

Council on General Affairs and Policy of the Conference – March 2019

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 9 of January 2019
Title	Use of Information Technology in the Transmission of Requests under the Service and Evidence Conventions	
Author	Permanent Bureau	
Agenda item	Item IV.2.b	
Mandate(s)	n.a.	
Objective	To seek the permission and endorsement of the Council to conduct further work on the use of information technology to support and improve the operation of both the Service and Evidence Conventions	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	n.a.	
Related documents	n.a.	

I. Introduction

1. It has long been established that both the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (“Service Convention”) and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (“Evidence Convention”) are technology neutral instruments. The Special Commission (SC) on the Practical Operation of the Service and Evidence Conventions has confirmed at various meetings that, just as for the other Legal Co-operation Conventions, neither the spirit nor letter of the Conventions constitutes an obstacle to the usage of modern technology.¹

2. Against this background, the SC has encouraged the transmission by electronic means of requests under both Conventions,² and has welcomed the use of information technology (IT) to assist in their execution³ and to facilitate communications between authorities designated under the Conventions.⁴

3. The use of IT would increase the utility and efficacy of both Conventions, with the potential to minimise delays as well as reduce costs and required resources. For example, the use of an electronic case management system would allow relevant procedures to be standardised, assisting Contracting Parties in ensuring efficient, step-by-step workflows and, in particular, providing guidance to new Contracting Parties with respect to best practice.

4. This document seeks to outline a framework within which further work may be conducted in order to determine the desirability and feasibility of using IT to improve the operation of the Service and Evidence Conventions. In particular, this document explores the possible future development of an electronic system to facilitate the transmission and management of requests under both Conventions.

II. Scope of analysis

5. While informal communications between authorities already take place via email, fax and telephone, the use of IT for the transmission and management of requests for service or for the taking of evidence has only recently gained more widespread interest.⁵

6. As such, this document deals with the transmission and management of requests to the Central Authority of the relevant Requested State under both Conventions, although the alternative means of service provided for by Article 10(a) and (b) of the Service Convention could also be examined as part of any future work.⁶ To this end, it is important to first draw a distinction between the actual *transmission* of the request and subsequent *execution* of the request, as demonstrated in the charts below (see page 3).

¹ C&R No 4 of the 2003 SC and No 3 of the 2009 SC.

² C&R No 39 of the 2014 SC.

³ C&R No 11 and Nos 36-38 of the 2014 SC. See also: C&R Nos 37-39 and 49-50 of the 2009 SC; C&R Nos 59-64 of the 2003 SC.

⁴ See, in particular: C&R No 9 of the 2014 SC; C&R Nos 44 and 63 of the 2003 SC.

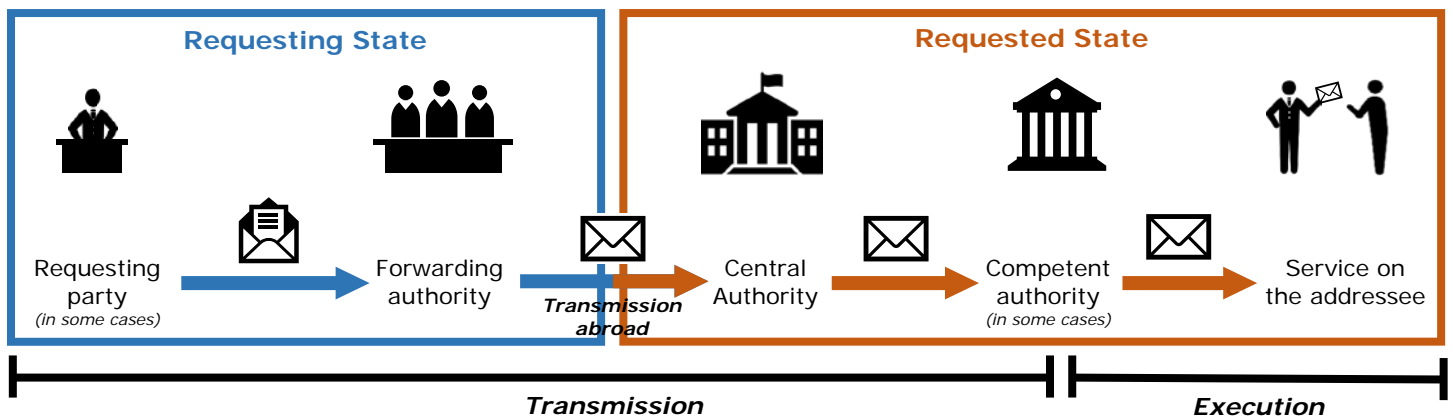
⁵ See “Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention)”, Part E and “Synopsis of Responses to the Questionnaire of November 2013 relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention)”, Part E (available on the HCCH website at < www.hcch.net > under “Evidence” then “Questionnaires and Responses”).

⁶ This document deals neither with the alternative channels of transmission under the Service Convention (Arts 8-9), nor with Chapter II of the Evidence Convention (*i.e.*, evidence obtained by Consuls or Commissioners). Additionally, with respect to Art. 10(a) of the Service Convention, it should be noted that the Universal Postal Union Convention (as revised by the 2016 Istanbul Congress) provides for “*electronic postal services*” in its Art. 37.

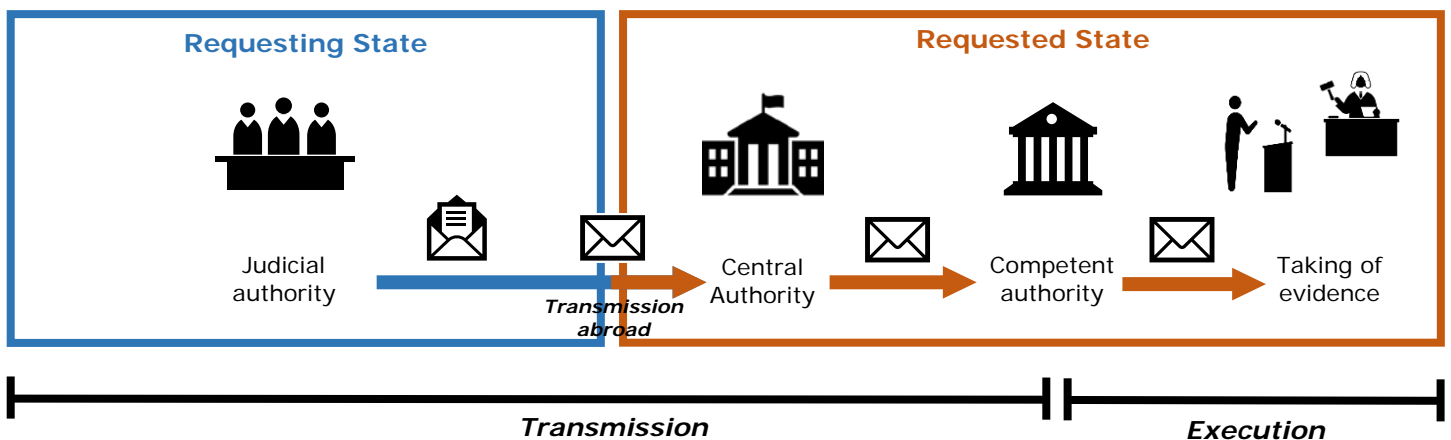
7. Any future system facilitating the transmission and management of requests under the two Conventions can only reach its full potential if judicial and extrajudicial documents can be kept in electronic form from initial issuance to final execution. This is because if the electronic flow of requests and documents is interrupted at any point, some of the added value inherent in the use of the technology may be lost (*e.g.*, if any of the actors involved must resort to printing a document in order to sign it or to affix a seal). Therefore, the importance of preserving the entire chain of transmission in an electronic context should not be underestimated.

8. Yet while this flow should remain a long-term vision for the Service and Evidence Conventions, in the interim, it is proposed that the scope of any future electronic system or tool should, at least in the first instance, focus primarily on the *transmission* of the request and its management, and in particular, the *transmission abroad*, *i.e.*, in the case of the Service Convention: the transmission from the forwarding authority in the Requesting State to the Central Authority of the Requested State; and in the case of the Evidence Convention: the transmission from the judicial authority of the Requesting State to the Central Authority of the Requested State.⁷ This is the part of the process that lends itself best to digitisation in terms of legal security and actors concerned. At other points in the transmission and execution chain, it is possible that the documents may have to be printed in order to reach the authority or to effect service on the addressee, because actual service cannot be performed electronically in many jurisdictions.

A. Transmission and execution under the Service Convention (Main Channel):



B. Transmission and execution under the Evidence Convention (Chapter I):



⁷ In the case of transmission of a Letter of Request under Chapter I. While in some instances a request under Chapter II may need to be transmitted to an authority in the State of Execution for permission, these instances are not specifically addressed here.

III. Minimum requirements

9. Any future electronic system developed to facilitate the transmission and management of requests under the Conventions must necessarily be able to meet the basic requirements as outlined in the texts of the Conventions themselves. For example, in the context of the Service Convention, determining that transmission occurs from one Contracting Party to the Convention to another and that the address of the person to be served must be known.⁸

10. An additional requirement arising from the Conventions is that of using the most updated versions of the Model Forms originally annexed to the Conventions. This is a mandatory requirement under the Service Convention,⁹ and is strongly recommended by the SC in the case of the Evidence Convention.¹⁰ It should be noted that the existence of these standardised Model Forms is advantageous when determining the standard terms to be used in the electronic forms to facilitate data entry. The Permanent Bureau has developed multiple fillable trilingual Model Forms in Word and PDF versions, which should further facilitate the task.

11. With respect to the document to be served, it may be either electronically issued, or be a scanned version of the paper document, in both cases bearing an electronic signature.¹¹

12. The frameworks of both Conventions provide a structure which is appropriate for and amenable to the creation of the IT architecture that would be implemented in any future electronic system. For example, the system would be able to give the necessary electronic access credentials to authorities in the Requesting State (*e.g.*, judicial authorities under the Evidence Convention and forwarding authorities under the Service Convention)¹² which may be required to transmit a request abroad to the Central Authority of the Requested State. Given that across Contracting Parties to the Conventions these authorities are many and varied (*e.g.*, many Parties have courts, lawyers or judicial officers acting as forwarding authorities under the Service Convention),¹³ this could become an added challenge. However, in States where there is only one forwarding authority under the Service Convention¹⁴ the system would be comparatively easily implemented.

13. Neither the Service nor the Evidence Convention requires an official designation of the forwarding authorities or the judicial authorities; nevertheless, some Contracting Parties have informed the Permanent Bureau of the categories of officials / authorities who act as forwarding authorities under the Service Convention by virtue of their internal law or practice. Verification of these authorities could be carried out using databases administered by profession (*e.g.*, in the case of lawyers or judicial officers) and / or on national (or sub-national jurisdiction) basis, taking into account the Contracting Parties which have multiple judicial / forwarding authorities.

⁸ See Art. 1 of the Service Convention. It should be noted that a mere email address with a generic extension such as “.com” or “.net” would not be considered sufficient to fulfil the requirement of Art. 1(2). See Annex 8 of the Practical Handbook on the Operation of the Service Convention (Service Handbook) (available on the HCCH website at < www.hcch.net > under “Publications” then “e-Book Store”), paras 24 *et seq.*, in particular para. 27.

⁹ The Model Form is mandatory under the main channel of the Service Convention (see Art. 3(1)) and recommended for the alternative channels of transmission. See also, C&R No 25 of the 2014 SC; C&R No 29 of the 2009 SC.

¹⁰ C&R No 12 of the 2014 SC. See also C&R No 54 of the 2009 SC.

¹¹ In the latter case, the law of the Requesting State will determine the authorities or persons competent to scan the document.

¹² See, *e.g.*, Art. 1 of the Evidence Convention and Art. 3(1) of the Service Convention.

¹³ At least 38 Contracting Parties to the Service Convention have multiple forwarding authorities. In 14 Contracting Parties this also includes a/the Central Authority: Canada, China, Germany, Ireland, Italy, Mexico, Monaco, Netherlands, Portugal, Russian Federation, San Marino, Slovakia, Switzerland, United Kingdom. In the other 24 there are multiple forwarding authorities excluding the Central Authority: Argentina, Australia, Belarus, Belgium, Botswana, Bulgaria, Czech Republic, Denmark, France, Japan, Korea (Republic of), Latvia, Lithuania, Luxembourg, Norway, Poland, Moldova (Republic of), Romania, Slovenia, Spain, Sweden, Turkey, Ukraine, United States.

¹⁴ At least 16 Contracting Parties to the Service Convention have designated a single entity to act as both Central Authority and forwarding authority. Those Contracting Parties are: Barbados, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, Estonia, Finland, Greece, Hungary, Iceland, Israel, Kuwait, Malawi, Sri Lanka, Venezuela, Viet Nam.

14. Therefore, even in the absence of comprehensive databases and directories in certain Contracting Parties, the process of verifying each authority of the Requesting State could be done on a case-by-case basis and only when the need arises. The use of a common system in this respect would also provide increased certainty in relation to the provenance of the request. In addition, the structure of any future system would be further facilitated by the existence of a limited number of “entry points” for a given Contracting Party when it is the Requested State / State of destination (*i.e.*, via its Central Authority / Authorities). For example, the fact that these forwarding / judicial authorities must initiate the interaction with a Central Authority in the other State concerned means that the incoming transmissions are necessarily limited to the designated Central Authorities, which may in turn render this obstacle more manageable.¹⁵

15. In addition to servicing Convention requirements, any future electronic system developed to facilitate the transmission of requests under the Conventions would also bring the following benefits:

- A secure system allowing for confidentiality of communications, mitigating the risk of loss of or tampering with data, and for authenticating senders and recipients;
- Basic case management capabilities, including generation of the relevant Model Forms and management of communications and workflows (*e.g.*, reminder and follow-up capacity) under a single case while limiting data entry – regardless of the means of communication used;¹⁶
- Ability to produce statistics indicating Requesting and Requested States, as well as other (yet to be defined) parameters;
- Availability of the software in several languages in addition to English and French.

IV. Existing systems

16. First, when contemplating potential electronic case management systems under existing HCCH Conventions, it would be remiss not to consider the work undertaken in designing and implementing iSupport, as the latter is an electronic case management system under the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Convention). While the Service and Evidence Conventions are distinct instruments which operate differently to that Convention, there remain aspects of the iSupport system that could prove valuable in terms of both guidance and inspiration, in particular the inclusive, open-source, and *agile methodology*¹⁷ used in its development.

17. Secondly, developed with European Union (EU) funding, e-CODEX is a technological solution that offers tools for secure electronic communications systems. The e-CODEX components are open-source and provide evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, as well as protection against the risk of data loss, theft, damage, or any unauthorised alterations. Given the experience of HCCH with e-CODEX, this technology could also serve as part of a possible model for implementation. Further, the developments in the context of the taking of evidence in criminal matters within the “Evidence2e-CODEX”¹⁸ project could also provide some inspiration.

¹⁵ These forwarding authorities would have to be identifiable by Central Authorities with an appropriate degree of confidence, although one should be careful not to create a greater burden than currently exists.

¹⁶ The principle of proportionality of data processing lends itself to favouring the use of decentralised databases to manage this aspect.

¹⁷ The *agile methodology* involves breaking down technical developments into several “sprints” (or co-ordinated stages), with users given the possibility to test each “sprint”.

¹⁸ Launched in 2018, this is an EU-funded project that aims to provide a European standard for the exchange of electronic evidence using the e-CODEX technology in criminal matters (*e.g.*, in the context of requests for mutual legal assistance and European investigation orders). For more information, see: < <https://evidence2e-codex.eu/> >.

18. Thirdly, it should also be noted that work relating to the use of electronic means in the transmission and execution of requests is currently being undertaken by the Working Party on Civil Law Matters of the Council of the EU, in the context of the revisions to the European Regulations relating to the service of documents and taking of evidence. These developments should also continue to be monitored and could prove useful in considering possible models for any future system, bearing in mind the differences between the Service Convention and EU *Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No 1348/2000* (EU Service Regulation).

19. Finally, with respect to electronic service, the European Chamber of Bailiffs has developed an e-justice service of documents (EJS) platform to be used under the EU Service Regulation.¹⁹ It makes use of a directory of European bailiffs, where those have been designated as transmitting or receiving agencies according to the Regulation.

V. Potential challenges

20. When considering electronic transmission abroad, some challenges may arise. In the context of the Service Convention, following the secure electronic transmission of the request and documents to be served, the Central Authority of the Requested State will process the request in a manner that is consistent with its domestic law. To expedite service of documents, and given their electronic form, it would be preferable that the Central Authority also serves or arranges to have such documents served electronically.

21. While an increasing number of States are amending their laws to enable service by electronic means, subject to certain conditions, this is a practice not available in all States. As such, if “e-service” is not able to be effected, and the electronic documents to be served, which have been electronically signed, are subsequently printed, a variety of questions may arise. For example, in relation to the value of a printed version of these electronic documents for the purposes of service.

22. It is also worth noting that documents initiating proceedings are unlikely to be served electronically without the express prior consent of the addressee.²⁰ The importance of effecting valid service of documents cannot be overstated as inadequate service of process can be quashed, further delaying procedures and running counter to the objectives of electronic transmission.

23. In light of the above, any future electronic system would need to focus first and foremost on the *transmission* of requests abroad and the basic management aspects of such transmission. Given the nature of requests for service (*i.e.*, the diversity of competent authorities), it may be advisable to take requests under the Evidence Convention as a point of departure for design and implementation. However, given the similarities between the two Conventions, it would be short-sighted not to include *both* Conventions in any analysis of a possible future IT solution. Full electronic transmission from beginning to end will remain a long-term goal, preserved through open standards and agile development methods, but it should not stand in the way of the gains that short-term digitisation can offer. Any future system would equally have to incorporate the possibility to issue documents in paper form, for communication with Contracting Parties or authorities that do not, or cannot, make use of the system.

¹⁹ This initiative was developed, with the financial support of the EU, by the national chambers of Belgium, Estonia, France, Hungary, Luxembourg, and the Netherlands, the Ministry of Justice of France and the International Union of Judicial Officers.

²⁰ Cases where service of process has been effected by social media or e-mail, without the prior consent of the addressee, are principally instances where substituted service was ordered in the jurisdiction where proceedings have been initiated. Typically, this has occurred in cases where the defendant has been evasive and after traditional means of service have failed. See Annex 8 of the Service Handbook (*op. cit.* note 8), paras 48 and 67-68.

VI. Further work

24. Should the Council consider this topic worthy of further study, possible future work could include:

- Circulating a questionnaire to survey existing legal systems, structures, and the views of the authorities of Contracting Parties;
- Research and analysis to take stock of existing technologies, tools or systems;
- Mapping out the legal, functional and technical requirements, including workflows, of States representing a diversity of legal traditions;
- Matching these requirements and workflows with a blueprint for technical developments;
- Conducting a risk analysis to ensure that adequate and proportionate security measures are put in place, so as not to impose any unnecessary burden on users;
- Conducting an economic analysis of the potential technological solutions;
- Identifying potential sources of funding and other resources: for example, applying for EU justice action grants could be explored, but as with other formal grants, may require a tangible product, or at least a comprehensive blueprint for one, at the end of the project; participation in the new, EU-funded project for the maintenance of e-CODEX could also be explored.²¹

VII. Proposal submitted to Council

25. In summary, the Permanent Bureau seeks the permission and endorsement of the Council to conduct further work on the use of technology to support and improve the operation of both the Service and Evidence Conventions, with a view to making a possible future proposal for the development of a system to facilitate the electronic transmission of requests. The Permanent Bureau further seeks the permission and endorsement of the Council to identify and request possible funding in the context of such future work.

26. In light of current priorities and the overall work programme of the Conference, it is envisaged that the Permanent Bureau could commence this preliminary work, if approved, in the course of 2019, providing an update on progress to the Council at its meeting in 2020. In terms of resource implications, the initial research and analysis would be conducted in-house by the team responsible for the Service and Evidence Conventions, in consultation with the iSupport team.

27. As the project progresses the balance of resources is expected to shift from primarily legal aspects to more technical aspects, at which point organisational resources could be economised by drawing on the project management and IT expertise (including e-CODEX) within the team responsible for iSupport.

²¹ According to the European Commission, one of the objectives of this project is to “further [develop] e-CODEX to support areas where its potential use has already been identified and [monitor] new areas where it could apply, including limited engagement with the relevant stakeholders in those areas.”