

Title	Report on HCCH developments in the area of transnational litigation
Document	Prel. Doc. No 14 of January 2021
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Agenda Item	Item IV.2.a
Mandate(s)	<ul style="list-style-type: none"> - C&R No 42 of the 2014 SC on the Practical Operation of the Hague Service, Evidence and Access to Justice Conventions - C&R No 40 of CGAP 2019; C&D No 34 of CGAP 2020 - “Working proposal No 2 REV from Argentina, Chile, Mexico, Peru and Uruguay”, Commission II on General Affairs and Policy of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments
Objective	To report on ongoing work carried out by the Transnational Litigation Team, including the preparations for the envisaged 2022 meeting of the SC on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action/Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	N/A
Related Documents	N/A

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Report on HCCH developments in the area of transnational litigation

I. Introduction

- 1 Certain core HCCH instruments, namely the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1965 Service Convention), the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970 Evidence Convention), the *Convention of 25 October 1980 on International Access to Justice* (1980 Access to Justice Convention), the *Convention of 30 June 2005 on Choice of Court Agreements* (2005 Choice of Court Convention), the *Principles on Choice of Law in International Commercial Contracts* (2015 Principles on Choice of Law) and the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention), have complementary goals, each contributing in their own way to effective access to justice and cross-border cooperation. Throughout the lifecycle of transnational civil or commercial litigation these instruments often serve the same stakeholders, either to facilitate process or to expedite procedures for cross-border litigation, from choice of law, choice of court, to service of process, taking of evidence, to recognition and enforcement of foreign judgments. With a view to supporting the effective implementation and operation of these instruments, and as part of a broader reorganisation of portfolios and allocation of resources, the Permanent Bureau (PB) has grouped them under a newly created Transnational Litigation Team (Team). The Team, consisting of one First Secretary (Diplomat Lawyer), one Senior Legal Officer and one Legal Officer, is responsible for the post-Convention assistance and for the relevant general activities and services, such as Special Commission (SC) meetings, guides to good practice and practical handbooks, the publication of documents and maintaining databases, promotional activities or the provision of day-to-day advice and assistance to States and other stakeholders.
- 2 This document, in section II, reports on work carried out, and progress made, in relation to the instruments under the portfolio of the Team. Section III reports on *HCCH a|Bridged Edition 2020: Innovation in Cross-Border Litigation and Civil Procedure*. The document then briefly outlines in section IV the proposed schedule and preparatory work for the envisaged meeting of the SC on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions, to be held in 2022 (the 2022 SC). Finally, in section V, it lays down proposals for CGAP's consideration and decision.

II. Progress on the work conducted by the Transnational Litigation Team

- 3 In 2020, the work carried out in the area of transnational litigation can be reported in conjunction with the celebration of special anniversaries of the instruments covered by the Team: the 1965 Service Convention celebrated its 55th anniversary; the 1970 Evidence Convention, its 50th anniversary; the 1980 Access to Justice Convention, its 40th anniversary; the 2005 Choice of Court Convention, its 15th anniversary; the 2015 HCCH Principles on Choice of Law, their fifth anniversary, and the 2019 Judgments Convention celebrated its first anniversary.

A. 2015 Principles on Choice of Law

- 4 The 2015 Principles on Choice of Law continue to demonstrate their influence in the modernisation of national private international law. For example, in Uruguay, the General Act of Private

International Law, approved in November 2020 by the *Cámara de Representantes*, was inspired by the Principles, and this new law includes choice of law provisions that are open to non-State law.

- 5 As reported in March 2020,¹ and in the context of the fifth anniversary of the 2015 Principles on Choice of Law, the PB carried out a survey among 77 arbitration centres from around the globe to gather apposite information concerning the usage of the Principles, and to promote their wider use within the arbitration community. The responses received from arbitral institutions from four different continents have been compiled in a [status table](#), which is available on the Choice of Law Section of the HCCH website. The status table is geared towards providing information about arbitral institutions and rules that respect and interpret a contractually chosen law in accordance with the Principles, for the benefit of private parties wishing to resort to arbitral proceedings. The PB intends, resources permitting, to conduct the survey on arbitration centres on an annual basis.
- 6 The 2015 Principles on Choice of Law feature in the *Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on Sales)* (Legal Guide), which was jointly developed by the Secretariats of UNCITRAL, UNIDROIT and the HCCH to further promote the adoption, application and uniform interpretation of the instruments of the three Organisations in the area of international commercial contracts law. In the same year that the Principles celebrated their fifth anniversary, the Legal Guide was approved by UNIDROIT and UNCITRAL in May and September 2020, respectively, following CGAP's approval of the first three chapters in March 2020.² The publication of the Legal Guide by the United Nations publishing services in all six official languages of the UN, including English and French, the two official languages of the HCCH, is expected in 2021, after edition for clarity as well as compliance with gender-positive drafting.

B. 2005 Choice of Court Convention

- 7 As at 15 December 2020, 32 HCCH Members are bound by the 2005 Choice of Court Convention, namely Mexico, Singapore, the European Union (EU), all EU Member States, Montenegro and the United Kingdom, making it thus accessible to over 8.4% of the global citizenship³ representing more than 22% of the world GDP.⁴
- 8 Since the adoption of the 2019 Judgments Convention, these two instruments are often promoted as complementary instruments in cross-border dispute resolution.

C. 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions

- 9 In 2020, the 1965 Service and 1970 Evidence Conventions witnessed a steady increase in the number of Contracting Parties. As at 15 December 2020, the 1965 Service Convention has 78 Contracting Parties. The most recent treaty actions were the ratification by Austria (HCCH Member) on 14 July 2020 and accessions by the Philippines (HCCH Member) on 4 March 2020 and by the Marshall Islands (non-HCCH Member) on 29 July 2020. With a total of 78 Contracting Parties, the Convention is accessible to almost 70% of the global citizenship, representing more than 80% of the world GDP.⁵
- 10 As at 15 December 2020, the 1970 Evidence Convention has 63 Contracting Parties, with the latest Contracting Party, Viet Nam, having acceded to the Convention on 4 March 2020. The

¹ CGAP 2020 Report of Meeting No 4, p. 12, available on the Secure Portal of the HCCH website at < www.hcch.net >.

² C&D No 42 of CGAP 2020, available on the HCCH website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

³ The calculation is based on the data shown on the website of the World Bank < <https://data.worldbank.org/indicator/SP.POP.TOTL> > (last visited on 8 December 2020).

⁴ The calculation is based on the data shown on the website of the World Bank < <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> > (last visited on 8 December 2020).

⁵ *Id.*, notes 3 and 4.

1970 Evidence Convention is accessible to over 60% of the global citizenship representing more than 75% of the world GDP.⁶ The year 2020 saw 62 new acceptances of accessions,⁷ which represents an increase of 3.7% in relation to the previous year, and which brings the total number of acceptances to 1697. Notwithstanding, there are still 1030 outstanding acceptances required in order for the 1970 Evidence Convention to become fully operational amongst all Contracting Parties.⁸ In this regard, the PB encourages Contracting Parties to revisit their pending acceptances so as to further enhance the usefulness and operation of the 1970 Evidence Convention.⁹

11 Furthermore, in 2020 there were no amendments to, or withdrawals of, declarations made under Article 23 concerning the execution of Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. As at 15 December 2020, 29 Contracting Parties have made a general declaration (“full exclusion”); 19 have made a particularised declaration qualifying the circumstances in which they will or will not execute such Letters of Request (“qualified exclusion”); and 15 have made no declaration. In this regard, the PB recalls the 2009 SC recommendation that Contracting Parties revisit their general, non-particularised declarations under Article 23, if any, taking into account terms such as those contained in the United Kingdom declaration.¹⁰

12 Additionally, in respect to the application of Chapter II of the 1970 Evidence Convention, and as at 15 December 2020, five Contracting Parties have excluded in whole the application of Chapter II; 17 have excluded in part the application of Chapter II; and 41 have made no reservation in respect of Chapter II.¹¹ In light of positive experiences reported by Contracting Parties in applying Chapter II (notably during the 2020 Edition of HCCH a|Bridged, see below paras 27 *et seq.*), including as between common law and civil law jurisdictions, Contracting Parties that have excluded Chapter II in whole or in part may wish to revisit their position.

13 The 1980 Access to Justice Convention, which currently binds 28 parties, is accessible to over 10% of the global citizenship, representing more than 15% of the world GDP.¹² The most recent treaty action was the accession by Costa Rica on 16 March 2016.

1. Questionnaires on the use of information technology (IT)

14 In line with CGAP’s mandate to conduct work with respect to the use of information technology (IT) under both the 1965 Service and 1970 Evidence Conventions,¹³ and as reported at the 2020 CGAP meeting,¹⁴ the PB circulated in September 2019 two questionnaires with the aim of gathering information related to the current or potential use of IT in the operation of the Conventions. Responses to the Service Convention questionnaire were received from 34 States, and from 30 States for the Evidence Convention questionnaire, including from one non-Contracting State.

⁶ *Ibid.*

⁷ The new acceptances were made by two Asian States (Armenia and the People’s Republic of China); 14 European States (Andorra, the Czech Republic, France, Lithuania, Luxembourg, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Ukraine and the United Kingdom); and three Latin American States (Argentina, Brazil and Colombia).

⁸ The table reflecting the applicability of Arts 15 to 18 and 23 of the 1970 Evidence Convention is available on the HCCH website at < www.hcch.net > under “Evidence Section”.

⁹ For more details, see the HCCH website at < www.hcch.net > under “Evidence Section” then “Acceptances of accessions”.

¹⁰ C&R No 51 of the 2009 SC on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions; See also, C&R Nos 29-34 of the 2003 SC on the Practical Operation of the Hague Apostille, Evidence and Service Conventions.

¹¹ Of those parties that have excluded in part the application of Chapter II, one party has also excluded the application of Article 15; 13 have excluded the application of Article 16; 11 have excluded the application of Article 17; and 13 have excluded the application of Article 18.

¹² *Op. cit.*, notes 3 and 4.

¹³ C&R No 40 of CGAP 2019, see path indicated in note 2.

¹⁴ Prel. Doc. No 13 of January 2020 of CGAP 2020, “1965 Service / 1970 Evidence Conventions – The Use of Information Technology”, paras 7-9, see path indicated in note 2.

The responses, as well as a summary of the responses obtained, are available on the respective Service and Evidence sections of the HCCH website.

- 15 A noteworthy finding is that close to two thirds of the responding parties in the case of the Service Convention questionnaire (64%), and three fifths in the case of the Evidence Convention questionnaire (59%), reported favouring the use of a common electronic platform by all Contracting Parties in the operation of the Conventions. This and other findings will be submitted for discussion at the foreshadowed 2022 SC meeting.

2. Publication of the Guide to Good Practice on the Use of Video-Link under the Evidence Convention (Guide to Good Practice on the Use of Video-Link)

- 16 In April 2020, the Guide to Good Practice on the Use of Video-Link, which examines the latest developments in relation to the use of video-link in the taking of evidence under the 1970 Evidence Convention and outlines good practices in this field, was published in both English and French. The Guide has been widely publicised both by the PB and other stakeholders.¹⁵

3. Practical Handbooks

- 17 As mandated by CGAP in 2019,¹⁶ the PB has started to conduct research on domestic legislation and case law, as well as on the use of IT, with the aim of updating the 4th edition of the Practical Handbook on the Operation of the Service Convention.

- 18 Following the encouragement of CGAP at its 2020 meeting that the PB “leverage[s] the milestone anniversaries of the Service, Evidence and Access to Justice Conventions when planning research activities, publications, and events”,¹⁷ and to commemorate the golden anniversary of the 1970 Evidence Convention, the PB worked on a special (4th) edition of the Practical Handbook on the Operation of the Evidence Convention. This edition, which is a light update of the previous one, incorporates the most recent developments in domestic and international legal instruments and case law. The Handbook, published in December 2020, is complemented by the Guide to Good Practice on the Use of Video-Link that was published in April 2020. The fifth edition of the Handbook will (again) be comprehensive and incorporate the comments on the use of video-link.

4. Central Authorities' review

- 19 In December 2020, the PB initiated a review of the contact details of Central Authorities and of the practical information provided by Contracting Parties to the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions. This review was conducted via *notes verbales* sent to current Central Authorities, as well as to National Organs and diplomatic missions. One of the purposes of this review is to ensure that the most updated details are used for all communications in relation to the preparation of the envisaged 2022 SC meeting.

D. 2019 Judgments Convention

- 20 As at 15 December 2020, the 2019 Judgments Convention has two signatories: Uruguay and Ukraine, both of which States are working on their respective ratification.
- 21 The 2019 Judgments Convention continues to draw interest from different stakeholders, and several Members have taken steps towards its eventual adoption: for example, the EU and Brazil have conducted public consultations inviting views on the joining of the Convention; the Ministry of

¹⁵ Such as, the *Academia Mexicana de Derecho Internacional Privado y Comparado* (AMEDIP) during its *XLIII Seminario Nacional (Virtual) de Derecho internacional privado*, 20 November 2020.

¹⁶ C&R No 40 of CGAP 2019, see path indicated in note 2.

¹⁷ C&D No 34 of CGAP 2020, see path indicated in note 2.

Foreign Affairs of the Russian Federation, together with the Ministry of Justice and the Supreme Court, has submitted a proposal to the Government of the Russian Federation in favour of signing the Convention. A Working Group instituted by the Government of Uzbekistan has also recommended ratification of the Convention.

- 22 In line with the approval process adopted by the Twenty-Second Session and duly noted by CGAP at its 2020 meeting,¹⁸ the Explanatory Report on the 2019 Judgments Convention, prepared by Professors Francisco Garcimartín (Spain) and Geneviève Saumier (Canada), with the assistance of the PB, was approved and published following a two-month silent approval procedure initiated on 22 July 2020, during which time no Member of the HCCH raised an objection.
- 23 As part of post-Convention assistance, the PB initiated its engagement with the project “Cross-border enforcement of judgments” financed by the German Federal Ministry for Economic Cooperation and Development (BMZ) and implemented by the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and its Open Regional Fund for South East Europe-Legal Reform (ORF-LR), aimed at promoting the 2019 Judgments Convention in South East Europe. As the first output of the project, the 2019 Judgments Convention and its Explanatory Report have been translated into Macedonian, Serbian, Bosnian and Montenegrin. With a view to further raising awareness of the Convention in the region, the video documentary featuring the Twenty-Second Session is now available on the HCCH YouTube Channel and on the Judgments Section of the HCCH website with subtitles in the region’s local languages.
- 24 While a number of planned promotional events were postponed due to the COVID-19 pandemic, a number of others were revised to fit into diverse online formats. Noteworthy are the following events:
- a. a joint conference organised by the University of Bonn, Germany, and the HCCH, “The HCCH 2019 Judgments Convention: Prospects for Judicial Cooperation in Civil Matters between the EU and Third Countries” which has been rescheduled to 13 and 14 September 2021; however, on 29 October 2020, a Pre-Conference Video Roundtable took place, which attracted approximately 200 participants;
 - b. on 3 December 2020, ASADIP and the HCCH, including the Regional Office for Latin America and Caribbean (ROLAC), co-organised a conference devoted to the 2019 Judgments Convention. The conference, attended by 300 participants, covered an introduction to the Convention and the reasons why States should join, a presentation of the particular benefits of the Convention for Latin America, as well as a discussion of the implementation challenges for States in the region.
- 25 In addition, the PB actively participated in various other events promoting the 2019 Judgments Convention such as, for example, a panel discussion dedicated to the Convention at the Academy of European Law on 29 October 2020.
- 26 Furthermore, in line with the mandate of the Twenty-Second Session,¹⁹ the PB, together with ROLAC, has been coordinating with the translation services of the EU and several Latin American States for the preparation of a Spanish translation of both the text of the Convention and the Explanatory Report.

¹⁸ *Id.*, No 36.

¹⁹ “Working proposal No 2 REV from Argentina, Chile, Mexico, Peru and Uruguay”, Commission II on General Affairs and Policy of the Twenty Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), available on the Secure Portal of the HCCH website at < www.hcch.net >.

III. HCCH a|Bridged: Innovation in Cross-Border Litigation and Civil Procedure

- 27 On 2 December 2020, the HCCH and the German Presidency of the Council of the EU co-hosted Edition 2020 of HCCH a|Bridged, in celebration of the 50th anniversary of the 1970 Evidence Convention. This second edition of HCCH a|Bridged was made possible thanks to a generous voluntary contribution from the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice of Germany. The livestream event was officiated by Dr Margaretha Sudhof, Secretary of State of the German Federal Ministry of Justice and Consumer Protection.
- 28 Over 200 participants registered for the fully online Edition 2020, which included representatives from Central Authorities and the diplomatic corps, practitioners, academics, and students from all over the world, to hear about the challenges and opportunities in the taking of evidence and the role of the Convention in the facilitation of cross-border proceedings. The proceedings of the event will inform the preparation of the 2022 SC meeting.
- 29 Moreover, as reported at CGAP 2020,²⁰ the post-event publication resulting from the Edition 2019 HCCH a|Bridged event, which took place on 11 December 2019, was released and is available on the dedicated page of the Service Section of the HCCH website.
- 30 The PB is envisaging dedicating Edition 2021 of HCCH a|Bridged to the 2005 Choice of Court Convention, resources permitting, and/or subject to sufficient voluntary contributions. In preparation for this event, the PB will prepare a questionnaire gathering information on the practical operation of the Convention, including the reasons why not more States have become Party to it.

IV. Preparation for the 2022 SC meeting

- 31 This section briefly outlines the proposed schedule for the meeting and the preparatory work envisaged for the upcoming period.

A. Scheduling

- 32 In light of the overall Work Programme of the HCCH, the PB proposes to hold an SC meeting of at least three meeting days during the last quarter of 2022, subject to any relevant decisions taken at the 2022 CGAP meeting.

B. Preparatory work

- 33 Since the 2019 CGAP meeting, the PB, pursuant to the CGAP mandate,²¹ has undertaken a number of projects that are relevant for the preparation of the suggested 2022 SC meeting,²² some of which have already been completed,²³ and some of which are underway.²⁴
- 34 With the aim of gathering relevant statistical information, preparing the draft agenda and informing the discussions of the 2022 SC meeting, the PB plans to circulate a questionnaire in the course of 2021 requesting information from Contracting Parties and HCCH Members on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions.

²⁰ Prel. Doc. No 13 of January 2020 of CGAP 2020, see, *supra*, note 14, para. 13, see path indicated in note 2.

²¹ C&R No 40 of CGAP 2019; *id.*, No 34, see path indicated in note 2.

²² See C&R No 42 of the 2014 SC meeting.

²³ See, *supra*, paras 14, 15 and 18.

²⁴ See, *supra*, paras 17 and 19.

V. Proposals to CGAP

- 35 The PB invites CGAP to take note of the afore-mentioned updates and to support further and consolidated efforts in raising awareness of the instruments under the portfolio of the Transnational Litigation Team.
- 36 The PB further invites CGAP to endorse its plans to dedicate Edition 2021 of HCCH a|Bridged to the 2005 Choice of Court Convention, resources permitting, and / or subject to sufficient voluntary contributions, including the circulation of a questionnaire to elicit reasons as to why not more States have become Party to the Convention.
- 37 With respect to the preparations for the 2022 SC meeting, the PB invites CGAP to (1) endorse the work undertaken by the PB to date, and (2) approve the proposed schedule for the holding of the meeting (*i.e.*, during the last quarter of 2022).