

# The Hague: Legal Capital of the World

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T·M·C·ASSER PRESS  
The Hague

## 14.1 THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: AN INTRODUCTION\*

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### 14.1.1 Introduction

Among the international organizations in The Hague, the Hague Conference on Private International Law is unique in that it is the only intergovernmental organization with a 'legislative' mission. However, its 'laws' take the form of multilateral treaties or conventions, and are primarily aimed at facilitating not the relations between States, but rather the lives of their citizens, private and commercial, in cross-border relationships and transactions. Although our world is increasingly interconnected, it is still composed of a great variety of legal systems, reflecting different traditions of private and commercial relationships. When people cross borders or act in a country other than their own, these differences may unexpectedly complicate or even frustrate their actions. For example, in some countries marriages take place in a religious ceremony, while other countries require a civil wedding; will either system give effect to the other's form of marriage? Two cars collide in Austria, injuring the passengers, all of whom are Turks; will Austrian or Turkish law apply in deciding damages or compensation? A patent certificate issued in California must be produced for official use in Russia; is there a way to avoid cumbersome legalization formalities? A London trustee wishes to acquire property; can he do so in Italy, where trusts do not exist? A Moroccan-Dutch couple separates and the father takes their children to Morocco; does the wife have a remedy if her custody rights were ignored?

There is an endless range of questions that may arise with regard to such cross-border situations. More often than not, there is no easy answer. The task of the Hague Conference on Private International Law is to develop and maintain frameworks of multilateral legal instruments which, despite the differences between legal systems, will allow both individuals and companies to enjoy a high degree of legal security.

### 14.1.2 Origins

The Hague Conference is the oldest of the international legal institutions in The Hague. The first Hague Conference was held in 1893 on the initiative of Tobias M.C. Asser (Nobel Peace Prize winner in 1911). Initial efforts to convene such a conference in Europe had failed, including one attempt to hold a conference in Rome in 1885 by Pasquale Mancini, Asser's principal source of inspiration. Asser's initiative in 1893 was the first to hit upon the right time and venue; in 1889 seven South American States had successfully concluded a diplomatic con-

\* The author is grateful to Sean Marlaire and Randy Ali, summer interns at the Permanent Bureau for their assistance in preparing this contribution.

ference on private international law in Montevideo, and The Hague in the Netherlands offered a 'neutral' place for Europe to respond with its own international conference, free of great-power rivalries. Moreover, Tobias Asser had the support not only of his government but also of a group of eminent friends and colleagues from European countries, including Louis Renault (France), Augusto Pierantoni (Italy), and Fyodor Martens (Russia). Their common vision was to remove legal obstacles to private international relations and transactions through the negotiation of treaties that were based on straightforward principles and acceptable to all nations. The key to achieving this goal was the use of nationality, the personal link between an individual and his or her nation, as a means of connecting people and their situations to the legal system of a country. For example, if a French court were required to appoint a guardian for an Italian child, it would apply Italian law.

The first Hague Conference was so successful that it was immediately followed in 1894 by a second Diplomatic Conference. Once again, Asser presided over the Conference, with Fyodor Martens leading the negotiations for Russia. Martens returned to St. Petersburg impressed by these conferences and the importance of Asser's diplomacy in ensuring their success. There is no doubt that these factors played a role when Martens advised Tsar Nicholas II to propose The Hague as the venue for the first Peace Conference in 1899, again to be chaired by Tobias Asser, with Fyodor Martens acting as *aide-de-camp*.

The first Hague Peace Conference was a success, its most noteworthy accomplishment being the creation of the Permanent Court of Arbitration. Asser went on to preside over the third and fourth Hague Conferences on private international law in 1900 and 1904, each one organized on an *ad hoc* basis without the support of any permanent secretariat. The 1904 Hague Conference welcomed the first non-European delegation, representing Japan. Together, these first four conferences produced seven Conventions:

- Convention of 1896 relating to civil procedure (later replaced by that of 1905);
- Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage (replaced by the Marriage Convention of 1978);
- Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions concerning divorce and separation (replaced by the Divorce Convention of 1970);
- Convention of 12 June 1902 relating to the settlement of guardianship of minors (replaced by the Protection of Minors Convention of 1961);
- Convention of 17 July 1905 relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates (replaced by the Matrimonial Property Regimes Convention of 1978);
- Convention of 17 July 1905 relating to deprivation of civil rights and similar measures of protection (replaced by the Protection of Adults Convention of 2000);

- Convention of 17 July 1905 relating to civil procedure.

The work of the Hague Conference stagnated after its fourth session, as the international political climate deteriorated and perverse nationalism gained ground in Europe, effectively discrediting nationality as any sort of guiding principle. Even before the First World War, countries began denouncing the conventions that they had so happily negotiated a decade before. Between the wars a fifth and a sixth Hague Conference were held (in 1925 and 1928), for the first time including a delegation from the United Kingdom, but no conventions were adopted. It was not until after the Second World War that the phoenix arose from its ashes.

In 1951 the seventh Hague Conference took place. Its participants institutionalized their work by creating a permanent organization: the Hague Conference on Private International Law. The implementing statute, which came into force in 1955 and was originally signed by sixteen States (all European with the exception of Japan), provided for diplomatic conferences to take place every four years as a rule, and created a small permanent secretariat to organize and do the preparatory work for these conferences for the development of new conventions. The Peace Palace in The Hague was chosen as the meeting place, which it remains to this day. In the beginning, the sole official language was French, but when the United States, Canada, and other common-law countries joined the Hague Conference in the 1960s, English became its second official language.

With the growth in its membership, bridging the gap between common-law and civil-law systems became an important challenge for the Hague Conference. The concept of 'habitual residence' became a prominent connecting factor in international situations, for determining both what law to apply and what court should have jurisdiction. This concept was adopted at the expense of both the nationality principle, so important in the first generation of Hague Conventions, and the principle of domicile, the primary connecting factor in common-law jurisdictions. Techniques were found to accommodate differences between civil and common-law systems for the service of process abroad and for the taking of evidence abroad; to reconcile different conceptions of the succession of estates of deceased persons and the administration of such estates; and to recognize the institution of the trust, widely used in the common-law world but practically unknown in civil-law systems.

In the 1980s and 1990s other States, such as Australia, China and several Latin American countries, joined the Conference. In the last four years the number of new Member States has increased by about a third, bringing the total to 64. Alongside all the European Union Member States, other Member States from Europe are Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Georgia, Iceland, Monaco, Norway, Romania, the Russian Federation, Serbia and Montenegro, Switzerland, Turkey and Ukraine. The Member States from the Americas are Argentina, Brazil, Canada, Chile, Mexico, Panama, Peru, Suriname, the United States of America, Uruguay and Venezuela. The Member States from Asia and Oceania are Australia, the People's Republic of China, Israel, Japan, Jordan, the Republic of Korea,

Malaysia, New Zealand and Sri Lanka. There are three Member States from Africa: Egypt, Morocco and South Africa. Three other States (Costa Rica, Paraguay and Zambia) have been admitted but have yet to accept the Statute of the Conference. In addition, the European Community has applied to be admitted as a Member of the Conference.

#### 14.1.3 Significance of the Conference's work

Since 1951, the Conference has adopted thirty-five Conventions in three major areas:

- International legal cooperation and litigation

##### *International Judicial and Administrative Cooperation:*

- Convention of 1 March 1954 on Civil Procedure (replaced by the Service, Evidence and Access to Justice Conventions)
- Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
- Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
- Convention of 25 October 1980 on International Access to Justice

##### *Jurisdiction and Enforcement of Judgments:*

- Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods
- Convention of 25 November 1965 on the Choice of Court
- Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
- Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

- International commercial and finance law

##### *Contracts:*

- Convention of 15 June 1955 on the Law Applicable to International Sales of Goods (replaced by the Sales Convention of 1986)
- Convention of 15 April 1958 on the Law Governing Transfer of Title in International Sales of Goods
- Convention of 14 March 1978 on the Law Applicable to Agency
- Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods

*Torts:*

- Convention of 4 May 1971 on the Law Applicable to Traffic Accidents
- Convention of 2 October 1973 on the Law Applicable to Products Liability

*Securities:*

- Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted on 13 December 2002)

*Trusts:*

- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (see also *infra*, under ‘Wills, Estates and Trusts’)

*Recognition of Companies:*

- Convention of 1 June 1956 on Recognition of the Legal Personality of Foreign Companies, Associations and Foundations

- International family and property relations

*International Protection of Children:*

- Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Applicable Law) Convention of 1973)
- Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Enforcement) Convention of 1973)
- Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors (replaced by the Protection of Children Convention of 1996)
- Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (replaced by the Intercountry Adoption Convention of 1993)
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (see also *infra*, under ‘Relations between Spouses and Former’)
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see also *infra*, under ‘Relations between Spouses and Former’)
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

*International Protection of Adults:*

- Convention of 13 January 2000 on the International Protection of Adults

*Relations between Spouses and Former:*

- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages
- Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes

*Wills, Estates and Trusts:*

- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
- Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons
- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
- Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons

It would be wrong to measure the success of a Hague Convention solely in terms of the number of States that have formally adopted it, as its beneficial effects are not limited to ratifying States. Since the Hague Conference produces treaties and, unlike the European Community, has no power to promulgate regulations or directives, States remain free, even if they have agreed to a Convention text at a diplomatic conference, to adopt or not adopt the Convention into their own system. In other words, in order for Hague Conventions to acquire the force of law in a country, they must pass through the constitutional procedures of that country. This is sometimes a slow process, and as a result countries will often, without formally adopting a Convention, simply borrow the text or some of the rules therein and incorporate them into their internal laws. Similarly, other international organizations may use Hague Conventions as a model. This has been the case, for example, with the Council of Europe, the Organization of American States, and, more recently, the European Union.

Over the years the Conference has generally been most successful when it has attempted to establish channels for cooperation and communication between courts and authorities in different countries. While not radically impacting on internal laws, the Conventions Abolishing the Requirement of Legalization (with over 80 States Parties), on the Service of Judicial and Extra-Judicial Documents

Abroad (50 States Parties), on the Civil Aspects of International Child Abduction (over 70 States Parties) and on Protection of Children and Cooperation in respect of Intercountry Adoption (60 States Parties) nevertheless facilitate cross-border activities and help to solve countless problems that would otherwise be intractable. The Legalization or Apostille Convention has been a blessing to countless people who have to produce official documents abroad and otherwise would have encountered long delays and unnecessary costs. The Child Abduction Convention is another striking example of an instrument that has been enormously beneficial, in this case for the prevention and correction of wrongful removals of children worldwide. Likewise, the Intercountry Adoption Convention is setting universal standards for the conditions which must be fulfilled before a child may be adopted abroad, as well as providing the machinery for international cooperation in the light of those standards.

A common feature of many Hague Conventions is that they operate through administrative agencies, typically Central Authorities, designated by each State bound by the Convention. These Central Authorities are in regular, often constant, contact with one another and with the secretariat of the Conference, through long-distance communication as well as regular meetings at the Peace Palace. More recently, the Conference has also been instrumental in promoting cross-border cooperation among courts in different States Parties to Conventions. A special database, [www.incadat.com](http://www.incadat.com), enables courts of one country to consult the case law of courts in other countries concerning the Child Abduction Convention, thus facilitating uniform interpretation of the Convention. Likewise, a Judges' Newsletter, also published on the Internet, provides a unique forum for the exchange of ideas, good practices and international developments. The result is that a number of these Conventions have become frameworks for permanent cooperation, creating the basis for worldwide networks that connect thousands of people and organizations. This also means that the organizational focus of the Hague Conference has shifted; it now devotes over 50% of its resources to post-Convention services such as monitoring Conventions and providing assistance to the Central Authorities and other agencies. The table below illustrates this development.

At the same time, the development of new Conventions continues. When in force, the most recent Hague Convention, concerning the law applicable to indirectly held securities, will help to reduce credit costs worldwide by ensuring the legal certainty and predictability of securities transactions, which have now reached a volume of more than a trillion euros/dollars/yen per day. Presently the Conference is working on two new Conventions: one concerning the effect of judgments given by a court selected by the parties in commercial (business-to-business, B2B) settings, the other on the international recovery of child support and other forms of family maintenance. For the future, the Conference is considering issues related to environmental damage, questions concerning non-marital relationships, and further work in the area of international finance.

| Evolution of the Hague Conference, 1965-2004 |                                |                                |  |
|--|--------------------------------|--------------------------------|--|
|  | 1965                           | 1980                           | 2004   |
| Member States                                | 23                             | 27                             | 64   |
| States Parties to Conventions                | 25                             | 53                             | 118  |
| Number of Conventions                        | 11                             | 26                             | 35   |
| Number of Authorities*                       | 23                             | 450 +                          | 1500 +   |
| Permanent employees (FTE)                    | 11                             | 11.5                           | 13.9   |
| Products and services                        | Development of new Conventions | Development of new Conventions | - Development of new Conventions<br>- Promotion<br>- Implementation<br>- Support<br>- Monitoring |

#### 14.1.4 The Hague Conference and other international organizations

Given its role as a lawmaking body, the Hague Conference has a sphere of operation distinct from that of the adjudication and arbitration institutions in The Hague. Nevertheless, these institutions are interconnected in several ways. Occasionally the International Court of Justice deals with a dispute between States concerning a question of private international law or even a Hague Convention. The arbitration bodies in The Hague sometimes draw inspiration from Hague Conventions, and increasingly their judges and arbitrators have gained prior experience as experts or delegates at the Conference. Almost every year former participants in the Hague Conference are invited to teach at the Hague Academy of International Law; similarly, staff members at the Hague Conference regularly teach at the Academy. Given its wide range of activities and interests, the Conference works closely with a large number of international and regional intergovernmental and non-governmental organizations to avoid duplication of effort, to create synergy, to pool the best available expertise and to ensure that the operation of its Conventions is as effective as possible. With increasing globalization and regional activity in the field of private international law, the need for the Hague Conference is growing exponentially. Never have its products and services been in such high demand. The support of the host country has always played an integral role in the Conference's success and is highly appreciated.

\* Authorities established under the Statute and under various Hague Conventions, such as National Organs, Central Authorities and other National Authorities. Not included are the accredited bodies under the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption.

The next step for the Conference will be to provide training and education, on a systematic basis, to the growing number of officials and judges in need of assistance, particularly those from developing countries and countries in transition. Cooperation with other international and national institutions in The Hague, the government of the Netherlands, and the City of The Hague will be essential. The Hague Conference is ready to play its exciting new role in 'The Hague, Legal Capital of the World'.

## 14.2 FURTHER READING AND WEBSITES

### A. Further reading

*ANNUAIRE DE LA HAYE DE DROIT INTERNATIONAL/Hague Yearbook of International Law*, Martinus Nijhoff Publishers.

ALEGRÍA BORRÁS, ANDREAS BUCHER, TEUN STRUYCKEN and MICHEL VERWILGHEN, eds., *E Pluribus Unum: Liber Amicorum Georges A.L. Droz on the Progressive Unification of Private International Law* (The Hague/Boston/London, Martinus Nijhoff Publishers 1996).

GEORGES A.L. DROZ, 'A Comment on the Role of the Hague Conference on Private International Law', *57 Law and Contemporary Problems* 3 (1994) p. 3.

KURT LIPSTEIN, 'One Hundred Years of Hague Conferences on Private International Law' *International and Comparative Law Quarterly* 3 (1993) p. 553.

JOHN DAVID MACCLEAN, *The Contribution of the Hague Conference to the Development of Private International Law in Common Law Countries*; in the series *Recueil des Cours de l'Académie de droit international de La Haye*, Vol. 233 (1992-II) p. 267.

PETER H. PFUND, 'The Hague Conference Celebrates Its 100th Anniversary', *Texas International Law Journal* 3 (1993) p. 531.

PETAR SARCEVIC and PAUL VOLKEN, eds, *Yearbook of Private International Law*, Kluwer Law International.

C.C.A. VOSKUIL, ed., *The Influence of the Hague Conference on Private International Law* (The Hague, T.M.C. Asser Press and Martinus Nijhoff 1993).

### B. Websites

Hague Conference on Private International Law, [www.hcch.net](http://www.hcch.net)

American Society of International Law Guide to Electronic Resources on Private International Law (David A. Levy), [www.asil.org/resource/pill.htm](http://www.asil.org/resource/pill.htm)