse to intercountry adoption for African children deprived of parental protection. Further, it is important to note that in numerous cases, filiation by full adoption does not reflect the true wishes of the biological parents who would like to maintain a bond with their child, as in the case with so-called 'simple adoptions'.

The fundamental principles and safeguards contained in the 1993 Convention were emphasised by the participants in two recent pan-African conferences, in which the Permanent Bureau of the Hague Conference on Private International Law was invited to participate. At both the Conference of sub-Saharan African Francophone Countries on the strengthening of families and alternative care measures (Dakar, Senegal, 10

and 11 May 2012) ("Conférence des pays francophones d'Afrique subsaharienne sur la mobilisation autour du renforcement de la famille et de la prise en charge alternative") and the 5th International Policy Conference on the African Child, held in Addis Abeba (Ethiopia) at the end of May 2012, there was significant awareness of the urgent need to regulate intercountry adoptions and a growing interest in the 1993 Convention, widely acknowledged to be the legal instrument of reference with regard to intercountry adoption. In this respect, the "Guidelines for Action on Intercountry Adoption of Children in Africa", drafted by the African Child Policy Forum and a group of international experts and presented in Addis Abeba, provide practical guidance and translate the rules and principles contained in the relevant international instruments, including the 1993 Convention.

To date, 13 sub-Saharan African States are Parties to the 1993 Convention. Other African countries are keenly interested, and to this end, the Permanent Bureau, through its Intercountry Adoption Technical Assistance Programme (ICATAP), participated in an awareness-raising seminar on the 1993 Convention in Cotonou (Benin) on 12 and 13 June 2012. Other States, such as the Ivory Coast, Mozambique, Namibia, Ghana and Lesotho, have approached the Permanent Bureau to request technical assistance aimed at helping them become Parties to the 1993 Convention and implement the principles and safeguards promoted by the Convention. These countries are aware that a simple ratification of or accession to the treaty would be ineffective without an in-depth national reform of their structures and procedures relevant to intercountry adoption. There remain formidable challenges for the African continent, notably in deterring improper material gains and monitoring the role of private actors in the adoption process. Faced with frequently inadequate resources or deficient child protection systems, the political will of African States to protect children deprived of parental protection and to encourage co-operation amongst stakeholders remains decisive.

Intercountry Adoption Workshop

Dakar, Senegal, 27-30 November 2012

As a follow up to the first Francophone Seminar held in The Hague (the Netherlands) in June 2009, the Permanent Bureau of the Hague Conference organised a four-day workshop on the implementation and operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, in partnership with the Governments of Belgium, Canada, France, Italy, the Netherlands and Switzerland. This meeting was intended for the Francophone States of origin in Africa and the Caribbean which are already Parties to the Convention (Burkina Faso, Burundi, Guinea, Madagascar, Mali, Mauritius, Rwanda, Senegal and Togo), and those which have shown an interest in becoming a Party to the Convention (Benin, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Haiti and Niger).

The workshop took place in Dakar (Senegal) from 27 to 30 November 2012 and gathered more than 60 experts from Central Authorities and the judiciary from 15 States of origin and 6 receiving States (Belgium, Canada, Italy, France, the Netherlands, Switzerland and the United States of America), international organisations (UNICEF) and non-

governmental organisations (African Child Policy Forum, EurAdopt, International Social Service, Save the Children).

The aim of the workshop was to bring together experts and judges responsible for intercountry adoptions in different States of origin in order to increase their knowledge of the Convention, to promote its effective implementation within these States and to encourage a constructive and close co-operation with receiving States. The work programme included the sharing of experiences and good practices in a wide range of fields related to intercountry adoption. Presentations on the Convention and on its implementation in certain States were alternated with time for discussion of specific 'case hypotheticals' with the objective of promoting exchanges on questions which are often sensitive.

The workshop also encouraged States to become Party to the Convention (where this was not already the case) and to put in place the necessary structures and procedures in order to guarantee that intercountry adoptions take place in the best interests of the child.

The participants adopted "Conclusions and Recommendations" aimed at improving the practices in each of these States and underlined their wish to hold this type of meeting regularly.



Participants to the Francophone Workshop on the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Adoption, Dakar, Senegal, 30 November 2012