Federal Ministry of Justice and Consumer Protection

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

Edition 2020: Golden Anniversary of the HCCH 1970 Evidence Convention

Hague Conference on Private International Law – Conférence de La Haye de droit international privé

2 DECEMBER 2020 | ONLINE CONFERENCE | SUMMARY OF THE EVENT

50 years of the HCCH Evidence Convention: Facilitating Cross-Border Proceedings

Introductory remarks

1. The second edition of *HCCH a|Bridged: Innovation in Cross-Border Litigation and Civil Procedure* took place online on 2 December 2020, under the auspices of the Hague Conference on Private International Law (HCCH) and with the generous support of the German Presidency of the Council of the European Union.

2. *HCCH a|Bridged* aims to gather experts and stakeholders from around the world to discuss and debate the very latest in transnational civil or commercial litigation. The 2020 Edition of the *HCCH a|Bridged* was dedicated to the Golden Anniversary of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("HCCH Evidence Convention" or "Convention") and attracted participants from a range of backgrounds.

3. The event sought to explore the use of the HCCH Evidence Convention during its 50 years of existence, its future challenges and how the use of technology is encouraged in both the transmission and execution of requests and in the taking of evidence remotely by video-link. Drawing on the expertise of the legal practitioners, the diplomatic community and academia, various conclusions and takeaways were gleaned from the event in relation to the operation and continuing relevance of the HCCH Evidence Convention.

4. The *HCCH a|Bridged* event commenced with Dr João Ribeiro-Bidaoui, First Secretary at the HCCH, stressing the global importance of the Convention in promoting access to justice: from 2000 to date, the number of Contracting Parties has doubled, the Convention is currently present in three Contracting Parties in Africa, nine in the Americas, 11 in the Asia Pacific and 40 across Europe and it is accessible to over 60% of the global citizenship and to businesses with more than 75% of the world GDP.

5. The opening remarks by Dr Margaretha Sudhof, State Secretary at the German Federal Ministry of Justice and Consumer Protection, indicated that the HCCH Evidence Convention, at the time, was an audacious project. Dr Sudhof clarified that the Convention has a keen sense of justice, and it is not only about making civil law proceedings more effective but also about making evidence abroad available to other countries, which is critical for courts to arrive at a correct and equitable decision.

6. Dr Christophe Bernasconi, Secretary General of the HCCH, emphasised that the HCCH Evidence Convention remains fit for purpose in the 21st century and at the time of printing has 64 Contracting Parties that collectively represent every major legal tradition. According to Dr Bernasconi, the key to its success is the way it simplifies procedures and how it provides the means to bridge differences between legal systems.

7. Professor Dr Michael Stürner delivered a speech "50 years of the HCCH Evidence Convention Facilitating Cross-Border Proceedings". During the speech, he stressed that the guarantee of the constitutional right of fair trial relies on the effective taking of evidence. In this sense, the HCCH Evidence Convention has primary importance in guaranteeing rights while facilitating the cross border taking of evidence. He presented an overview of the Convention's main achievements and introduced its main challenges from the past 50 years and those that may be faced in the future.

8. According to Professor Stürner, some of the innovations brought by the HCCH Evidence Convention to international civil procedure were (i) enhancing the further taking of evidence through Letters of Request provided in Chapter I; (ii) establishing Central Authorities which work as a single point of contact to all national courts, simplifying the network of courts and the transmission of documents abroad; and (iii) introducing the direct taking of evidence by a diplomatic officer, a Consular agent of a Contracting Party or a person dully appointed as a commissioner for that purpose, pursuant to Chapter II.

9. Professor Stürner emphasised that, even though these innovations were important, especially in regard to building bridges between civil and common law traditions, they imposed some challenges to the operation of the HCCH Evidence Convention. For instance, the direct taking of evidence mechanism was included in the Convention primarily to make it more attractive for common law States and to best serve the principle of immediacy. Still, he argued, it could be seen as an intolerable sovereign violation for a State of the civil law tradition.

10. Another observation made by Professor Stürner concerned the reservation that can be made to the effects of the direct taking of evidence under Article 23 of the Convention. According to him, these reservations hamper the goal of the Convention, which is to set up uniform rules for the taking of evidence in a potentially worldwide judicial arena. Forty-four States (almost 70% of the Contracting Parties) have made a declaration under Article 23 of the Convention, which allows an opt out of the system of the Letters of Request issued for the pretrial discovery of documents. In 1989, the Special Commission meeting encouraged Contracting Parties making a reservation under Article 23 to limit the scope of such reservation. In doing that, the operation of the HCCH Evidence Convention should be facilitated, but such narrowing of scope of the reservation has not been pursued by any of the Contracting Parties that have made reservations under Article 23.

11. Even though the HCCH Evidence Convention has limitations, according to Professor Stürner, it is extremely important and widely accepted by States. Therefore, he concluded that, for the future, the attractiveness of the Convention will depend on its openness towards technological developments. He acknowledged that efforts to modernise the Convention had already been made, as was demonstrated with the recent publication of the 2020 Guide to Good Practice on

the Use of Video-link under the HCCH Evidence Convention. By taking into account developments in the use of information technology in the context of cross-border civil procedure, the HCCH Evidence Convention will enhance the administration of justice in the future.

The first panel

Effective Taking of Evidence under Chapter I of the HCCH 1970 Evidence Convention: A Requesting State's Perspective

12. For the first session, a panel of judges from civil and common law jurisdictions from around the world shared their views and experiences in the effective taking of evidence under Chapter I of the HCCH 1970 Evidence Convention from the point of view of a requesting State.

13. Judge Kerstin Empt from the Higher Regional Court of Cologne chaired the panel, which consisted of the following panellists:

- Colleen McMahon
  Chief Judge, US District Court, Southern District New York, United States of America
- Marcelo De Nardi
  Federal Judge, Federal Court of First Instance of Rio Grande do Sul, Brazil
- Haerang Lee
  Judge, Suwon District Court, Republic of Korea

A Requesting State's Perspective

14. In her introductory remarks, Ms Kerstin Empt highlighted the importance of taking into account the procedural requirements of the requesting State for the effective cross-border taking of evidence. Evidence taken abroad must be obtained in such a way that it is admissible and hence utilisable in the forum State where the action is pending,[1] even though the domestic framework of procedural rules may differ especially between common law and civil law jurisdictions. In this context, Ms Kerstin Empt shared some general good practices in relation to the drafting of Letters of Request: Requesting authorities should take into account that the authorities

[1] See *Practical Handbook on the Operation of the Evidence Convention* (4th edition 2020), Annex 3, Explanatory Report on the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, by Mr Philip W. Amram, para. 5.

executing the request will presumably not be familiar with the procedural requirements of the forum State. Hence, Letters of Request should be as detailed and specific as possible in order to provide the requested authority with all necessary information to obtain utilisable evidence. While the use of the standard form is not mandatory, it facilitates the drafting of Letters of Request and helps requesting authorities to include all necessary information as set out in Article 3 of the Convention and all the additional information it deems necessary. When requesting the examination of a witness, it is oftentimes preferable to compile a list of questions instead of merely stating the subject matter. Where the production of documents is requested, the documents should be identified precisely, indicating author, addressee, and date, if possible. Requesting courts from a common law jurisdiction should consider whether the requested State has made a declaration under Article 23 of the Convention if documents are needed for pre-trial discovery. If a special method or procedure is requested in accordance with Article 9(2) of the Convention, the requesting State should pay particular attention to providing all necessary information to enable the proper execution of the request.

15. Dr Marcelo De Nardi shared the experiences of the judiciary in Brazil and supported Judge Empt's recommendations, highlighting that Letters of Request should be drafted in a comprehensive and yet concise manner. This should also be borne in mind, for instance, if the testimony is to be given under oath or affirmation and it should be clearly specified if a special form of oath or affirmation is required in accordance with Article 3(h) of the Convention. Despite having acceded to the Convention only in 2014, Brazil has registered 44 cases in 2019. Dr De Nardi shared as an additional good practice that the Brazilian Central Authority provides guidance to courts in the drafting of Letters of Request and offers comprehensive information for courts on its website. From the point of view of a requesting State, the Brazilian Code of Civil Procedure allows for a wide margin of judicial discretion. Hence, the procedural requirements for evidence obtained abroad to be admissible are few. In 2016, a substantial reform of the Brazilian Civil Procedure entered into force which emphasises the principle of party autonomy and bestows attorneys with additional procedural rights. For instance, the cross-examination of witnesses was introduced and therefore the reform of the procedural framework has, in some ways, been inspired by the common law tradition.

16. Ms Haerang Lee explained that the domestic procedural framework in the Republic of Korea provides Judges with a high degree of flexibility, which makes it difficult to define a general minimum standard. Inspired by the principle of mutual trust, courts will, in general, consider evidence taken abroad to be admissible in proceedings pending in the Republic of Korea. In some specific cases, however, the differences between the procedural frameworks of the Republic of Korea and of the requested State may require the requesting court to specify precisely the special method that will have to be observed in accordance with Article 9(2) of the Convention for the evidence to be utilisable in the forum State. For instance, where a physical examination of the victim of an accident is concerned, the requesting court will have to give detailed instructions specifying the methods of itemising and calculating damages to ensure that the report will be utilisable in the forum State. This illustrates the need for a judge to be aware of the procedural differences between the requesting and the requested State. In this context, the importance of communication between the respective courts cannot be overemphasised.

17. Ms Colleen McMahon noted that in 1983, the US Supreme Court held that the Convention was non-mandatory and, hence, litigants would often make private arrangements to obtain evidence abroad instead. As a feature of a common law State, the form of the taking of evidence mainly depends on what the parties request. While litigants often prefer video depositions in order to be able to better assess the credibility of a witness, the non-compliance of a requested State to allow for video recording does not make the request futile. Instead of a video recording, a transcript of a deposition may also be introduced into proceedings by reading it to the court and the jury. What is more important from the point of view of the United States as a requesting State is that both parties must have an opportunity to question the witness. The right to cross-examination is of paramount importance in common law jurisdictions, which is also the reason why litigants often prefer private arrangements where cross-examination is possible without any restrictions. Judge McMahon remarked that Central Authorities oftentimes provide comprehensive information and examples of the types of requests that can and cannot be executed under the procedural framework of the requested State. For instance, the Office of International Judicial Assistance (OIJA) at the US Department of Justice offers guidance which should be carefully considered when drafting a Letter of Request for evidence to be taken in the United States.

18. Dr De Nardi concurred that the Central Authorities are an important source of information and highlighted that the Brazilian Central Authority also provides comprehensive information on its website that should be consulted prior to issuing a Letter of Request for evidence to be taken in Brazil. Outgoing requests are also channelled through the Brazilian Central Authority, which assists the courts with the drafting of Letters of Request.

The use of modern technology and the taking of evidence under Chapter I

19. Taking the discussion a step further, the panel then shifted its focus to the use of modern technology and how it can best be used to facilitate the taking of evidence under Chapter I of the Convention.

20. Ms Hearang Lee highlighted the increasing relevance of the use of video-link with regard to requests for the indirect taking of evidence. Video-link will typically come into play in two scenarios, under Chapter I: first, oftentimes the parties to the proceedings and their representatives or the members of the judicial personnel of the requesting court may want to observe the taking of evidence remotely. This is possible if Articles 7 and 8 of the Convention are interpreted in such a way that being “present” can also be achieved via video-link. Such an interpretation also facilitates the litigant’s right to cross-examine the witness, which can be exercised remotely as well. Secondly, if the witness is in a remote location, the court of the requested State may examine the witness via video-link if this is in accordance with its domestic law. The use of video-link will have to be requested as a special method pursuant to Article 9(2) of the Convention. Items 13 to 15 of the model form should be completed, if applicable, to provide the requested State with all the relevant information. The HCCH Guide to Good Practice for the use of Video-Link also provides an optional Video-Link form. There are, however, challenges that may arise: firstly, technical problems still constitute an issue in practice; secondly, in the Republic of Korea, the requesting court is not allowed to directly question the

witness under Chapter I and, hence, while the requesting court may follow the hearing remotely, it may not actively take part in the taking of evidence as this would amount to a violation of the requested State's sovereignty; and thirdly, the participation of the litigants or members of the requesting court's personnel entails an additional need for practical coordination. These challenges should be addressed through active communication between the relevant authorities of the requesting and the requested State. When drafting a Letter of Request, it is thus of paramount importance not only to provide all relevant information with regard to the method of execution but also to make sure that the relevant contact details are included so as to enable the authorities in both States to communicate continuously and directly via e-mail or phone in order to overcome any practical issues that may arise.

21. Finally, the panel discussed the implications of the current pandemic situation on the cross-border taking of evidence. The panelists agreed that the Convention is an effective solution to the obstacles that arise in a situation where most of the courts are working remotely, and travel is severely restricted. The technology-neutral language of the Convention allows for the use of modern technology as the acceptance of videoconferencing technology in judicial proceedings is growing. Dr Marcelo De Nardi noted that the digital transmission of Letters of Request via e-mail has also been a frequent option in the current situation. While this may help to expedite the procedure, the digital transmission of requests should take place through formal and secure channels that have yet to be established.

Conclusion

22. Summing up the key takeaways of the discussion, Ms Kerstin Empt highlighted that Letters of Request should be sufficiently substantiated, providing all necessary information in a clear and concise manner so that the evidence can be effectively utilised in proceedings in the requesting State. Requesting authorities should also provide the relevant contact details, especially e-mail and telephone, in order to facilitate a swift and direct follow-up.

23. The current pandemic situation has further accelerated digitalisation in the context of the cross-border taking of evidence. As practical experience has shown, the technology-neutral language of the HCCH 1970 Evidence Convention allows for the use of modern communication technology, in particular the use of video-link. Due to the COVID-19 pandemic, courts increasingly rely on videoconferencing technology which is also very relevant regarding requests under Chapter I of the Convention, as the discussion has shown. While the electronic transmission of Letters of Request may potentially expedite the procedure substantially, the panel identified a need for the establishment of a formal and secure digital channel, as the transmission via e-mail is not accepted in many Contracting Parties to the Convention due to concerns over data integrity and confidentiality.

A(bridged) presentation: Showcasing the Guide to Good Practice on the Use of Video-Link under the Evidence Convention

24. After the first panel, Ms Elizabeth Zorrilla, Legal Officer at the HCCH, showcased the Guide to Good Practice on the Use of Video-Link under the HCCH Evidence Convention. Ms Zorrilla explained that there are two separate and independent systems of taking evidence abroad under the Convention: under Chapter I, by which evidence will be taken indirectly under Letters of Request, and under Chapter II, by which evidence may be taken directly by a Consul or a Commissioner appointed by the court of a State of origin to the extent that a Contracting Party has not made reservation to this chapter.

25. As confirmed by the Special Commission that reviews on a regular basis the practical operation of the Convention, she stressed that the Convention's technological neutral language allows the use of video-link in the taking of evidence abroad in both systems. Under Chapter I, video-link may enable the remote presence and participation of parties, their representatives or the members of the judicial personnel of the requesting authority of the execution of the Letter. Under Article 9, the evidence is taken directly by video-link by the authority before which proceedings are pending with the permission and assistance of an authority of the State in whose territory the witness is located.

26. Under Chapter II, the Counsel may take evidence by video-link of witnesses and experts at a distant location but still in the State of execution. This will be subject to conditions specified in the permission granted. Video-link may also be used to facilitate the presence of the parties or their representatives. Additionally, a Commissioner located in the State of origin may use video-link to take evidence directly from a witness in the State of execution. Video-link may also be used if the witness is in a remote location or to facilitate the virtual presence of the parties.

The second panel

Effective Taking of Evidence under Chapter II of the Convention: Challenges and Opportunities for Cross-Border Proceedings

27. For the second session, a panel of judges from civil and common law jurisdictions, as well as lawyers from different parts of the world, shared their experiences and national practices in the effective taking of evidence under Chapter II of the HCCH 1970 Evidence Convention ("the Convention").

Alexander Blumrosen from the Polaris Law firm in Paris chaired the panel, which consisted of the following panelists:

- Nicola Engels
  Judge at the Higher Regional Court of Dusseldorf – Central Authority for North Rhine-Westphalia
- Willem Visser
  Court Registrar and Senior Law Clerk, Netherlands Commercial Court – Utrecht District Court
- Paula Pott
  Judge, Court of Appeal, Lisbon, Portugal
- Noëlle Lenoir
  Avocate à la Cour, Partner, Attorney at law, former Judge at the *Conseil Constitutionnel*
- Michael Baylson
  Judge, US District Court, Eastern District of Pennsylvania

28. In his introductory remarks, Mr Alexander Blumrosen noted that in Chapter I of the HCCH 1970 Evidence Convention, there are 15 Articles explaining how Letters of Request should be presented, what their content should be and what procedures should be followed. However, Chapter II does not provide the same detailed information, so the role and the mission of the Commissioner is almost *sui generis* and needs to be defined both by the law of the State of execution and the State of origin. The requesting authority will define the mission of the Commissioner in accordance with its own law. Article 9 of the Convention refers to the possibility for the requesting judge to specify methods and procedures that he / she wishes to see in a discovery procedure. The Letter of Request will usually contain very detailed information; a Request from a court in the United States would include, for example, requests that (a) a court reporter create a stenographic transcript, (b) a videographer create a video record, (c) the appointed Commissioner administer an oath to the witness, (d) an interpreter be available, if needed, (e) the meeting take place by video, and (f) whether the Commissioner is to be bound by any confidentiality provision applicable in the underlying proceeding.

29. As for the State of execution, it most typically will agree to apply the procedure requested by the State of origin provided any Convention reservations have been complied with, unless these are incompatible with its own law.

30. Regarding the role of the Commissioner, Mr Blumrosen pointed out that it is not clear whether certain of the requirements that apply to Chapter I Letters of Request also apply, *mutatis mutandis*, to Chapter II Commissioner proceedings. For example, the French Article 23 reservation requires that Letters of Request meet the dual requirements of being relevant to the underlying dispute and being "limitatively enumerated" (as defined by the Paris Court of Appeals in the judgment of 23 September 2003) applies by its terms to Chapter I Letters of Request, but accepted practice has been for the Commissioner to oversee compliance with this requirement even under Chapter II. Mr Blumrosen suggested that a study of Commissioner practice by

jurisdiction, including recommendations for best practices, would be helpful guidance to litigants and signatories.

31. Finally, Mr Blumrosen noted that increasingly United States courts were asking the appointed Hague Convention Commissioner to also act as "Privacy Monitor" to oversee compliance by the foreign party with the GDPR or other data protection legislation, as recommended by the EU Article 29 Working Group in the WP158 guidance (11 February 2009) and consistent with the recommendations of the Sedona Conference. Having a single court-appointed Commissioner also provide legal security to the parties about GDPR compliance of the cross-border document production and is an additional level of legal security for the parties given the heavy fines of up to 4% of annual turnover for non-compliance with Article 48 GDPR (by the transfer of personal data in the discovery production outside the EU to a country that does not have equivalent personal data protections in place). Compliance with data protection legislation could be studied by the HCCH for future Evidence Convention guidance and recommendations.

Variety of procedures and national practices under Chapter II (focus on Commissioners)

32. Ms Nicola Engels shared her experience as part of the German Central Authority under the Convention. Ms Engels began by briefly retracing the historical background of Article 17 of the Convention and recalled that the direct taking of evidence in Chapter II was inspired by the desire to leave the taking of evidence in the hands of the courts where the action was pending. Thus, the judge that was hearing the case was obliged to travel to the State in which the evidence was located. As an alternative, a Commissioner could be appointed in the State of execution. The direct taking of evidence therefore was, and still is to a certain extent, associated with considerable additional costs and time expenditure. Technological development has provided for the opportunity to minimise the costs and the administrative burdens. In Germany, the hearing of a witness via video-link was established in 2002.

33. Ms Engels then explained that in order to obtain permission for the direct taking of evidence, certain requirements must be met. The permission of the State is a prerequisite. For such permission to be granted, the request must be transmitted by a judicial authority[2] and the Letter of Request should be issued in a civil or a commercial matter[3]. The direct taking of evidence will then take place according to the law of the State of origin[4], but the Authority giving the permission may lay down conditions under Article 19 of the Convention. The presence of a German judge during the hearing is often required by the German Central Authority, though other countries have different practices and do not require judicial attendance.

2 Within the meaning of Art. 1 of the HCCH Evidence Convention.

3 "Civil / commercial'' must be interpreted in an autonomous manner.

4 The taking of evidence is conducted in accordance with the law of the State of origin. This could, however, be incompatible with the law of the State of execution (Art. 21 of the HCCH Evidence Convention). For instance, the fishing of evidence would be incompatible with German procedural law.

34. As for the practical side, Ms Engels stated that the following aspects must be considered when executing a request involving the use of video-link: the fundamental principles of the law of the State of execution should be observed; the coordination of time-schedules; the notification of the witness should only be transmitted once the time-schedules are settled; the compatibility of the technical systems; at any stage, it must be verified that the witness participates without compulsion.

35. Ms Engels concluded that despite the obstacles, the direct taking of evidence under Chapter II of the Convention is an effective manner to facilitate pending procedures with a cross-border element. The current pandemic situation has demonstrated the advantages of video hearings which will certainly be beneficial to the taking of cross-border evidence.

36. Mr Willem Visser noted that Chapter II is mostly used and is most efficient when a witness is unwilling to appear before a foreign court, or when the witness needs to be heard in a court with a slow-functioning judiciary system, or in a State where there are concerns regarding the rules of law. The hearing of witnesses can be done by a Consular agent or in their presence using videoconference. However, where the taking of evidence is more complex, for instance where documents are sought, or when an expert hearing or an investigation has to be organised, appointing a Commissioner is a more appropriate option. In that case, the Netherlands usually requires the Commissioner to be a lawyer and a member of the Bar of the State of execution for the law of that State to be observed. As it concerns incoming requests for appointing a Commissioner in the Netherlands, permission needs to be obtained from the President of the District Court where the Dutch witness resides. Three conditions are to be met:

- the witness must be duly summoned (but there is no obligation for the witness to appear, and he / she may have a lawyer present);
- the requesting authority must give the reasons why the taking of evidence has been entrusted to a Commissioner and provide details on the Commissioner's official status;
- the costs of taking the evidence must be fully reimbursed.

37. If the President of the District Court grants the request, the Commissioner can act without any supervision, except when it concerns privileged documents or if the Commissioner needs to go to places connected to the exercise of the State powers.

38. Ms Paula Pott shared the experiences of the judiciary in Portugal regarding Chapter II and the use of video-link[5]. Video-link and videoconference will typically be used when a witness or a party resides outside the district or the country. When a witness or a party is located in Brazil, Portuguese judges usually send a Letter of Request under Chapter I of the Convention and ask authorisation to hear the testimony in a Brazilian Court. The Portuguese judge then directs the hearing and applies its own law. If the person is a Portuguese national located in a country where Article 15 of the Convention can be used, Portuguese judges prefer to refer to the system of the

5 Portugal made reservations regarding Chapter II, except for Art. 15.

Consulate, but instead of asking a Consular agent to hear the witness or the party, the judge will directly hear them. This practice is innovative. Moreover, judges will not ask permission to interrogate a Portuguese national to the hosting State. This is due to the interpretation of Article 15 as a requirement to ensure compliance with the doctrine of judicial sovereignty. According to the latter, a Consular agent cannot interpret and take evidence. In Portugal, judges have exclusive power to take evidence in judicial procedures.

39. Ms Noëlle Lenoir shared the French perspective on the Convention. From France's point of view, the Convention is binding because the 1968 (Law No 68-678 of July 26, 1968) and 1980 (Law No 80-538 dated July 16, 1980) laws prohibit discovery in support of foreign proceedings by criminal penalties (including prison and fines) unless it is organized under an international treaty such as the 1970 Evidence Convention, thus requiring all such discovery in France to be subject to the prior authorization of the Central Authority (the Ministry of Justice). In practice, more than half of the requests received each year are dealt with under Chapter II, and Letters of Request under Chapter I are less and less frequent. In France, the method of appointment of a Commissioner under Chapter II is very flexible: the foreign judge must request, through the Central Authority, the appointment of a Commissioner. The judge then has a vast margin of initiative in defining the mission of the Commissioner, which can be limited or more extensive. Once the request is granted, the Commissioner acts only under the supervision of the foreign judge.

40. The Council Regulation of 28 May 2001[6] is inspired by the Convention. This Regulation also permits the recourse to a Commissioner. There is also a French-British Convention from 1992, which is still applicable to commonwealth countries under which a Commissioner may also be appointed. This solution presents itself as a useful and efficient bridge between the common law and civil law traditions allowing both oversight by signatories of authorised discovery on their territory, and flexible and efficient procedures that be tailored to fit the needs of the foreign proceeding.

41. Mr Michael Baylson shared the experience of the judiciary in the United States and gave an example from a particular case where he required the parties in his court to use Chapter II to obtain document discovery in France. The case involved the tragic 2013 fire which broke out in the 24-story Grenfell Tower block of flats in North Kensington, London, and which resulted in 72 deaths and many wounded. An electrical fault in a refrigerator was the initial cause of the fire but its spread was largely exacerbated by flammable exterior cladding on the building. A group of survivors filed a lawsuit in Pennsylvania federal district court (as this US state accords punitive damages), even though the incident had been in London. The defendants sued in Philadelphia were Arconic, which supplied the aluminium cladding of the building, and Whirlpool, which manufactured the refrigerator. The defense attempted to dismiss the case under the doctrine of *forum non conveniens*. However, the plaintiffs knew that there was a French subsidiary of Arconic that had manufactured the aluminium cladding used in the London tower and so they

6 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

requested that the US court obtain documents from the French subsidiary of Arconic in order to show that *forum non conveniens* should not be used to dismiss the case; they considered that the documents obtained from the French subsidiary could show that the ultimate decisional control over the manufacture and supply of the Grenfell tower cladding was, in fact, made by the Arconic group parent company in the United States, and that accordingly jurisdiction of the entire matter was appropriate in the Philadelphia. The evidence was taken through the Convention and Judge Baylson appointed Noëlle Lenoir as the Chapter II Commissioner to review the documents produced by the French subsidiary. Ultimately, after review and production of tens of thousands of documents and briefing by the parties in an efficient and short time frame of just a few months, the court ordered that the case proceed in London under the *forum non conveniens* doctrine.

42. Even prior to the appointment of a Commissioner, though, the question was raised "should the procedures of the Hague Convention be used at all in this matter", because US Supreme Court in the *Aérospatiale* case (482 U.S. 522 (1987)) had ruled that using the Convention is optional, not required, under United States law. In addition to hearing from the parties, the Court appointed Noëlle Lenoir as Special Master and Expert to make a recommendation to the court regarding whether the "balancing test" in *Aérospatiale* warranted using the Hague Convention for this discovery. The court ordered that the discovery from the French Arconic subsidiary be taken through Chapter II of the Hague Convention.

Improvements for the Convention

43. Mr Willem Visser had one general recommendation, namely to share more knowledge about the application of the Convention, as it would be preferable to know if the State of execution allows or disallows certain things. This information, he stated, is not always easy to find for the purposes of making a request / appointing a Commissioner.

Conclusion

44. The panel demonstrated the wide variety of national approaches and practices under Chapter II. While the flexibility that allows consensual Chapter II discovery is a benefit to parties, and often a saving of scarce judicial resources for overburdened courts, there is little guidance to courts and commissioners about the variety of possible practices as they have developed across jurisdictions, or about recommended best practices that litigants and signatory states might consider as they tailor Chapter II procedures to their proceedings. Special attention could be paid in such guidance to using video-link under Chapter II and whether any particular domestic implementing legislation, such as the recently adopted article 747-1 of the French Code of Civil Procedure allowing direct execution of Chapter I requests without domestic court intervention, could be useful in clarifying and simplifying recourse to the Convention.

45. The panelists learned much from each other's Chapter II experiences and recommend that the Conference in the run-up to the next Special Commission (a) collect and share more comparative Chapter II practice from signatory States, and (b) provide guidance to signatories,

courts, litigants and commissioners on best practices and recommendations under Chapter II including simplifying the process for Chapter II authorization and court oversight of discovery, developing a more complete exposition of the role and duties of a commissioner, and using Chapter II to comply with new variations of domestic "blocking statutes" such as the GDPR.

Closing remarks

46. For the final remarks, Ms Ruth Schröder, Head of Directorate General Civil Law at the German Federal Ministry of Justice and Consumer Protection, summarised the views and opinions expressed during the event and stressed the importance of the discussions for the evolution of effective legal assistance in civil matters.

47. To conclude, Dr Ribeiro-Bidaoui recapitulated the ideas and arguments presented in the course of the sessions and stated that these would be brought to the attention to the 2022 meeting of the Special Commission for reflection.

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