

INTERNATIONAL CHILD PROTECTION *THE JUDGES' NEWSLETTER*

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✍ **WELCOME TO THE NEWS- LETTER !**

It is now about a year since the Hague Conference on Private International Law, with the financial support of the EU Grotius Programme, organised at "De Ruwenberg" in the Netherlands, the Seminar for Judges on the international protection of children. The reactions to the Seminar were very positive. It provided an opportunity to reflect on and discuss current developments in international child protection. It also provided a unique opportunity to bridge some of the differences in legal cultures and to promote the mutual understanding and confidence between judges which is necessary for the effective operation of the international instruments.

There was a clear desire to maintain the momentum achieved by the Seminar, and in particular to continue an exchange of information concerning judicial co-operation in matters of international child protection.

This Newsletter fulfills a promise made by the Permanent Bureau of the Hague Conference on Private International Law towards achieving this objective.

✍ **CHANNELS FOR JUDICIAL COMMUNICATION**

Judges are reminded of the following conclusion reached during the final session of the "De Ruwenberg" Seminar on the subject "Towards International Judicial Co-operation":

"The recommendation was made that, following the example of Australia, judges attending the Seminar should raise with the relevant authorities in their jurisdictions (e.g. court presidents or other officials, as appropriate within the different legal cultures) the potential usefulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other States, in respect, at least initially, of issues relevant to the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*."

The Permanent Bureau would welcome news of any developments following on this recommendation.

✍ **NEWS ON THE HAGUE CONFERENCE**

Discover the Hague Conference on the web!

The Hague Conference on Private International Law has recently opened its own website. The details of this entirely bilingual (English / French) website are as follows:

<http://www.hcch.net>

The website contains general information concerning the Hague Conference, the full text of all the Hague Conventions that were adopted after 1945, full status details (signatures, ratifications, accessions, declarations, reservations, Central Authority contact details, etc.), as well as bibliographical information. Moreover, for two Conventions – the 1993 Hague *Inter-country* Adoption and the 1996 *Protection of Children* Conventions – the Explanatory Reports drawn up by G. Parra-Aranguren and P. Lagarde, respectively, are available on the site.

The creation of this website has been made possible by a special financial contribution from the Netherlands Government.

The Hague Conference releases its first CD-ROM: The Children's Conventions

The Hague Conference is pleased to announce that it has recently launched its first CD-ROM. It is entitled *The Children's Conventions* and contains the full text of the *Convention of 1980 on International Child Abduction*, the *Convention of 1993 on Inter-country Adoption*, and the *Convention of 1996 on the Protection of Children*. The CD-ROM also includes the background material essential to the full understanding of these Conventions: original research Reports drawn up by members of the Permanent Bureau, questionnaires and the replies of the Governments, earlier drafts of the Conventions, other Preliminary and Working Documents, the minutes of the Commission meetings leading to the adoption of the Conventions, and of course the three official Explanatory Reports by Professors

Pérez-Vera, Parra-Aranguren and Lagarde.

The Hague Conference is very pleased to offer you a copy of the CD-ROM for your personal use. Additional copies can be ordered at the Permanent Bureau (Dfl. 125).

✍ **HAGUE CONVENTIONS - AN UPDATE**

CHILD ABDUCTION CONVENTION:

ratification by *Belgium* (e.i.f.* 1 May 1999)

accessions by *Paraguay* (e.i.f.: 1 August 1998); *Costa Rica* (e.i.f.: 1 February 1999) and *Fiji* (e.i.f.: 1 June 1999)

extensions by Portugal to *Macau* (e.i.f.: 1 March 1999); by the United Kingdom to the *Cayman Islands* (e.i.f.: 1 August 1998), *Montserrat* and *Bermuda* (e.i.f.: 1 March 1999)

INTERCOUNTRY ADOPTION CONVENTION:

signatures by *Austria* (18 December 1998) and *Belgium* (27 January 1999)

ratifications by *France* (e.i.f.: 1 October 1998); the *Netherlands* (e.i.f.: 1 October 1998); *Colombia* (e.i.f.: 1 November 1998); *Australia* (e.i.f.: 1 December 1998); *El Salvador* (e.i.f.: 1 March 1999); *Israel* (e.i.f.: 1 June 1999) and *Brazil* (e.i.f.: 1 July 1999)

accessions by *Lithuania* (e.i.f.: 1 August 1998); *Moldova* (e.i.f.: 1 August 1998); *Paraguay* (e.i.f.: 1 September 1998); *New Zealand*, *Mauritius* (e.i.f.: 1 January 1999); *Burundi* (e.i.f.: 1 February 1999) and *Georgia* (e.i.f.: 1 August 1999)

extension by Canada to the *Yukon Territory* (e.i.f.: 1 August 1998)

PROTECTION OF CHILDREN CONVENTION:

signature by the *Czech Republic* (4 March 1999)

* e.i.f. = entry into force.

NEW MEMBER OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

On 22 April 1999, *Bulgaria* deposited its instrument of acceptance of the Statute of the Conference. Hence, the Hague Conference has now 47 Member States.

✍ **A DATA-BASE OF JUDICIAL DECISIONS UNDER THE 1980 CONVENTION**

Work has already begun on the establishment of the above data-base. The idea in the first instance is to make available on the Hague Conference website the significant decisions of national courts concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, in a form which is readily searchable and will therefore be of use to judges, practitioners, researchers and others interested in this important and rapidly developing branch of jurisprudence. It will be possible to search the data-base by reference to articles and key concepts in the Convention, as well as by country. It is planned to begin by placing on the data-base recent judgments, and eventually to include the back-log of several hundred judgments which the Permanent Bureau has in its possession.

The project has already attracted generous financial support from the Norwegian Government and from the Levi Lassen Foundation in The Hague. However, more funding will be required to maintain the data-base. Also the co-operation of judges and others will be needed to ensure that all relevant decisions are received for inclusion on the data-base. Further details of the format of the data-base will be included in a future Newsletter. Any advice or suggestions concerning this project will be most welcome.

✍ **INTERNATIONAL SUPPORT OBLIGATIONS – A NEW INTERNATIONAL INSTRUMENT?**

The Special Commission on Maintenance Obligations, which met at The Hague from 13-16 April 1999, has recommended

that the Hague Conference should commence work on the elaboration of a new worldwide international instrument. After examining the practical operation of the existing instruments (four Hague Conventions, the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, and numerous regional and bilateral agreements), the Commission concluded that there was a need to modernise and improve the international system. If formally accepted by Member States, this project, which would be carried out in co-operation with other international organisations, will involve work towards a comprehensive instrument, containing as an essential element provisions on administrative co-operation, as well as rules on recognition and enforcement.

✍ **NATIONAL DEVELOPMENTS**

(Note: The matters reported under this heading are partial and selective. We hope to include in future Newsletters more news supplied by our readers. See questionnaire at the end of the Newsletter.)

England and Wales

(with thanks to Lord Justice Thorpe)

(1) A father without parental responsibility does not have rights of custody and a mother is entitled as a matter of English domestic law to remove a child from the jurisdiction unless there is in force an order prohibiting removal or there are proceedings pending either for such an order or for an order which would give the father parental responsibility: **Re W** and **Re B** [1998] 2 FLR 146.

(2) As a consequence of the above decision the Central Authority has issued a policy statement respecting applications by fathers who do not have parental responsibility for the return of children: the text of the statement is reported at [1998] 1 FLR 491.

(3) An application for the return of an eleven year old girl to Denmark was dismissed on the grounds of the child's objec-

tion and the mother's long delay in seeking return. The Court of Appeal emphasised the undesirable consequence of permitting the child party status in the case and reaffirmed that any trial should take place within six weeks and any appeal within six weeks thereafter.

(4) Negotiations following an abduction were to be encouraged and did not necessarily lead to the conclusion of acquiescence: *P v P* [1998] 1 FLR 630.

(5) A mother abducted the children from USA to Sweden. The Swedish court refused the father's application for return. The father re-abducted the children to England and applied for an order under the Convention for their return to the USA on the grounds of the mother's original abduction. The father's application was dismissed and the children were returned to Sweden under the court's inherent jurisdiction: *Re O* [1998] 2 FLR 712.

Germany

In a case involving the re-abduction of two children from France to Germany, the Federal Constitutional Court of Germany has re-affirmed the compatibility of the 1980 Convention with the German Basic Law. It has approved a strict approach to the interpretation of Articles 13 and 20 (unusual endangerment to child's welfare which appears to be substantial, specific and current), but in the case of re-abduction has accepted the need for closer examination of the child's welfare. While there is no need, as a general rule, for the child to be heard in Hague proceedings, special circumstances may create an exception. (Note: the case was remitted for a decision to the Higher Regional Court, which subsequently made a return order.) In *Re AT* (29 October 1998).

Western Samoa

A German father abducted his child to Western Samoa. Western Samoa is not a signatory or Party to the Hague Convention. However, the Court found that it should have regard to the purpose and principles of that Convention, primarily that the fundamental purpose is to en-

sure that children wrongfully removed from their place of habitual residence are returned as soon as possible. The Courts in Germany were found to be the appropriate forum to decide the questions of the child's custody. Return of the child to Germany was ordered. *CW v HR* MISC 20701.

Hong Kong

On the father's application for the return from Hong Kong to England of a child removed by the mother, the Hong Kong High Court rejected a defence raised by the mother under Article 13 *b* based on health risks for the child arising from the father's turkey farming activities. The Court accepted that "the risk of physical harm must be weighty and it must be substantial or severe and not trivial harm. A very high degree of intolerability of physical harm must be established." Emphasising the summary nature of Hague proceedings, and that "speed is of the essence", the Court refused to admit affidavits of rejoinder or to allow oral evidence and cross-examination on the medical issues. The child (6 years of age) was regarded as too young for his views to be taken into account. The Court expressly stated that, even if the threshold requirements concerning risk of physical harm and the child's objections had been met, it would have exercised its discretion to order the immediate return of the child. In *Re DCS*, High Court of Hong Kong SAR (3 April 1998).

Spain

(with thanks to D^a M^a Rosario Ormosa Fernández)

Following a Swiss decision awarding custody to a Swiss mother, a Spanish father retained his children in Spain during a visitation, and commenced new custody proceedings. In an unprecedented decision, the Spanish Supreme Court definitely held that under the Hague Convention and a strict interpretation of Article 16, judicial authorities of the state to which the child has been removed or retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned

under the Convention; the return of the child is of primary importance. 98/7057 TS 1^a, S 22-6-1998, núm. 604/1998, rec. 1226/1994. Pte: Almagro Nosete, José

Conclusions of a Judges Seminar held in Spain (November 1998)

The application of International Conventions in Spanish International Law

(1) The procedure envisaged in the articles 1901 to 1909 of the "Ley de Enjuiciamiento Civil" may be applied only to the enforcement of decisions coming within the Hague Convention on Child Abduction, which has come into force in Spain on 1 September 1987.

(2) In this procedure, the priority possessed by the case will be respected, and the second instance proceeding will be governed by the principle of simplicity, whereby the appeal proceedings may not involve a more complicated procedure than that at first instance.

(3) In cases of international child abduction, there is a legal presumption that the interest of the child is best served by the application of this [Hague] Convention, and by effecting the return of the child to the country from which the claim originates as soon as possible once it has been established that all the Convention requirements have been met.

✍ **A SPECIAL COMMISSION FOR JUDGES?**

Three Special Commissions have so far been convened by the Secretary General to examine the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (in 1989, 1993 and 1997). These Commissions, which have been attended mainly by Central Authority and Government personnel, have played an important role in achieving greater uniformity and efficiency in the operation of the Convention and in promoting better understanding and co-operation between the Central Authorities.

The Permanent Bureau has been considering how the next Special Commission should be organised, and in particular how it may best contribute to the development

of improved procedures and practices surrounding the judicial process itself. It will be essential to involve the judiciary more centrally in this process. For this reason, the possibility is being considered of holding a Special Commission (or part of one) to which States would be invited to send, as experts, judges and persons responsible for reforms in court organisation, practice and procedure. Such a Special Commission might include on its agenda, for example:

- questions of court organisation, practice and procedure (including appeals);
- certain questions of interpretation;
- issues surrounding direct judicial communications;
- issues surrounding the return of the child together with the primary caretaker;
- issues surrounding parental contact/access.

If such a Commission is carefully prepared, it might be possible for it to agree upon certain principles, especially on matters of practice and procedure, which would carry great weight and contribute to the development of a more effective and uniform judicial approach.

The Permanent Bureau would welcome any comments which judges may have concerning this proposal, especially as regards the possible content of its agenda.

✍ **FUTURE ISSUES OF THE NEWSLETTER**

To celebrate the launching of the newsletter, this first issue has been printed on paper. However, because of the time and costs involved, it may not be possible to do so for future issues. We plan to distribute them by e-mail (but still in colour!). Please do not forget to provide your e-mail address (see the form attached).

We look forward to receiving your reactions to the Newsletter and any information you wish to have included in the next Newsletter. Thank you for your co-operation.