HCCH
Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul

PROGRAM BOOK

Co-Hosted by

HCCH
법무부 Ministry of Justic
JUDICIAL RESEARCH & TRAINING INSTITUTE
외교부 Ministry of Foreign Affairs
KOPILA
KOREAN BAR ASSOCIATION
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Table of Contents

3-4, July 2017

Programme

3rd July (Mon)

Time	Program	Details
Opening of the HCCH Asia Pacific Week		
09:30 – 10:00	Opening Remarks	**Keum-ro Lee** Acting Minister of Justice, Republic of Korea
	Welcome Remarks	**Christophe Bernasconi** Secretary General of the HCCH
	Celebratory Remarks	**Seongdong Kweon** Chairman of the Legislation and Judiciary Committee of the National Assembly **Hyun Kim** President of the Korean Bar Association **Ikhyeon Rhee** President of the Korea Legislation Research Institute
10:00 – 10:30	Presenter	[Status and Envisaged Development of Korean Private International Law] **Byungsuk Chung** President of the Korea Private International Law Association
10:30 – 10:45	**Intermission**	
Session 1. Experiences in the Hague Conventions in the Asia Pacific Region		
10:45 – 12:00	Report of Representatives	**Australia, China – HKSAR, Japan, Philippines, Singapore, South Korea, USA, Vietnam**
	Moderator	**Laura Martinez-Mora** Principal Legal Officer of the HCCH
12:00 – 13:30	**Lunch**	
Session 2. Child Abduction		
13:30 – 15:30	Presenter	**Victoria Bennett** Judge of Family Court of Australia (Melbourne Registry)
	Moderator	**Chul-Won Lee** Attorney at Kim & Chang (Korea)
	Panelist	**Minhui Gwak** Associate Professor at Sookmyung Women's University (Korea) **Hajime Ueda** Director of Hague Convention Division, Ministry of Foreign Affairs (Japan) **Mary Sheffield** Chief Judge of the Missouri Court of Appeals (USA) **Sunmi Lee** Judge of Seoul Central District Court (Korea)
Session 3. Child Adoption		
16:00 – 18:00	Welcome Remarks	**Seunghee Kim** Member of the Health and Welfare Committee of the National Assembly
	Introduction of Korean Adoption History	**Susan Cox** Vice President of Policy & External Affairs, Holt International (USA)
	Presenter	**Laura Martinez-Mora** Principal Legal Officer of the HCCH
		Kyung-eun Lee Former Director of the Division of Child Welfare Policy, Ministry of Health and Welfare (Korea)
	Moderator	**Mary Sheffield** Chief Judge of the Missouri Court of Appeals (USA)
	Panelist	**Lisa Ellingson** Vice President of Korean Affairs, International Korean Adoptee Associations (USA) **Hyunhee Han** Judge of Sungnam Branch of Suwon District Court (Korea) **Ana Carolina Pedrosa Massaro** Professor at University Center Moura Lacerda (Brazil)

4th July (Tue)

Time	Program	Details
Session 4. Child Protection & Child Support		
09:30 – 11:00	Presenter	**Yuko Nishitani** Professor at Kyoto University (Japan)
	Moderator	**Byungsuk Chung** President of the Korea Private International Law Association (Korea)
	Panelist	**Yongping Xiao** Director of Wuhan University (China) **Anne-Marie Hutchinson** Partner of Dawson Cornwell (UK) **Marie Vautravers** Deputy head of Private International Law Unit of Ministry of Justice (France) **Kyungho Choi** Research Fellow of Korea Legislation Research Institute (Korea)
Session 5. Jurisdiction (Revising Korean Private International Law)		
11:00 – 12:30	Presenter	**Kwang Hyun Suk** Professor at Seoul National University School of Law (Korea)
	Moderator	**Frank Poon** next Representative of Asia Pacific Regional Office of the HCCH
	Panelist	**Tae-ak Rho** Chief Judge of the Seoul Northern District Court (Korea) **Anselmo Reyes** Representative of Asia Pacific Regional Office of the HCCH **Yuko Nishitani** Professor at Kyoto University (Japan)
12:30 – 14:00	**Lunch**	
Session 6. Apostille & e-APP		
14:00 – 16:00	Welcome Remarks	**Jae-wan Lee** Deputy Director-General for Overseas Koreans and Consular Affairs, Ministry of Foreign Affairs (Korea)
	Presenter	**Peter Zablud** Professor at Victoria University (Australia)
		Gyooho Lee Tenured Professor at Chung-Ang University (Korea)
	Moderator	**Christophe Bernasconi** Secretary General of the HCCH
	Panelist	**Yoon-jung Choi** Judge of Goyang Branch of Uijeongbu District Court (Korea) **Changmin Chun** Research Fellow of Korea Capital Market Institute (Korea) **Mayela Celis** Principal Legal Officer of the HCCH **Anselmo Reyes** Representative of Asia Pacific Regional Office of the HCCH **Jeeyoung Ha** Second Secretary of Ministry of Foreign Affairs (Korea)

Opening Remarks

Keum-ro Lee

Acting Minister of Justice, Republic of Korea

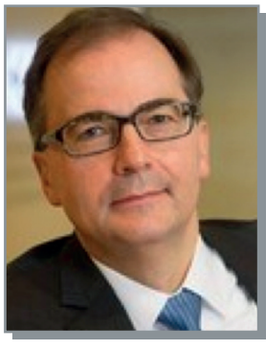
Education

- ~ 2003 M.A. Graduate School of Public Policy, Hanyang University
- ~ 1987 LL.B., College of Law, Korea University
- ~ 1983 Shinheung High School, Cheongju

Work Experience

- May, 2017 ~ Vice Minister, Ministry of Justice
- Dec. 2015 Chief Prosecutor, Incheon District Prosecutors' Office
- Feb. 2015 Director General, Planning & Coordination Department, Supreme Prosecutors' Office
- Dec. 2013 Deputy Chief Prosecutor, Daejeon High Prosecutors' Office
- Apr. 2013 1st Deputy Chief Prosecutor, Daegu High Prosecutors' Office
- Jul. 2012 2nd Deputy Chief Prosecutor, Seoul Central District Prosecutors' Office
- Sep. 2011 Chief Officer, Office of Investigation Planning, Supreme Prosecutors' Office
- Sep. 2009 Legal Specialist, Legislation and Judiciary Committee, General Assembly
- 2009 Director, Criminal Department 4, Seoul Central District Prosecutors' Office
- 2008 Director, Public Security Affairs Division, Ministry of Justice
- 2007 Director, Criminal Department 6, Seoul Northern District Prosecutors' Office
- 2004 Vice Director, Seoul Central District Prosecutors' Office
- 2003 Vice Director, Gwangju District Prosecutors' Office
- 2002 Prosecutor, Seoul Central District Prosecutors' Office
- 2000 Prosecution Research Officer, Supreme Prosecutors' Office
- 1998 Prosecutor, Suwon District Prosecutors' Office
- 1996 Prosecutor, Gangneung Branch of Chuncheon District Prosecutors' Office
- 1994 Prosecutor, Seoul Eastern District Prosecutors' Office

Welcome Remarks



Christophe Bernasconi

Secretary General of the HCCH

Christophe Bernasconi is the fourth Secretary-General of the Hague Conference on Private International Law. He took office on 1 July 2013. He joined the Permanent Bureau (Secretariat) of the Hague Conference in September 1997.

As Secretary-General, Dr Bernasconi is responsible for the administration of the Hague Conference (with currently 146 connected States, and a total of 80 Members from around the world) and the operation of its Permanent Bureau (approx. 30 FTEs). He has long-standing expertise in the field of international civil procedural law (jurisdiction of courts, recognition and enforcement of foreign judgments, service of process and taking of evidence abroad, access to justice, etc.), international administrative cooperation (Apostille; he is the designer and principal administrator of the electronic Apostille Program, e-APP), international commercial and finance law (intermediated securities), as well as international child protection law (parental child abduction, protection of children generally). He has been responsible for various meetings of Special Commissions, Experts' and Working Groups, both in relation to normative work of the Hague Conference and post-Convention services. His current focus is on developing and implementing various management improvement initiatives at the Permanent Bureau, and on furthering the global visibility of the Hague Conference.

He holds a law degree from Fribourg University in Switzerland (magna cum laude; bilingual German/French), an LL.M. degree in comparative law from McGill University in Montreal (Canada), and a doctoral degree in Private International Law from Fribourg University (summa cum laude).

Before joining the Permanent Bureau, Dr Bernasconi lectured at the University of Fribourg, worked as Legal Expert at the Swiss Institute of Comparative Law in Lausanne, and as Scientific Collaborator at the Federal Office of Justice in Switzerland. He also advised practitioners on various Private International Law matters.

Dr Bernasconi was a Member of the Model Notary Act Revision Committee (USA), which produced the Model Notary Act 2010, published by the National Notary Association (NNA). He was also a Member of the International Bar Association Capital Markets Forum Subcommittee on Legal Certainty for Intermediated Securities, and was Co-Rapporteur of the International Law Association's former Committee on Transnational Enforcement of Environmental law. He is an Honorary Fellow of the Australian New Zealand College of Notaries (ANZCN). He is a member of the advisory board of the Hague Project Peace and Justice Foundation. He was born in 1964 in Basel, Switzerland. He is married and has 3 children.

Celebratory Remarks

Seongdong Kweon

Chairman of Legislation and Judiciary Committee of the National Assembly

Education

- ~ 1986 LL.M., Graduate School of Law, Chung-Ang University
- ~ 1984 LL.B., College of Law, Chung-Ang University
- ~ 1979 Myeongryun High School, Gangneung
- ~ 1976 Kyongpo Middle School, Gangneung
- ~ 1973 Choungang Elementary School, Gangneung

Work Experience

- May, 2017 ~ Member of the 20th National Assembly (Gangneung City, Gang Won Province / Liberty Korea Party)
- Jun., 2016 ~ Chairman of the Legislation and Judiciary Committee in the First Half of the 20th National Assembly
- Jun., 2016 Member of the Emergency Response Committee for Innovation, The Saenuri Party
- Jun., 2016 Secretary-General, The Saenuri Party
- May, 2016 Member of the 20th National Assembly (Gangneung City, Gang Won Province / Liberty Korea Party)
- Jul., 2015 Director of the Strategy and Planning Headquarters, The Saenuri Party
- Jun., 2014 Member of the Intelligence Committee in the Second Half of the 19th National Assembly
- Jun., 2014 Secretary of the Environment and Labor Committee in the Second Half of the 19th National Assembly
- 2012 Member of the Special Committee on Governmental Support for International Sporting Events and the Pyeong-Chang Winter Olympic Games of the 19th National Assembly
- Jul., 2012 Member of the Special Committee on Budget and Accounts in the First Half of the 19th National Assembly
- Jul., 2012 Secretary of the Legislation and Judiciary Committee in the First Half of the 19th National Assembly
- May, 2012 Vice Chairman of the Saenuri Party Policy Committee
- May, 2012 Member of the 19th National Assembly (Gangneung City, Gangwon Province/Saenuri Party)
- Nov., 2009 Member of the 18th National Assembly (Gangneung City, Gangwon Province/Hannara Party)
- Jul., 2008 Presidential Secretary for Legal Affairs
- Apr., 2005 Director of the Special Investigation Department, Incheon District Prosecutors' Office

Awards

- 2017 Received Grand Prize for good member of the 19th National Assembly from the Good Law
- 2016 Awarded Grand Prize for good member of the 19th National Assembly from the Good Law
- 2016 Selected as Outstanding Member of the National Assembly in monitoring and evaluation of the National Assembly inspection
- 2015 Awarded Grand Prize in parliamentary activities from the Republic of Korea Voters Federation
- 2015 Received Grand Prize at the 2015 Global Leadership Awards

- 2015 Selected as Outstanding Member of the National Assembly at the Korea Creative Management Awards 2015
- 2014 Selected as Outstanding Member of the National Assembly in monitoring and evaluation of the National Assembly inspection
- 2014 Received Grand Prize for good member of the National Assembly from the Good Law
- 2014 Selected as Best Member of the National Assembly in green environment of the National Assembly inspection
- 2014 Selected as Outstanding Member of the National Assembly in environment
- 2014 Selected as Outstanding Member of the National Assembly in legislation and policy establishment
- 2013 Selected as Outstanding Member of the National Assembly in monitoring and evaluation of the National Assembly inspection
- 2013 Awarded Grand Prize for good member of the 19th National Assembly from the Good Law
- 2012 Selected as Outstanding Member of the National Assembly in legislation and policy establishment

Celebratory Remarks

Hyun Kim

President of the Korean Bar Association

Education

- University of Washington Law School, Ph.D., 1990.
- University of Washington Law School, LL.M., 1985.
- Cornell Law School, LL.M., 1984.
- Seoul National University Law School, LL.M., 1983.
- Seoul National University Law School, LL.B., 1980.

Work Experience

- President, Korean POWs Repatriation Commission, 2013 – present.
- Advisor, Ministry of Agriculture, Food and Rural Affairs, 2013 – present.
- President, Korea Construction Vision Forum, 2011 – present.
- President, University of Washington Alumni Association of Korea, 2010 – present.
- President, Future Consumers Forum, 2010 – present.
- Member, Cornell University Council, 2009 – present.
- President, Seoul Bar Association, 2009 – 2011.
- President, Seoul Jeongdong Rotary Club, 2008 – 2009.
- Outside Director, Hanjin Heavy Industries & Construction, 2008 – present.
- Advisor, Minister of Ministry of Justice, 2007 – 2009.
- Country Councillor, International Bar Association, 2007 – 2009.
- Liquidator, Korea Mortgage Corporation, 2007 – 2011.
- Secretary General, Korean Bar Association, 2007 – 2008.
- President, Cornell Club of Korea, 2006 - 2008.
- Member, Ministry of Construction & Transportation, Committee for Conflicts Management, 2005-2007.
- Mediator, Seoul Central District Court, 2004 - 2013.
- Advisor, Ministry of Science & Technology, 2003 - 2009.
- Vice President, Korea Arbitrators' Association, 2003.
- Vice President, Korea Logistics Society, 2003.
- Vice President, PL Mediation Committee, Korea Medical Instruments Cooperative, 2002.
- Advisor, Incheon International Airport , 2002.
- Director, National Federation of Fisheries Cooperatives, 2001.
- Member, Kwangyang Port Construction Project Evaluation Committee, 2001.
- Counsel, Hyundai Motor Co./E-business Project, 2001.

- Counsel, Korea Container Terminal Authority/Kwangyang Harbor SOC Project, 2001.
- Arbitrator, London Court of International Arbitration, 2000 – present.
- Advisor, Korea Railroad Bureau Planning Committee, 2000 – 2004.
- Advisor, Ministry of Construction & Transportation Road Policy Committee, 2000 – 2007.
- Advisor, Korea Publications Ethics Committee, 2000 – 2002.
- Mediator, Seoul High Court, 1999-2013.
- Advisor, Seoul Venture Incubator, 1999- 2007.
- Advisor, Korea Precious Metal & Stone Designers Association, 1999-2003.
- Arbitrator, Korea Commercial Arbitration Board, 1999- present.
- Attorney, Yoon & Partners, Seoul, 1991-1992.
- Attorney, Shin & Kim, Seoul, 1998-1990.
- Judicial Research and Training Institute, Korean Supreme Court, 1986-1988.
- Foreign Legal Consultant, Bogle & Gates, Seattle, 1985.

Published Books

- Basic Text on Maritime Law in Korea, 3rd ed.
  (Co-authored by Chief Justice Sang-Hyun Song; Pakyoung Publishing Co., 2008).
- Overview of Korean Precedents on Construction Law, 3d ed. (Bumwoosa Publishing Co., 2012)
- Ocean Carriage of Goods by Sea (Co-authored by Prof. Suh and President Jeong; Pakyoung Publishing Co., 2009).

Awards

- Award, Prime Minister, 2012.
- Alumni of the Year Award, Univ. of Washington Alumni Association of Korea, 2009.
- Award, Minister of Ministry of Construction & Transportation, 2007.
- Presidential Award, 1997.

Celebratory Remarks

Ikhyeon Rhee

President of the Korea Legislation Research Institute

Education

- Ph.D. in Law completed, Sungkyunkwan University (Korea) (2005)
- LL.M., Columbia University (USA)
- LL.B., Sungkyunkwan University (Korea)
- M.A. (Public Administration), Syracuse University (USA)
- B.A. (Political Science), Sogang University (Korea)

Work Experience

- Aug. 2016 - : President of the Korea Legislation Research Institute (KLRI)
- 1988 – Jul. 2016: Ministry of Government Legislation (MOLEG)
- 2008 – 2016 Director General, Ministry of Government Legislation
- 2007 – 2008 Assistant Officer to the President for Legal Affairs at the Office of the President of the ROK
- 2006 – 2007 Constitutional Research Officer, Constitutional Court
- 2005 – 2006 Administrative Appeals Officer, Ministry of Government Legislation
- 2002 – 2005 Personnel Management Officer at Legislation Management Office of the MOLEG
- 1995 – 2002 Legislative Information Division of the MOLEG

Published Books

- Breaking the Vicious Circle (규제의 악순환–효과적인 위험 규제), by Stephen Breyer, Co-translation, Law Information Service, 2012
- Administrative Justice in the United States (미국행정법개론), by Peter L. Strauss, Co-translation, Korea Legislation Research Institute, 2010

Awards

- Presidential Commendation for Service Merit (2001)
- Presidential Commendation for Service Merit (2011)

Presentation

Status and Envisaged Development of Korean Private International Law

Byungsuk Chung

President of the Korea Private International Law Association

Presenter

Byungsuk Chung

President of the Korea Private International Law Association

Education

- University College London (LL.M., 1987)
- Judicial Research and Training Institute of the Supreme Court of Korea (1980)
- Graduate School of Law, Seoul National University (1980)
- College of Law, Seoul National University (LL.B., 1977)

Work Experience

- President of Korea Private International Law Association (2015-Present)
- Adjunct Professor, Maritime Law, Seoul National University School of Law (2013-Present)
- Adjunct Professor, Korea University, School of Law (2013-Present)
- Member of the Committee to Reform the Private International Law, Ministry of Justice (2014.6.-Present)
- Member of the Committee to Reform the Provisions of the Korean Commercial Code on Marine Insurance, Ministry of Justice (2014.5.-2015.2)
- President of Korea Maritime Law Association (2012.4.-2014.4.)
- Member of the Committee for Transportation Law, Ministry of Justice (2011.2.-Present)
- Member of the Committee to Reform the Maritime Chapter of the Korean Commercial Code, Ministry of Justice (2004.9.-2006)
- Korean Delegate to UNCITRAL Working Group III on Transportation Law (2003.4.)
- Member of the Committee for studying the International Transactions Law, Ministry of Justice (2002.2.-Present)
- Member of the Committee for Reforming the Conflict of Laws of Korea, Ministry of Justice (2000.6.-2001.5.)
- Member of the Committee for Consulting the Policy, Ministry of Maritime Affairs & Fisheries
- Lecturer, Judicial Research and Training Institute of the Supreme Court Mediator, Seoul Central District Court (1998-Present)
- Arbitrator, Korean Commercial Arbitration Board (1994-Present)
- Associated with Haight, Gardner, Poor and Havens, New York (1987.9.-1988.3.)
- Kim & Chang (1980-Present)

Published Books

- European Lawyer Reference - Shipping & International Trade Law (Second edition 2014): "South Korea" chapter (Thomson Reuters, 2014)
- Transnational Litigation: A Practitioner's Guide (Co-author, Oceana Publications, Inc., 2003)
- Provisional Remedies in International Commercial Arbitration (Co-author, De Gruyter, 1994)

Awards

- Band 1, Chambers Asia-Pacific Awards 2017
- Leading Individual, The Legal 500 Asia Pacific 2017

CURRENT STATUS AND NEXT STEPS IN THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW IN THE REPUBLIC OF KOREA

Attorney-at-Law Byung-Suk Chung
President of the Korea Private International Law Association

It is my great honor to speak to you about the **current status and next steps in the development of private international law in the Republic of Korea** as the first speaker at the Hague Conference on Private International Law ("HCCH") Asia Pacific Week 2017, an event co-hosted by the Hague Conference on Private International Law, the Ministry of Justice of the Republic of Korea, the Judicial Research & Training Institute, the Ministry of Foreign Affairs of the Republic of Korea, the Korea Private International Law Association, the Korean Bar Association, and the Korea Legislation Research Institute, to commemorate the 20th anniversary of the Republic of Korea's joining the HCCH.

In addition, on behalf of the Korea Private International Law Association, one of the co-hosting organizations, I would like to express my heartfelt gratitude to all of you who are attending and participating in the HCCH Asia Pacific Week 2017 international seminar.

As you know, the Dutch government held an international conference in the Hague in 1893 with the goal of bringing about the unification of the rules of private international law. This was the genesis of the HCCH. On 20 August 1997, the Republic of Korea joined the HCCH as the 45th member state and is now celebrating its 20th anniversary[1]. After joining the HCCH, the Republic of Korea acceded to the Service Convention[2] in 2000, the Apostille Convention[3] in 2007, the Evidence Convention[4] in 2009, and the Child Abduction Convention[5] in 2012 (which entered into force in 2013). Also the Republic of Korea signed the Adoption Convention[6] in 2013. Furthermore, I understand that the Korean government is currently considering and preparing for further accessions to other various international conventions of the HCCH.

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1 *Ho-Jeong Lee*, Joining of Hague Conference on Private International Law and Its Meaning, Korea Private International Law Journal, No. 2 (1997), p. 7 and below.

2 The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

3 The Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents.

4 The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

5 The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

6 The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Even before joining the HCCH in 1997, the Republic of Korea already had close direct and indirect ties with the Hague Conventions, as well as the European Economic Community ("EEC")'s private international laws and other private international law doctrines which have been closely linked with the Hague Conventions. I would like to take this opportunity to share briefly with our distinguished guests and speakers the history of Korea's Private International Law and also discuss the next steps in the further development of Private International Law in Korea.

The 1962 Korean Private International Law (enacted 15 January 1962)

Before the enactment on 15 January 1962 of the first Private International Law statute in Korea (the "1962 KPIL"), the Korean legal system looked to the Japanese conflict of laws (法例) system. The Japanese conflict of laws (法例), in turn, was enacted in 1898 based on the draft German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB) (the so-called "Gehard Draft") and consisted of 30 provisions at the time of legislation.

The 1962 KPIL[7] was criticized for being outdated from the outset as it was thought to be based on outdated theories and legislation of the 19th century, and was perceived as being not much different from the Japanese conflict of laws (法例), except for the implementation of certain new provisions on commercial matters[8]. For example, ignoring the principle of gender equality guaranteed by the Korean Constitution, the 1962 KPIL designated the laws of the country of which the husband or father is a national as the governing law for international family law matters. Other examples of the flaws in the 1962 KPIL include (i) the automatic application of the law of the place where the act that gave rise to the legal claim occurred (*lex loci actus*) as the governing law, in cases where the parties failed to determine the governing law for international contracts, and (ii) applying a single connecting principle for all types of torts while it made that the law of the place where the tort was committed (*lex loci delicti commissi*) and the law of the forum (*lex fori*) both applicable[9].

Despite such criticism from its inception, it was not until April 1999, 27 years after the enactment of the 1962 KPIL, that discussions on amendment started in earnest with the Ministry of Justice organizing a group to research and study issues regarding amendment. By that time, new approach challenging the traditional approach of the civil law system had emerged globally, driven in part by the conflicts of law principles of the United States, and in response, the private international law of the civil law systems was undergoing considerable changes. These included further specifying and diversifying the connection mechanism in more detail, expanding the principle of party autonomy, applying protection policy for the

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7 For circumstances surrounding the enactment of the 1962 KPIL and its characteristics, *Kyung-Han Sohn*, Historical Development of Korean Law on International Jurisdiction, Korea Private International Law Journal, No. 18 (December 2012), pp. 6-7.

8 *Kong Woong Choi*, Amendment of Private International Law and Its Characteristic, Family Mediation, No. 4 (2001), pp.16-18; Need to Amend the Private International Act and Its Direction, Korea Private International Law Journal, No. 4 (1999), p. 193.

9 *Kwang Hyun Su*k, Commentary on Private International Law Amended in 2001, (2nd ed. August 2003), p. 4.

socially and economically weaker contract parties to the domain of private international law, and adopting a methodological pluralism in private international law. As a result, many countries amended their private international law or conflict of laws in or after 1970[10]. At the same time, the HCCH and others made continuous efforts to harmonize and unify the rules of private international law (conflict of laws) in various legal fields.

Establishment of the Korea Private International Law Association (1993) and its Role

Although the 1962 KPIL was an elective subject for the first round of the Korean national bar exam, and taught at law schools,[11] it was not until the late 1980s that scholars and practitioners began taking interest and conducting research on the 1962 KPIL in earnest. And in 1993, scholars and practitioners interested in the study of conflict of laws gathered and established the Korea Private International Law Association ("KOPILA")[12].

Since its establishment, KOPILA has engaged in numerous academic activities to raise awareness about conflict of laws issues and strongly requested the Korean Government to join the HCCH. Furthermore, the amendment to the 1962 KPIL was set as one of its major goals at the time of establishment and KOPILA carried out the research that formed the bases for the amendment. Further, KOPILA members participated as members of the Ministry of Justice's study group for the amendment to the 1962 KPIL and the special committee for the amendment to the 1962 KPIL (the "Committee"), playing a pivotal role in amendment process.

Today, KOPILA holds regular international academic conferences jointly with private international law associations of China and Japan to contribute to the development and unification of the rules of private international law within the East Asian region. Furthermore, by encouraging its members to participate in international conferences such as the HCCH, and engaging in continuous international exchanges, KOPILA has been instrumental in Korea's early adoption of international developments of private international law, thereby contributing to the development of private international law and relevant theories in Korea.

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[10] *Kong Woong Choi*, *op. cit.* (Note 8) p. 194: 'East Germany (1975), Austria (1978), Hungary (1979), Yugoslavia (1983), West Germany (1986), China (1987), Switzerland (1987), Japan (1989), Louisiana, the United States (1992), the United Kingdom (1995).'

[11] *Kyung Han Sohn*, *op. cit.* (Note 7) p. 5: It is said that the Private International Act was designated as one of the elective subjects for the higher civil service examination, which has been conducted since 1949 to select higher civil servants and has contributed greatly to the popularization of the private international law in the legal field in the Republic of Korea.

[12] On 27 March 1993, the Korea Private International Law Association was established, and Professor Ho-Jeong Lee of the Seoul National University College of Law was elected the first president.

Amendment to the 1962 Korean Private International Law

The Committee formed under the auspices of the Ministry of Justice conducted a systematic and comprehensive research and review of the statutes of countries like Germany, Switzerland, Austria, the United States, and Japan, as well as various international conventions of the HCCH, relevant international conventions such as the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"). Based on such research and review, the Committee recommended revisions to the relevant parts of KPIL, taking into account the circumstances in Korea. The key contents of the amendment are as follows[13]:

1. Change of name

   The name of the act, formerly "*Seop-oe-sa-beop*",[14] (verbatim meaning foreign matters laws) was changed to "*Guk-je-sa-beop*", which literally means "private international law," consistent with global practices[15].

2. Insertion of the provision on international jurisdiction

   While the 1962 KPIL only had only provisions on governing law, a general provision on international jurisdiction has been newly introduced in the revised Korean Private International Law (the "Revised KPIL"). This is the mainstream approach taken under the French, Swiss, and Anglo-American laws, and the HCCH, which view the issue of international jurisdiction as a part of the private international law. However, the amendment provided for only general principles on international jurisdiction (Article 2) and special provisions on international jurisdiction for the protection of consumers and workers (Articles 27 and 28), with further details being left to a later amendment. The decision at the time to defer the further details to a later amendment was based on the desire to await and refer to the further progress of the HCCH regarding the broad convention to cover international jurisdiction and recognition and enforcement of judgments, which was then underway. As the HCCH's works were eventually scaled down to focus on the production of the 2005 Choice of Court Convention[16], we are currently working on these detailed provisions on international jurisdiction[17].

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[13] *Kwang Hyun Suk*, *op. cit.* (Note 9) pp. 15-22; *Chang-Seon Shin/Nam-Sun Yoon*, New Private International Law (2nd ed. February 2016), pp. 58-60.

[14] It is introduced that the name of "*Seop-oe-sa-beop*" had originated in translation of French "*droit extra-national,*" cf. *Moon-Chul Chang*, General Private International Law (1996) p. 23.

[15] The HCCH, Switzerland, Austria, and Italia

[16] The Hague Convention of 30 June 2005 on Choice of Court Agreements.

[17] So far, the amendment committee has prepared a draft, which is scheduled to be submitted by the Ministry of Justice to the National Assembly in 2017 for legislation.

3. Establishment of the “most closely connected” principle

The Revised KPIL requires the application of the law of the country most closely connected to various connecting parties as the governing law. For example, in the case of the governing law of international contracts, the Revised KPIL requires that the laws of the country which is most closely connected to the contract be applied as the governing law, instead of the law of the place where the act occurred that gave rise to the legal claim (*lex loci actus*) (Article 25). Also, as for the governing law for torts, the Revised KPIL requires the application of the law of common habitual residence in which the relevant persons (i.e. tortfeasor and victim) are based as the governing law (Article 32 (2)). In addition, the Revised KPIL specifies incidental or dependent connections in deciding the governing law for statutory claims (Article 30 (1), proviso clause to Article 31, and Article 32 (3)). Furthermore, by setting forth an exclusion clause requiring the application of the law of the country “most closely connected,” in cases where the applicable law designated as per the Revised KPIL leads to non-conformity with the above principle in a particular case, the Revised KPIL establishes the “most closely connected” principle (Article 8).

4. Introduction of “habitual residence” as the connecting factor

The Revised KPIL maintains the law of nationality, in principle, in the areas of international domestic relations and international inheritance, but introduces the concept of “habitual residence” used by international treaties and a variety of legislative cases as a new connecting factor, consistent with international developments.

5. Realization of gender equality in the Private International Law

The 1962 KPIL has been criticized for being against the principle of gender equality guaranteed by the Constitution by designating as the governing law the laws of the country of which the husband (夫) or father (父) is a national. The Revised KPIL eliminates this element of gender discrimination by requiring the application of the law of common nationality of the married couple as the primary governing law and the law of common habitual residence of the married couple as the secondary governing law (Articles 37 through 39).

6. Provisions on consumer and employee protection

The Revised KPIL sets forth special rules on the determination of governing laws and jurisdiction to protect consumers and employees that are socially and economically weaker contract parties in private international law domain, taking into account various (mandatory) provisions of substantive law (Articles 27 and 28).

7. Expansion of party autonomy

   The Revised KPIL expands the principle of party autonomy (which used to apply in the area of contracts only) to the areas of marital property, inheritance, and legal claims.

8. Consideration of international treaties

   The Revised KPIL incorporates to a substantial degree the 1980 Rome Convention and the Inter-American Convention on the Law Applicable to International Contracts signed on 17 March 1994 (the "Mexico City Convention"). It also adopts the connecting principles from the 1973 Hague Maintenance Convention[18] and the 1961 Hague Form of Wills Convention[19] to a substantial extent.

Through such amendment, the Revised KPIL clearly presents a more well-organized regime. However, we cannot say that the Revised KPIL is flawless. Also, given that long time has already passed since the last amendment, there is a recognized need for another amendment, to reflect changes in society and the emergence of new theories.

Proposed Amendment as to International Jurisdiction

The Revised KPIL, through the amendment to the Korean Private International Law in 2001, only concerned a general rule on international jurisdiction and a special rule for the socially and economically weaker contract parties. To step forward, as mentioned earlier, recently a committee has been formed and working under the auspices of the Ministry of Justice to provide detailed individual rules for international jurisdiction based on accumulated previous court precedents on international jurisdiction and relevant international conventions.

The following detailed directions have been proposed by the said amendment committee regarding the amendment to the international jurisdiction provision[20].

(a) Specification/individualization of the principle of "substantial connection"
(b) Effective resolution of international disputes
(c) Provision that keeps abreast of globalization and information trends
(d) Legislative rectification of unfair precedents

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[18] The Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

[19] The Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

[20] *Kyung Han Sohn*, *op. cit.* (Note 7) pp. 28-33.

(e) Harmonization with the rules of the international jurisdiction of neighboring countries

In connection with item (e), based on the draft that was being discussed in the said amendment committee, Korea had the opportunity to hear opinions from Japan and China through joint academic conferences held with private international law associations in Japan and China. In the course of preparing the amendment, the 2005 Choice of Court Convention and other various Hague Conventions adopted by the HCCH were key references.

Professor Kwang Hyun Suk will introduce the proposed amendments to the international jurisdiction provision in Session 5, which is scheduled to be held on 4th of July.

The Next Steps (and Prospects) of the Private International Law in Korea

The "nation founded on trades" has been the slogan driving the Korean economy, and for this reason, the Republic of Korea has been highly dependent on international trade. International transactions by domestic companies in the overseas construction, shipbuilding, and overseas resource development industries account for a large part of the Korean economy. Meanwhile, with increased levels of international migration, foreign workers settling in Korea, and international marriages and foreign women married to Korean spouses entering the country, the number of international family law cases has been on a steady increase. Nonetheless, the level of interest and awareness is less than it should be and does not match the importance of private international law.

There are not enough resources for the future of KOPILA, and most law schools do not have full-time professors teaching private international law. As such, I cannot help but be concerned that the future of interest in private international law in Korea as a discipline is not as bright as it should be in terms of volume and appearance[21].

Nevertheless, I can see the growing interest of young scholars and practitioners in private international law who are attending KOPILA meetings in increasing numbers. And the quality of the presentations and serious discussions that take place at regular seminars has been impressive. One way to continue the development of private international law would be to continue and promote private international law education at law schools. Also, the government and law schools should ensure that those specializing in private international law can become full-time professors in their own right so that the research and study of private international law can continue and be fruitful[22].

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[21] *Kwang Hyun Suk*, International Adjudicatory Jurisdiction and Recognition and Enforcement of Foreign Judgments: Codification and Court Precedents, Special Issue: 20 Years of the Korea Private International Law Association Retrospect and Prospect, Korea Private International Law Journal, Vol. 20 No. 1 (June 2014), p. 66.

[22] *Kwang Hyun Suk*, *op. cit.* (Note 21), p. 66.

It is my wish and belief that this HCCH Asia Pacific Week 2017 will serve as a valuable opportunity to widely spread and emphasize the importance of private international law among Korean legal professionals and Korean society.

I hope this provided you with a glimpse on the current status of private international law in the Republic of Korea. Once again, I would like to express my sincere gratitude to all of you who took time to attend the HCCH Asia Pacific Week 2017 international seminar and listening to my talk. Thank you.

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HCCH Asia Pacific Week 2017

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HCCH Asia Pacific Week 2017

SESSION 1.

Experiences in the Hague Conventions in the Asia Pacific Region

Moderator

Laura Martinez-Mora
Principal Legal Officer of the HCCH

Presenter

[Australia]
Ravi Kewalram Deputy Head of Mission, Australian Embassy

[China - HKSAR]
Bebe, Pui-Ying CHU Judge of Court of First Instance, Hong Kong Judiciary

[Japan]
Hajime Ueda Director of Hague Convention Division, Ministry of Foreign Affairs

[Philippines]
Bernadette Abejo Executive Director of Inter-Country Adoption Board (ICAB)

[Singapore]
Sarala Subramaniam Senior Assistant Director, International Legal Division, Ministry of Law

[South Korea]
Jeongsoo Soh Prosecutor of the Ministry of Justice

[USA]
Christine Harold Senior Advisor of U.S. Department of State, Bureau of Consular Affairs

[Vietnam]
Bui Thi Nhan
Deputy Director of International Cooperation Department,
Supreme People's Court of Vietnam

Moderator

Laura Martinez-Mora

Principal Legal Officer of the HCCH

Education

Laura received her law degree from University of Valencia (Spain), a Master of Laws (LL.M) in International Law with a specialisation on child's rights and comparative family law from the University of London (UK), and a Diploma in Child Protection and Juvenile Justice from the University Diego Portales in Santiago (Chile).

She is fluent in Spanish, French, English and Italian.

Work Experience

Laura joined the Permanent Bureau of the HCCH in 2007 as Adoption Technical Assistance Programme Co-ordinator. Since 2012 she is the Principal Legal Officer in charge of the post-Convention services which the Permanent Bureau provides in relation to the 1993 Hague Convention on Child Protection and Cooperation in respect of Intercountry Adoption. She also coordinates the work on Parentage and International Surrogacy Arrangements done by the Permanent Bureau.

In this capacity, Laura is responsible for the organisation and preparation Special Commission meetings on the practical operation of the 1993 Convention, and any other meetings related to her subject of work. Laura has also extensive experience in providing legal and technical assistance and training to experts and professionals in different countries all over the world and carrying research and drafting documentation for the Permanent Bureau.

Before working for the Hague Conference, Laura worked for over three years for the International Social Service (Geneva, Switzerland) and for three years at UNICEF (Regional Office for the Southern Cone, Santiago, Chile). She has also worked on children's issues at the European Commission in Brussels (Belgium) and at the Council of Europe in Strasbourg (France).

Australia

Ravi Kewalram

Deputy Head of Mission, Australian Embassy

Educational and professional qualifications

- Master of Arts (Foreign Affairs and Trade), Monash University
- Master of Laws, University of Sydney
- Graduate Diploma in Legal Practice, University of Technology, Sydney (Subsequently admitted as a Solicitor in NSW)
- Bachelor of Laws, University of Sydney
- Bachelor of Economics, University of Sydney

Work Experience

- Deputy Head of Mission, Australian Embassy, Seoul (29 September 2014-)
- Assistant Secretary, Trade Law Branch, Office of Trade Negotiations (from 20 Feb 2012 to 20 June 2014)
- Assistant Secretary, Legal Counsel Branch, Free Trade Agreement Division (FTD; from Feb 2011 to Feb 2012)
- Senior Adviser to Minister for Trade, and then to Minister for Foreign Affairs and Trade (Sep 2009 to Sep 2010)
- Assistant Secretary, Pacific Regional and New Zealand Branch (Nov 2008 – Sep 2009
- Head (Counsellor-level), Political and Trade Policy Branch, London (Aug 2005 to Sep 2008)
- Director, WTO Disputes (May 2001 – July 2005)
- Executive Officer, Office of Trade Negotiations (WTO Services; then Disputes) (Mar 1999 to May 2001)
- Second Secretary, Wellington (Dec 1995 – Feb 1999)
- Desk Officer, APEC Branch (Dec 1994 – Dec 1995)
- Graduate Trainee, New Zealand Section and study (Feb – Dec 1994)

China – HKSAR

Bebe, Pui-Ying CHU

Judge of Court of First Instance, Hong Kong Judiciary

Work Experience

Madam Justice Chu joined the Family Court of Hong Kong in October 2003 and was appointed Judge in charge of the Family Court in July 2006 and the Principal Family Court Judge in September 2009. She was promoted to become a Judge of Court of First Instance of the High Court in April 2015 and in October 2015, Madam Justice Chu was designated with the special responsibilities for Family Cases in the High Court. Madam Justice Chu is one of Hong Kong's International Hague Network Judges.

Madam Justice Chu has been appointed by the Chief Justice to be a member of the Working Party on Mediation, Working Group on Children and Ancillary Relief Procedures in Family Proceeding, and Deputy Chairperson of the Implementation Committee on Family Procedure Rules.

Outside Judiciary, Madam Justice Chu is a Judicial Member of the International Academy of Family Lawyers, a member of the International Association of Family Judges and, a member of the Association of Family and Conciliation Courts. She sits on the Editorial Advisor Board of the Hong Kong Family Law Reports and also on Academic Advisory Board, Department of Law and Business, Hong Kong Shue Yan University.

Japan

Hajime Ueda

Director of Hague Convention Division, Ministry of Foreign Affairs

Education

- BA in Law, Sophia University, Japan
- BA in History, Carleton College, USA

Work Experience

He joined the Ministry of Foreign Affairs of Japan (MOFA) in 1995 and has served in the Philippines, the United States (Permanent Mission of Japan to the United Nations, New York) and Iran. He has been the Director of Hague Convention Division since August 2016.

Philippines

Bernadette Abejo

Executive Director of Inter-Country Adoption Board (ICAB)

Education

- 2013-2016- University of the Philippines-Open University, Diliman, Quezon City, Philippines
  DIPLOMA IN SOCIAL WORK (DSW)
- 1991 - University of the Philippines, Diliman, Quezon City, Philippines
  BACHELOR OF LAWS
- 1986 - University of the Philippines, Diliman, Quezon City, Philippines
  BACHELOR OF ARTS IN POLITICAL SCIENCE
- 1982 - Poveda Learning Centre, Edsa, Quezon City, Philippines
  SECONDARY AND PRIMARY EDUCATION

Work Experience

- Executive Director, 2008- Present
  Inter Country Adoption Board
  2 Chicago corner Ermin Garcia Sts.,
  Cubao, Quezon City
- Permanent Representative, 2008- Present
  Council for the Welfare of the Children
  10 Apo St., Santa Mesa Heights
  Quezon City
- Inter Country Placement Committee,2007- 2008
  Inter Country Adoption Board
  2 Chicago corner Ermin Garcia Sts.,
  Cubao, Quezon City
- Legal Consultant,2004- 2006
  Commverge Solutions Philippines, Inc
  15th Floor Equitable Bank Towers,
  Paseo De Roxas St., Makati City
- Legal Counsel, June 2001 to October 2003
  Keppel Communications Philippines, Inc
  9th Floor Equitable Bank Towers,
  Paseo De Roxas St., Makati City
- Legal Counsel, 1998 to December 2000
  Roasters Philippines, Inc., and its subsidiaries and affiliates: Coffee Masters, Inc.(Seattle's Best Coffee); Food Service and Logistics, Inc.; Meal Solutions, Inc;

2nd Floor Singapore Airlines Building,
H.V. de la Costa St., Makati City

- Assistant Legal Counsel, 1995 to 1998
  Filinvest Land, Inc.
  2nd Floor FDC Building,
  Pilar St., San Juan, Metro Manila

- Solicitor I, 1991 to 1995
  Office of the Solicitor General
  OSG Building,
  Amorsolo St., Makati City

SEMINARS AND TRAININGS ATTENDED

- October 13-15, 2016- Working Group on Preventing & Addressing Illicit Practices in Intercountry Adoption, THC, Netherlands
- Sept. 19-21, 2016 - Expert Meeting on Illegal Adoptions, Terre de Hommes, The Netherlands
- Aug. 16-31, 2016 - Signing of MOA, Ireland/ Re-accreditation visit with Foreign Adoption Agencies/ France
- June 29-30, 2016 - Asia Pacific Symposium on the 1980 Hague Child Abduction Convention, Tokyo, Japan
- Sept. 2-4, 2015 - 13th Philippine Global Consultation on Child Welfare Services, " ADOPTION: A LIFELONG JOURNEY AND COMMITMENT", SMX, SM Aura, Taguig City, Philippines
- June 8-12, 2015 - Chairman, Special Commission on Practical Operation of the 1993 Intercountry Convention, The Hague Netherlands
- Feb. 21-Mar.7, 2015- Accreditation Visit with Foreign Adoption Agencies, New Zealand and Australia
- Jan. 26-28, 2015 - National Management Development Conference(NMDC), AIM, Makati City, Philippines
- Oct. 1-4, 2014 - Speaker on "Post Adoption Services Ties w/ the Country of Origin, Paris, France
- July 6-July 21, 2014- Accreditation visit with Foreign Adoption Agencies in Denmark and Spain
- Feb. 10-14, 2014 - Meeting of the Experts Group on the "Possibilities of Intermediation of Adoption of Children, Prague, Czech Republic
- Aug. 14-16, 2013 - 12th Global Consultation on Child Welfare Services, "POST ADOPTION SERVICES: THE WAY FORWARD", Manila Hotel, Philippines
- Nov. 5- Dec.7, 2012 - Undertake and lead the operationalization and training of the Cambodian Intercountry Central Authority Committee and the Intercountry, Cambodia
- Oct. 6-11, 2012 - Co-Chairman: Meeting of the Expert Group on the Financial Aspects of Intercountry Adoption, The Hague Netherlands
- Jan. 23-Feb. 2, 2012- PART II of the Special commission on Practical Operations of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection, The Hague Netherlands
- Aug. 17-19, 2011 - 11TH GLOBAL CONSULTATIN ON CHILD WELFARE SERVICES " SECURING CHILDREN'S RIGHTS THROUGH DYNAMIC INTERNATIONAL PARTNERSHIP" , Dusit Thani Hotel, Makati City, Philippines
- June 15-28, 2010- PART I OF THE SPECIAL COMMISSION ON PRACTICAL OPERATIONS OF THE 1980 HAGUE CHILD ABDUCTION CONVENTION AND THE 1996 HAGUE CHILD PROTECTION CONVENTION, The Hague Netherlands
- Feb. 9-19, 2010- INTERNATIONAL MEETING WITH CENTRAL AUTHORITIES TO DISCUSS THE FINAL DRAFT OF THE GUIDE TO GOOD PRACTICE ON ACCREDITATION OF ADOPTION BODIES, The Hague Netherlands
- Aug. 18-21, 2009- 10TH GLOBAL CONSULTATION ON CHILD WELFARE SERVICES " ADOPTION PRACTICES: ADVANC IN CHILDREN'S RIGHTS AND WELFARE", Dusit Thani Hotel, Makati City
- June 14-20, 2009- Seminar for advanced Studies in Public and Private International Law 5th Session, The Hague Netherlands
- Nov. 10-28, 2008 - ACCREDITATION OF FOREIGN ADOPTION AGENCIES, USA

South Korea

Jeongsoo Soh

Prosecutor of the Ministry of Justice

Education

- 2014 LL.M., University of Pennsylvania
- 2007 Certificate, Judicial Research and Training Institute, the Supreme Court
- 2004 LL.B., Korea University College of Law

Work Experience

- 2015-present Vice Director of the International Legal Affairs Division, the Ministry of Justice
- 2012 Prosecutor, Chungju Branch of Cheongju District Public Prosecutors' Office
- 2010 Prosecutor, Daegu District Public Prosecutors' Office
- 2007 Public Service Advocate, Ministry of Justice

USA

Christine Harold

Senior Advisor of U.S. Department of State, Bureau of Consular Affairs

Education

Catholic University of America, Washington, DC
Juris Doctor, May 1989

University of North Carolina, Chapel Hill, North Carolina
Bachelor of Arts in International Studies

Work Experience

Foreign Service Officer, U.S. Department of State May 1992 - present

- United States diplomat and consular officer with policy and management experience developed during four domestic and seven overseas Foreign Service assignments.
- Currently advising on policy and regulatory matters regarding intercountry adoptions as a Senior Advisor in the Office of Children's Issues in the Bureau of Consular Affairs.
- Directed more than 100 staff members in the adjudication and processing of diplomatic and official passports for government personnel, while managing inter-agency, regulatory, and policy matters as Director of the Special Issuance (Passport) Agency.
- Coordinated consular operations for the U.S. Mission to the United Arab Emirates, including day-to-day management of Embassy Abu Dhabi's consular section.
- Managed American Citizen Services Units in U.S. Embassy Mexico City, Mexico, U.S. Embassy Kingston, Jamaica and U.S. Consulate General Vancouver, Canada. Coordinated the work of Foreign Service officers and locally engaged staff providing passport, citizenship, and special consular services to U.S. citizen visitors and residents.
- Managed visa services to a diverse applicant pool as Chief of the Non-immigrant Visa Unit in Vancouver, Canada.
- Served as a consular and general services officer during Foreign Service assignments to the United Nations, U.S. Embassy Manila, Philippines, and U.S. Embassy Madrid, Spain.

Michaels & Wishner, PC, Washington, D.C.
Attorney, September 1989 - May 1992

- Provided legal services related to venture capital investments, asset purchase arrangements, and the registration and regulation of securities firms.

Vietnam

Bui Thi Nhan

Deputy Director of International Cooperation Department,
Supreme People's Court of Vietnam

Education

- 2000: Law master Degree in Deakin University, Australia
- 1991: Bachelor of Law in Former Soviet Union

Work Experience

From 1994 to 2007: Supreme People's Court of Vietnam

Position: Legal specialist of the Institute for Judicial Science of the Supreme People's Court

- Carrying out legal research including international laws, comparative laws, especially civil law.
- Participating in legal drafting group of the Civil Procedure Code and other normative documents
- Preparing guidance for local courts if requested.
- Taking part in many researching works at ministerial levels in various legal fields as commercial, IP and so on
- Participating in seminars and training courses aiming at improving legal knowledge

From 2007 to present: Supreme People's Court

Position: Senior legal specialist of the International Cooperation Department of the Supreme People's Court

- Carrying out legal research including international laws, comparative laws, especially civil law.
- Taking part in many researching works at ministerial levels in various legal fields as commercial, IP and so on
- articipating in seminars and training courses aiming at improving legal knowledge

SESSION 1.

Australia

Experiences in the Hague Conventions in the Asia Pacific Region

Ravi Kewalram

Deputy Head of Mission, Australian Embassy

Australian Government
Attorney-General's Department

Hague Convention application statistics (September 2016)

New Hague Convention abduction applications received by Australian Central Authority

	Applications from another country (child in Australia)	Applications to another country (child overseas)
Financial Year 2011-2012	**64**	**100**
Proportion New Zealand	62.5%	30%
Proportion UK and US	18.76%	30%
Proportion all other countries	18.74%	40%
Financial Year 2012-2013	**75**	**71**
Proportion New Zealand	62.67%	39.44%
Proportion UK and US	20%	21.12%
Proportion all other countries	17.33%	39.44%
Financial Year 2013-2014	**60**	**54**
Proportion New Zealand	45%	31%
Proportion UK and US	8.33%	20.38%
Proportion all other countries	46.67%	48.62%
Financial Year 2014-2015	**52**	**82**
Proportion New Zealand	42.31%	41.46%
Proportion UK and US	25%	29.27%
Proportion all other countries	31.69%	29.27%
Financial Year 2015-2016	**55**	**92**
Proportion New Zealand	43.64%	26.09%
Proportion UK and US	27.27%	43.48%
Proportion all other countries	29.09%	30.43%

Children in Hague Convention abduction applications

	Financial Year 2011-2012	Financial Year 2012-2013	Financial Year 2013-2014	Financial Year 2014-15	Financial Year 2015-16
Applications from another country (child in Australia)	151	112	94	80	79
Applications to another country (child in other country)	177	92	79	114	137

Australian Government
Attorney-General's Department

Children returned in Hague Convention abduction applications

	Financial Year 2011-2012	Financial Year 2012-2013	Financial Year 2013-2014	Financial Year 2014-15	Financial Year 2015-16
Applications from another country (child in Australia)	41	78	64	44	44
Applications to another country (child in other country)	67	65	45	56	63

'Applications from another country (child in Australia)' relate to a child who has been abducted to Australia, where the Hague Convention application is heard by a judicial or administrative authority in Australia, and the child is returned to the other country. 'Applications to another country (child in other country)' relate to a child abducted overseas, where the Hague Convention application is heard by a judicial or administrative authority in the country where the child is located, and the child is returned to Australia.

Note: All statistics are drawn from case management systems maintained by the Australian Central Authority (Commonwealth Attorney-General's Department). These statistics only reflect applications to the Australian Central Authority, and are not an authoritative representation of the total number of Hague Convention cases to/from Australia, or the total number of abductions to/from Australia. The number of Hague Convention applications, or the number of children in Hague Convention applications received in a financial year, cannot accurately be compared against the number of children returned in that same financial year, as matters may span financial years. The number of children returned in Hague Convention abduction applications does not necessarily reflect the success or otherwise of an application given the range of possible outcomes, including withdrawal by the applicant, voluntary agreements or discontinued applications.

HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
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SESSION 1.

China - HKSAR

Report from China (Hong Kong Special Administrative Region)

Bebe, Pui-Ying CHU

Judge of Court of First Instance, Hong Kong Judiciary

THE ASIA PACIFIC HAGUE CONFERENCE – SEOUL - 2 July 2017

Report from China (Hong Kong Special Administrative Region)

Generally

1 July 2017 was the 20th anniversary of Hong Kong's return to Mainland China.

It was also almost 20 years ago , on 5 September 1997, that legislation first came into effect in Hong Kong to bring in the provisions of the 1980 Convention on the Civil Aspects of International Child Abduction.

Although there have not been that many incoming return applications in Hong Kong under the 1980 Convention, one of our major problems in recent years is that due to the rising number of cross-boundary marriages between Hong Kong and Mainland China, there have been many cases when a child is taken across the boundary , from Hong Kong to the Mainland, or vice versa, by one parent unilaterally without the consent of the other parent. Unfortunately, Mainland China is not a contracting state under the 1980 Convention and there has been no channel through which an application can be made for the return of an abducted child.

I am therefore very pleased to report that there has been a great break through, in that very recently, 10 days ago on 20 June 2017, an arrangement was signed between our Secretary for Justice and the Executive Vice President of the Supreme People's Court of Mainland China, on reciprocal recognition and enforcement of civil judgments in matrimonial and family cases between the two places. The reciprocal enforcement arrangement concerns a wide range of orders, and includes custody and access orders.

Although the arrangement only concerns enforcement of actual custody or access orders made by the courts, it is a step forward for Hong Kong and Mainland China, and it is our hope that with the arrangement and subsequent legislation in place, the unilateral removal of a child by a parent across the

boundary without the consent of the other parent may be reduced. Hopefully, this will also lead to Mainland China reaching a similar arrangement with other jurisdictions and becoming eventually a contracting state to the 1980 Convention.

Incoming Return Applications

So far as incoming return applications under the 1980 Convention from contracting states are concerned, there were only 4 in 2014 , 4 in 2015, and none in 2016. There have been 3 during the first 6 months this year.

In one case, the left behind father is British, and the taking mother is Chinese. The matter was quickly resolved by the taking mother agreeing to a voluntary return to England.

The second case concerned two children child taken from Seoul to Hong Kong by the mother , and the third one concerned a child taken from Australia to Hong Kong, also by the mother. Both these cases were in my view not straightforward cases and I would like to share the facts of these two cases with you, time permitting.

<u>The Korean case (HCMP 409/2017)</u>

In this case, the father is Korean and the mother is a Hong Kong Chinese. The mother took their two children, a 9 year old son a 7 year old daughter, from Seoul to Hong Kong. The mother raised a number of objections to return , including the father's acquiescence under Article 13(1)(a) , the grave risk defence under Article 13(1)(b), and also the children's objection to return under Article 13 (2).

In relation to the grave risk defence, I sought the assistance of the Korean Ministry of Justice through our Central Authority in relation to possible protective measures. The Korean Ministry of Justice was very helpful and came back with answers very quickly. I understand there is no mechanism for a mirror order to be made by the Korean Court or any mechanism to record any undertakings, although the Korean Ministry of Justice stated that any undertakings or interim arrangements could be agreed by the parties and incorporated in a "Notarial Deed" executed by the parties and lodged with

the Korean Court. Unfortunately, there was no co-operation at all between the parties in this case and no agreement could be reached.

As it turned out, ultimately I did not find that the mother had made out a grave risk defence under Article 13(1)(b) and therefore I did not need to consider the issue whether protective measures would be available. However, I found that there was acquiescence on the part of the father, and the mother had also made out a defence of children's objection. I did not in the end order a return.

This was an unusual case in that I found from the evidence the father had anticipated that the mother would take the children to Hong Kong after they left the matrimonial home and disappeared, but took no legal action to prevent the children from leaving Seoul during the one month period when the mother and the children were staying in a temporary shelter in Seoul. He had anticipated the mother would take the children to Hong Kong , as about 2 or 3 years earlier, with the father's consent, the children had in fact moved to Hong Kong to receive their education but later they returned to Seoul when their paternal grandfather became ill and later died. Further prior to the removal, the parties already were discussing a divorce and the mother's intention was all along to return to Hong Kong with the children. The evidence was the father was not really objecting to this arrangement but was only concerned over the mother's application for maintenance in Hong Kong.

Not long after the mother and the children arrived in Hong Kong, the mother started divorce and custody proceedings in Hong Kong and all the papers were properly served on the father. The father did seek legal advice in Seoul, and although he was told to find a lawyer in Hong Kong, he said he did not know how. He simply ignored the Hong Kong proceedings. Later, he issued divorce proceedings in Seoul, but he did not notify the mother of his divorce proceedings in Seoul. The father said he was only advised of the 1980 Convention 6 or 7 months after the removal. Yet, even after when the Hong Kong Central Authority was ready to file the return application, he told the Hong Kong Central Authority to withhold proceedings for two months. No reasons were given.

Throughout the Hong Kong divorce proceedings, the father did not challenge jurisdiction even though he was informed of the date for the hearing of the divorce and the mother's custody application. He only instructed the Hong Kong Central Authority to file the return application one month away from the expiration of the 12 month period. The return proceedings were filed only after the mother had already obtained a custody order in Hong Kong and on the day her divorce was made final by the Hong Kong court.

The father maintained that he did not acquiesce to the removal. I found that his lack of action and silence, as seen from the mother's side, had led the mother to believe that he was not asserting or going to assert his right to summary return. All along, the father had the mother's email address, and her Hong Kong solicitors' address, email and telephone number. The father did not offer any maintenance for the children, notwithstanding he knew the children had all along been supported by him and knew of the mother's Hong Kong bank account. The father did not ask to see the children when he came to Hong Kong for the proceedings. There was simply silence from him, so far as the mother and the children were concerned, for 11 months.

The removal was at about end of March in 2016, and after the summer, the children were enrolled in local primary school/s. They were interviewed by our social welfare officer in May this year . The children had by then settled and objected to return. The father alleged that the children were influenced by the mother, but when I pointed out to the father's lawyers in Hong Kong he could apply to question the social welfare officer, his lawyers informed the court that he did not wish to and that the father wanted no further adjournment.

I think this may be the first case between Hong Kong and Republic of Korea under the 1980 Convention, and I am sorry that I did not in the end order the return of the children.

Australian case (HCMP 455/2017)

In the Australian case, the father is Australian, and the mother is a Hong Kong Chinese and the mother took their son to Hong Kong.

Unlike the Korean case, the father in this case lodged his application for return under the 1980 Convention almost immediately.

The parties have financial problems and the mother complains of the father's violence ,gambling, drinking, taking marijuana/cannabis, and constantly borrowing money from her. The mother objects to return and has raised the grave risk defence under Article 13 (1) (b).

I came to the view that the facts asserted by the mother of the father's behaviour were not of sufficient detail that , if proven, would constitute a grave risk that the return would expose the child to physical or psychological harm, and in any event, there would be adequate and effective protective measures available for the child.

However, the child was only about 15 months old at the time of the removal, and I found that the mother was the primary carer prior to the removal, and has since the removal been the sole carer. The difficulty is that if the child is to return without the mother, he might not see his mother for at least another 3 years. This is because there are a number of obstacles to the mother returning with the child, among which, the main obstacles are:

(i) The father had lodged a complaint to the police that the mother had forged his signature on the application form for the child's passport, and the mother might face criminal prosecution upon return;

(ii) The mother had failed to apply for a spousal visa after the marriage and she was staying in Australia illegally. She later gave herself up and obtained a bridging visa, but because of this, she now faces a visa ban for 3 years, which means the mother will not be able to apply for a valid visa to go to Australia for 3 years.

I indicated to the parties over my concerns in relation to the mother being the primary carer and may not be able to return with the child. The mother fortunately is prepared to return with the child if the obstacles are to be removed. Our Central Authority contacted the Australian Central Authority for assistance over the visa and other issues. Eventually, I made an order

for return provided certain undertakings, terms and conditions are in place, and are part of a mirror order made by the Australian court. These undertakings include the father's undertaking to withdraw the criminal complaint and the mother's undertaking to apply for a visa, and there are also interim financial and living arrangements, which have to be made part of a mirror order. I hope the return can be achieved eventually.

This also concludes my report from Hong Kong and I welcome any questions.

Thank you.

Bebe Pui Ying Chu

Judge of First Instance with special responsibilities for Family Cases

High Court of HKSAR

HKSAR's International Hague Network Judge

HCCH Asia Pacific Week 2017

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SESSION 1.

Japan

Japan's Experience in Implementing the 1980 Hague Convention

Hajime Ueda

Director of Hague Convention Division, Ministry of Foreign Affairs

JAPAN'S EXPERIENCE IN IMPLEMENTING THE 1980 HAGUE CONVENTION

HCCH Asia Pacific Week
Session 1 – Experiences in implementing and operating the Hague Conventions in the Asia Pacific Region

Seoul, 3 July 2017

Hajime Ueda
Director, Hague Convention Division
Ministry of Foreign Affairs
(Central Authority of Japan)

2

1 Japan and the 1980 Hague Convention

- The 1980 Hague Convention came into force 3 years ago, on April 1, 2014 in Japan.

- There were concerns prior to joining the Convention

Isn't the Convention:

- ✓ *incompatible with our tradition and culture?*
- ✓ *harsh if the taking parent was in vulnerable situations? e.g. domestic violence*

3

But now we can say…

- *The Convention is compatible with any culture and tradition, because…*
  - ✓ it only requires that the merit of custody be decided in the country of habitual residence, respecting culture and tradition there.
  - ✓ it does not require a Member State to change its domestic law.
- *Vulnerability is attended, because…*
  - ✓ if the vulnerability is established at the Court as a grave risk for the child under Article 13 Ⅰ (b), the Court will not return the child.
  - ✓ the support provided through Japanese consuls have been expanded to help the vulnerable parents forgo removals and to continue legal processes in the habitual residence.
- *Benefits of joining the 1980 Hague Convention*
  - ✓ prevents possible removal / retention.
  - ✓ enables a rule-based solution by pointing to the legal forum where a cross-border parenting issue should be sorted out.
  - ✓ provides an opportunity for a facilitated amicable solution.
  - ✓ eliminates psychological and legal obstacles for temporary visits from one Member State to another.

4

2 Services of the Japanese Central Authority

- ✓ receives application and decides on assistance;
- ✓ finds – but not disclose – the location of the child;
- ✓ establishes communication with parents in Japan and facilitates the parents' communication and efforts to resolve the issue;
- ✓ provides cost-free out-of-court mediation (ADR)(up to 4 sessions);
- ✓ provides cost-free translation for documentation to the Court;
- ✓ provides lawyer referral and qualifies non-doms for legal aid (loan for legal fees etc.);
- ✓ provides assistance for enforcement as required by the Court;
- ✓ facilitates safe return of the child;
- ✓ provides parent-child visitation/contacts through a support institution (free of charge up to 4 sessions)
- ✓ raises awareness to prevent future wrongful removal & retention.

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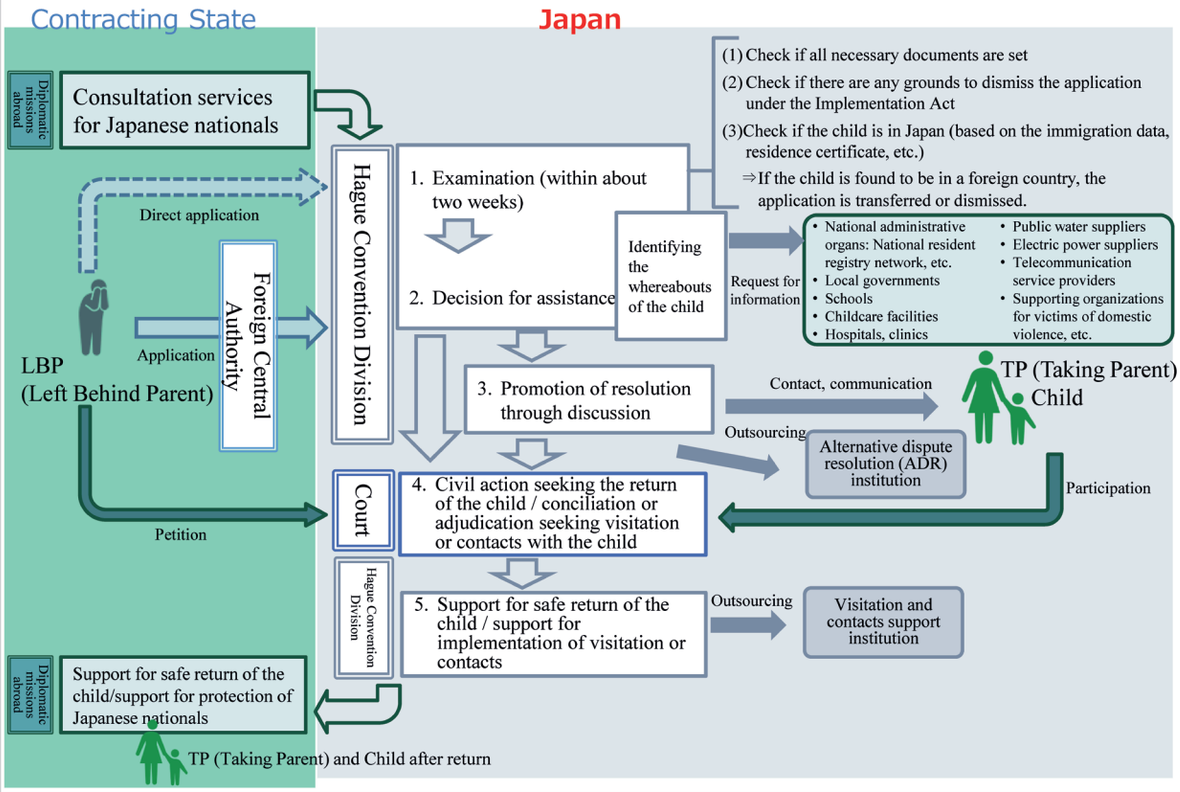
① For incoming cases (cases requested to Japan for return or access)



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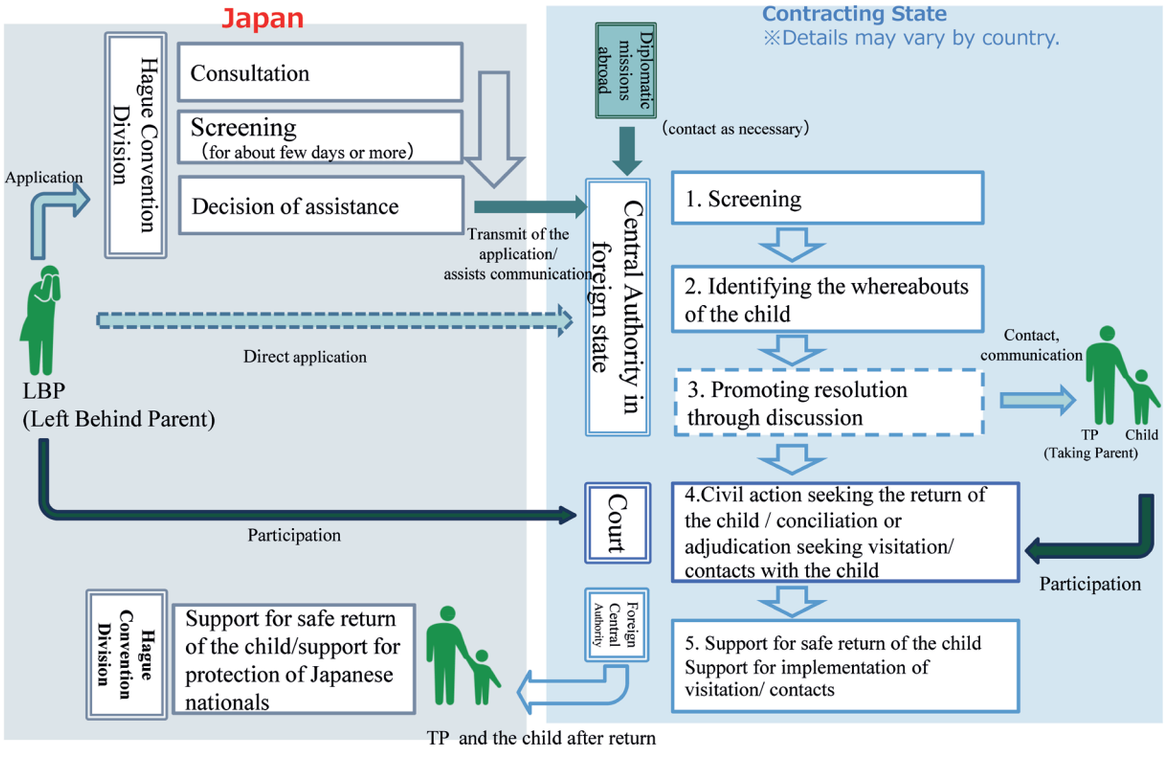
② For outgoing cases (cases requested from Japan for return or access)



3 Applications (figures for the first 3 years and 2 months)

- As of June 1, 2017, 242 applications from 34 states/regions were submitted.
- Preventive effects observed
  - ✓ More consultations with the overseas embassies and consulates

	Assistance in return	Assistance in visitation/ contacts
Applications regarding children in Japan	**71** US 18, France 6, Australia 5, Germany 5, Canada 4, Singapore 2, UK 2 , Russia 2, Hong Kong 2, Italy 1 , Spain 1, Switzerland 1, Belgium 1, Turkey 1, Sri Lanka 1, Korea 1, Fiji 1, Colombia 1, Thailand 1, Mexico 1, Sweden 1, NZ 1, Dismissal 12	**87** US 41, France 6, UK 6, Canada 5, Australia 4, New Zealand 3, Singapore 3, Mexico 2, Costa Rica 1, Germany 1, Italy 1, Thailand 1, Dismissal 13
Applications regarding children abroad	**57** Korea 6, Thailand 6, US 6 , Brazil 5, Russia 4, Germany 3, Philippines 3, Canada 2, France 2, Peru 2, Sweden 2, Belarus 1, Italy 1, Romania 1, South Africa 1, Spain 1, Slovakia 1, Sri Lanka 1, Switzerland 1, UK 1, Dismissal 7	**27** US 5, Canada 3, Russia 3, Germany 2, Korea 2, Thailand 2, Ukraine 2, Australia 1, Fiji 1, Hong Kong 1, Netherlands 1, Poland 1, UK 1, Uruguay 1, Withdrawal 1
Total	**128**	**114**

4 Achievements so far:

① Return Cases

Child's return from Japan: 18 cases

Voluntary: 5 cases (US 2 , France 1, Germany 1, Belgium 1)
ADR-based: 1 case (Canada 1)
In-court mediation-based: 6 cases (Spain 1, France 1, US 1, Fiji 1, Germany 1, Hong Kong 1)
In-court settlement-based: 1 case (Italy 1)
Court ordered: 5 cases (US 2, Sri Lanka 1, Canada 1, Hong Kong 1)

Child's return to Japan: 19 cases

Voluntary: 9 cases (Thailand 3, US 2, Russia 1, Canada 1, Sri Lanka 1, Philippine 1)
Court-ordered: 10 cases (France 2, US 2, Switzerland 1, Spain 1, Germany 1, Brazil 1, Korea 1, Romania 1)

Cases settled not to return the child: 28 cases

	Children removed to Japan	Children removed to foreign state
Agreement	7 cases (Australia 2, US 2, Germany 1, Korea 1, Russia 1)	2 cases (Sweden 1, Thailand 1)
In-court mediation	7 cases (US 3, Germany 1, Switzerland 1, Australia 1, Singapore 1)	–
In-court settlement	1 case (Canada 1)	–
Court order	5 cases (France 2, Turkey 1, Australia 1, US 1)	6 cases (Germany 1, US 1, UK 1, Russia 1, Belarus 1, South Africa 1)

9

② Visitation/Contacts Cases

➡ In many cases, we have facilitated parent-child visitation/contacts.

Assistance in visitation/contacts with the child in Japan (Incoming cases): 74 cases
- -signed written agreements on conditions of visitation/contacts:
  11 cases (US 4, NZ 2, Australia 1, Canada 1, France 1, Italy 1, UK 1)
- -visitation/contacts (face-to-face, online, etc.) achieved without written agreements:
  17 cases(US 11, Singapore 2, UK 2, France 1, NZ 1)

Assistance in visitation / contacts with the child in foreign states (Outgoing cases): 26cases
- -signed written agreements on conditions of visitation/contacts:
  4 cases (Germany 2, Poland 1, Thailand 1)
- -visitation/contacts (face-to-face, online, etc.) achieved without written agreements:
  5 cases (US 2, Australia 1, Thailand 1, Ukraine 1)

➡ **5 visitation/contacts cases have resulted in the return of the child.**

Child's return from Japan: 4 cases (US 2, Canada 1, Singapore 1)
Child's return to Japan: 1 case (US 1)

10

Thank You!

Hague Convention Division
Consular Affairs Bureau
Ministry of Foreign Affairs
hagueconventionjapan@mofa.go.jp
http://www.mofa.go.jp/fp/hr_ha/page22e_000249.html

SESSION 1.

Philippines

The Philippine Intercountry Adoption Law RA 8043

Bernadette Abejo

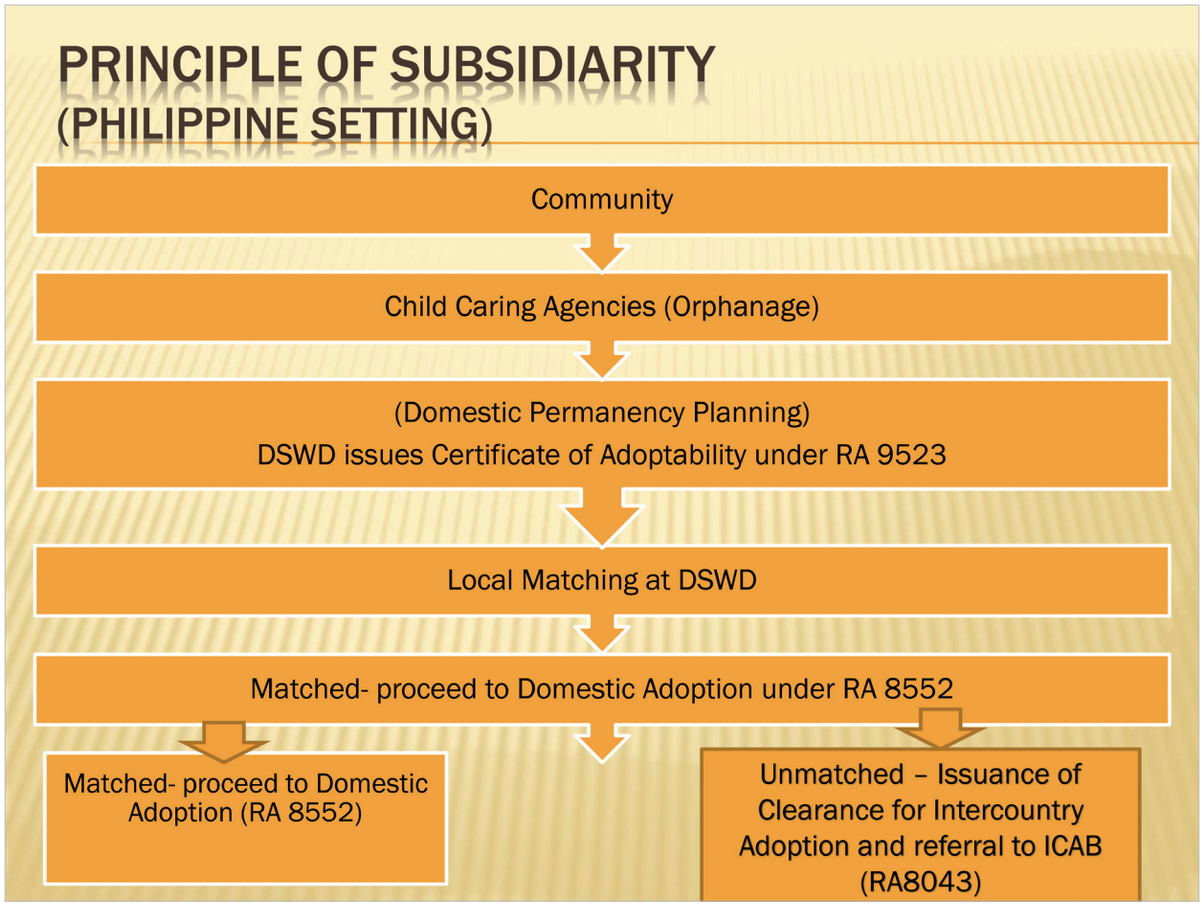
Executive Director of Inter-Country Adoption Board (ICAB)

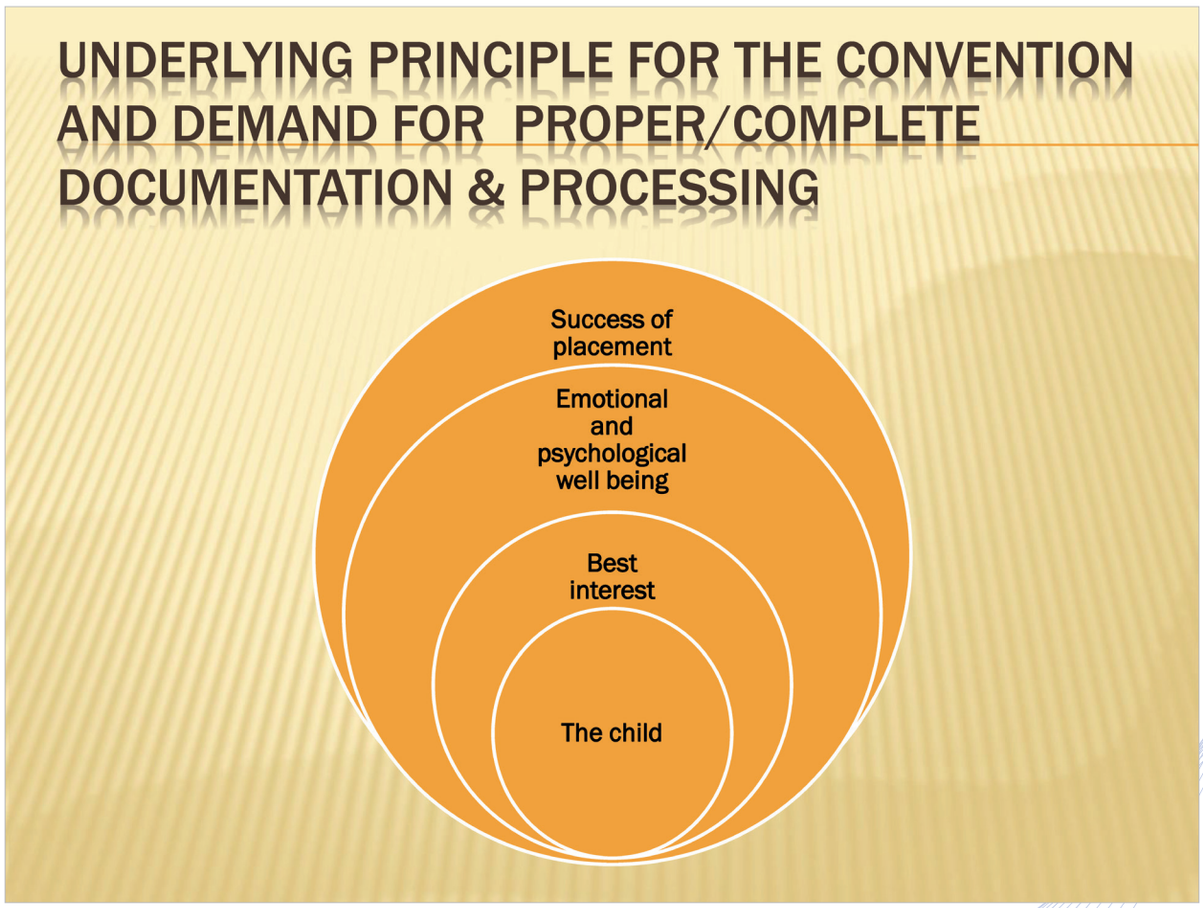
THE PHILIPPINE INTERCOUNTRY ADOPTION LAW RA 8043

BERNADETTE B. ABEJO
FOUR SEASONS HOTEL
SEOUL, KOREA
JULY 3, 2017

EFFECTS OF THE HCCH CONVENTION OF '93

- Set minimum standards for child protection
- Sets a legal framework for co-operation between Central Authorities of State of Origin and receiving states.
- Prevent: abduction, sale, traffic of children, remove abuses in intercountry adoptions
- Ensure the automatic recognition of Convention Adoption in receiving state.


PRINCIPLE OF SUBSIDIARITY
(PHILIPPINE SETTING)
Community
Child Caring Agencies (Orphanage)
(Domestic Permanency Planning)
DSWD issues Certificate of Adoptability under RA 9523
Local Matching at DSWD
Matched- proceed to Domestic Adoption under RA 8552
Matched- proceed to Domestic Adoption (RA 8552)
Unmatched – Issuance of Clearance for Intercountry Adoption and referral to ICAB (RA8043)


UNDERLYING PRINCIPLE FOR THE CONVENTION AND DEMAND FOR PROPER/COMPLETE DOCUMENTATION & PROCESSING
Success of placement
Emotional and psychological well being
Best interest
The child

Composition of the Board

Secretary of the DSWD *Judy M. Taguiwalo* is the *Ex-officio* Chairperson of the ICAB

Psychologist:
Antonia Siy, CEFAM

Social Work Rep:
Rosario de la Rosa, KBF

NGO Representatives:

Ma. Teresa Nuqui (NORFIL)

Katrina Legarda (CPN)

Lawyer:
ASG Eric Remegio Panga

Lawyer:
Atty. Maria Gabriella Concepcion

PROGRAMS FOR WAITING CHILDREN OR SPECIAL NEEDS CHILDREN

Special Needs Children

- with minor to major developmental delays
- handicapped
- has behavioral and/or emotional problems,
- older children (6 years old and above)
- sibling groups of older children
- sexually or physically abused
- with serious illness or global delays

POST ADOPTION

- Cultural Visit
- Request for Information
- Search and Reunion
  - Of legal age as defined by receiving country
  - Emotional maturity
    - Exception: emotional well being

Challenges in inter-country adoption:

- Limited number of children cleared for inter-country adoption as against a large number of adoptive families waiting for a match.
- Lack of information in the description of a child and lack of documents (e.g. significant information are not included in the child's documents).

9

- Circumvention of the inter-country adoption law.
- Pre-identification of unrelated child for adoption
- Pursuing domestic adoption by couples who are temporary residents or former Filipinos with dual citizenship but have habitual residency abroad
- Many other illicit practices which are currently being compiled by the Permanent Bureau for the establishment of a easy tool in the form of a fact sheet / practical examples

10

How the challenges are being addressed:

- Continuous provision of training orientation on inter-country adoption
- Strong coordination with competent authorities on cases of children for inter-country adoption

11

Thank you!

HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul

SESSION 1.

South Korea

Implementation of the HCCH Conventions in the Republic of Korea

Jeongsoo Soh

Prosecutor of the Ministry of Justice

법무부
Ministry of Justice

Implementation of the HCCH Conventions in the Republic of Korea

International Legal Affairs Division, the Ministry of Justice

Public Prosecutor Jeongsoo Soh

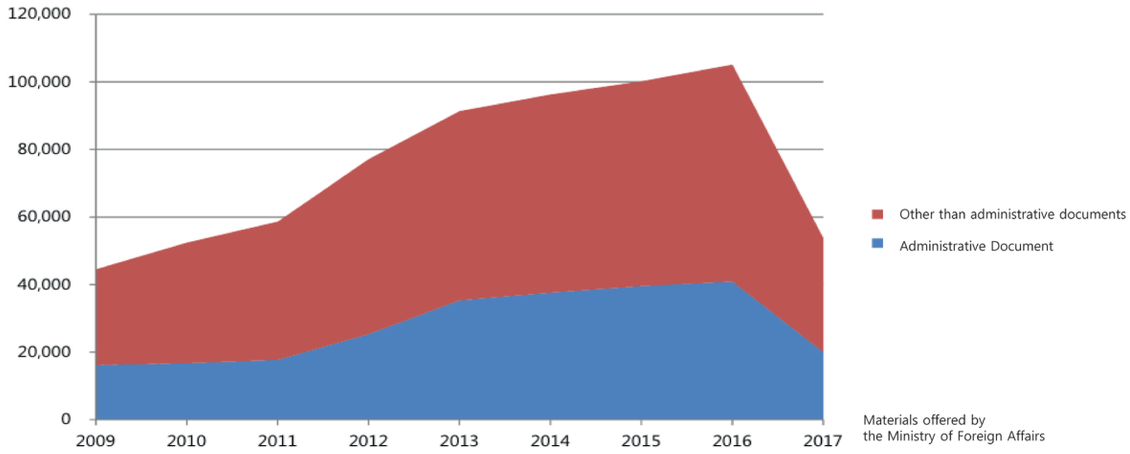
I. HCCH Conventions in the Republic of Korea

- Became 45th member state of the HCCH in 1997
- **Signed 5 Conventions** (4 Conventions have entered into force)

Established	Conventions	Entry into force
'61. 10. 5.	Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents	'07. 7. 14.
'65. 11. 15.	Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	'00. 8. 1.
'70. 3. 18.	Convention on the Taking of Evidence Abroad in Civil of Commercial Matters	'10. 2. 12.
'80. 10. 25.	Convention on the Civil Aspects of International Child Abduction	'13. 3. 1.
'93. 5. 29.	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption	Before Ratification

Ⅱ. Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents

- Authorities : Ministry of Foreign Affairs (Administrative documents)
  Ministry of Justice (Other than administrative documents)
  National Court Administration
- On-line Apostille



Materials offered by the Ministry of Foreign Affairs

Ⅲ. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

- Authority : National Court Administration
- Service through Authorities
  - Incoming Service

  - Outgoing Service

	Outgoing		Incoming	
	Request	Return	Request	Return
Total ('00~'17.6.)	6,063	4,561	8,596	7,945

Materials offered by the National Court Administration

- Other methods and Opposition

IV. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

- Authority : National Court Administration
- Declaration
  - Article 8 'Foreign Judicial personnel can be present at the execution with prior authorization by the National Court Administration'
  - Article 23 No pre-trial discovery
- Reservation
  - Article 4 Korean or English
  - Article 16, 17 No Taking Evidence by a diplomatic official, consular agent or person appointed within the Korean territory

	Outgoing		Incoming	
	Request	Return	Request	Return
Total ('10~'17.6.)	54	38	88	34

Materials offered by the National Court Administration

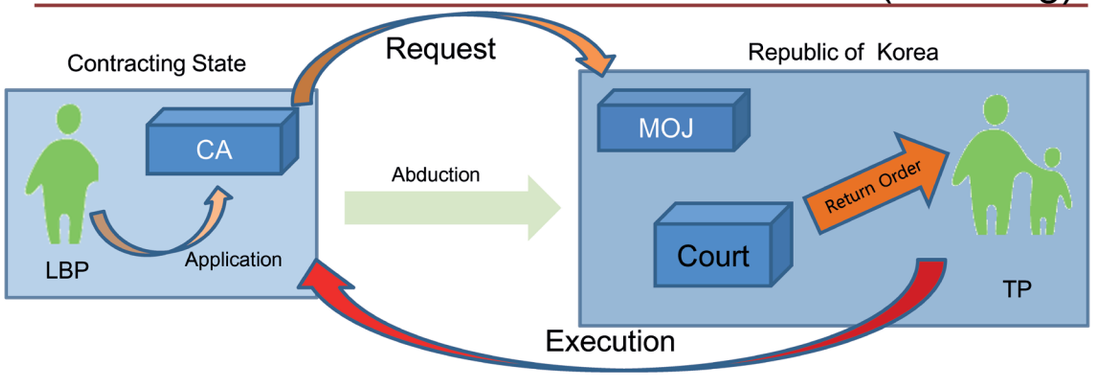
V-1. Convention on the Civil Aspects of International Child Abduction(Overview)

- Signed as the 89th state on December 13, 2012
- Entered into force on March 1st, 2013 (Convention and the Implementation Law)
- Central Authority : Ministry of Justice
- Case Status Table

		Application	Assistance Completed	Ongoing	Non-Acceptance
Return	Incoming	18	8	8	2
	Outgoing	9	5	2	2
Access	Incoming	5	2	3	0
	Outgoing	1	0	1	0
Total		33	15	14	4

- 49 countries accepted (Two more from August 1st One more from September 1st)

V-2. Convention on the Civil Aspects of International Child Abduction(Incoming)



- Request from other CA – If Convention is applicable, Accept!
- Check entry record, Find whereabouts (cooperation with the police, if necessary)
- Recommend voluntary return
- Provide support for LBP to file a suit in Korea Family Court
- Assist execution of return order

V-3. Convention on the Civil Aspects of International Child Abduction(Outgoing etc)

Outgoing case

- Application from LBP – Check if Convention is applicable
- Check departure record, Request to other CA
- Assist translation, preparing evidence, official explanation about legal status

Developing Implementation

- Building up experienced lawyer pool
- Leaflet in 7 language distribution
- http://www.moj.go.kr/HP/ENG/hitech/ica.jsp

법무부
Ministry of Justice

감사합니다

Thank you

SESSION 1.

Vietnam

Vietnamese Efforts in Implementing Hague Convention on the service abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Bui Thi Nhan

Deputy Director of International Cooperation Department,
Supreme People's Court of Vietnam

VIETNAMESE EFFORTS IN IMPLEMENTING HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

By Bui Thi Nhan
Deputy Director of ICD,
Supreme People's Court of Vietnam

The accession into Hague Convention the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters

After many years to study and assess the possibility to join the La Hay Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, on 16/3/2016, Vietnam has officially applied for its membership. On 01/10/2016, Vietnam has become 71th member of the Convention.

Vietnamese declaration (1)

When joining the Convention, Vietnam declared that Vietnam shall not apply service means provided in Article 8 and point b and c of Article 10 for the parties in Vietnam: that are (i) service of judicial documents directly through diplomatic or consular agent in Vietnam to parties in Vietnam, except the parties are citizens of serving country; (ii) serving directly among court officials or other competent persons of the serving state to competent court officials of service judicial documents of Vietnam; (iii) serving by any person interested in civil or commercial cases to court officials of Vietnam or other competent persons of service documents in Vietnam.

Vietnamese declaration (2)

- Vietnam does apply the service means of serving documents by postal channels to parties in Vietnam provided in point a, Article 10 of the Convention if the documents have been sent by secured letter and it must be in Vietnamese or attached a Vietnamese notarized or certified translation. Vietnam has also declared Vietnamese courts may hear the case in case the defendant has not appeared if it has satisfied provisions provided in Paragraph 2 of Article 15 of the Convention.

Vietnamese efforts (1)

- **At national scale**:

In order to implement the Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, Vietnam has incorporated some provisions of the Convention into domestic legislations. Such as:

- Vietnam National Assembly has included some provisions of the Convention into Civil Procedure Code 2015 and Administrative Procedures Law 2015. Particularly, the National Assembly has incorporated provisions on services of documents through official channel of the Convention, services of documents through postal channel to abroad parties, through Vietnamese overseas diplomatic and consular channels; provision on hearing the case without defendant' s appearance and ensuring right to appeal of the defendant in case the defendant has not appeared;

- Vietnam Prime Minister promulgated the Plan to implement La hay Convention 1965 on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, nationally;

Vietnamese efforts (2)

- **At national scale**:

- Decision No 2312/QĐ-TTg on 29 November 11, 2016 of Prime Minister approving the Plane for Implementation of La Hay Convention 1965 on service abroad of judicial and extrajudicial documents in Civil or Commercial Matters of Vietnam.

- the Ministry of Justice and the Supreme People's Court pay particular attention to the training, retraining and capacity building for officials directly involved in the implementation of the Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters (To collaborate with training provisions of the Civil Procedure Code 2015 and the Civil Code 2015); Actively prepare human resources and software upgrades to ensure good service of the process of serving the documents under the new process of serving the convention

Vietnamese efforts (3)

- **Court efforts**:

- Based on Government Plan, Chief Justice of the Supreme People's Court issued the La Hay Implementation Plan for entire court system. Decision No 25/QĐ-TANDTC on 9/3/2017 of Chief Justice of the Supreme People's Court of Vietnam approving the Plane for Implementation of La Hay Convention 1965 on service abroad of judicial and extrajudicial documents in Civil or Commercial Matters in court system.

Based on the Plan, the following activities will be conducted:

- To issue guidance on the implementation of the Convention in the system;

- To increase awareness of the court officials on the Convention and its roles in serving abroad judicial and extrajudicial documents;

Vietnamese efforts (4)

- **Court efforts**:

- To conduct training courses, seminars in order to strengthen capacity of court officials in understanding and carrying out service abroad of judicial and extrajudicial documents in Civil or Commercial Matters.

- Supreme People's Court of Vietnam in collaboration with Ministry of Justice, Ministry of Foreign Affairs, issued a joint circular guiding the process of serving documents through official serving channels provided in the Convention; (issued Joint Circular No 12/2016/TTLT-BTP-BNG-TANDTC on 19/10/2016 of Ministry of Justice, Ministry of Foreign Affairs and Supreme People's Court)

Vietnamese efforts (4)

- **Court efforts**:

- To conduct training activities to improve the capacity of staff have been implemented by Supreme People's Court through in-country seminars and trainings, and dispatched staff to participate in international conferences and forums by the Hague Conference.

- The Supreme People's Court, in collaboration with Ministry of Foreign Affair, in 2017, will issue a joint Circular guiding the implementation of serving documents through Vietnam diplomatic and consular agents in foreign states.

Thank you for your attention

VIETNAMESE EFFORTS IN IMPLEMENTING HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

By Bui Thi Nhan

Deputy Director of ICD,

Supreme People's Court of Vietnam

After many years to study and assess the possibility to join the La Hay Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, on 16/3/2016, Vietnam has officially applied for its membership. On 01/10/2016, Vietnam has become 71th member of the Convention. When joining the Convention, Vietnam declared that Vietnam shall not apply service means provided in Article 8 and point b and c of Article 10 for the parties in Vietnam: that are (i) service of judicial documents directly through diplomatic or consular agent in Vietnam to parties in Vietnam, except the parties are citizens of serving country; (ii) serving directly among court officials or other competent persons of the serving state to competent court officials of service judicial documents of Vietnam; (iii) serving by any person interested in civil or commercial cases to court officials of Vietnam or other competent persons of service documents in Vietnam.

At the same time, Vietnam has also declared that Vietnam does apply the service means of serving documents by postal channels to parties in Vietnam provided in point a, Article 10 of the Convention if the documents have been sent by secured letter and it must be in Vietnamese or attached a Vietnamese notarized or certified translation. Vietnam has also declared Vietnamese courts may hear the case in case the defendant has not appeared if it has satisfied provisions provided in Paragraph 2 of Article 15 of the Convention.[1]

In order to implement the Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, Vietnam has

[1] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1337&disp=resdn.

incorporated some provisions of the Convention into domestic legislations. Such as:

- Vietnam National Assembly has included some provisions of the Convention into Civil Procedure Code 2015 and Administrative Procedures Law 2015. Particularly, the National Assembly has incorporated provisions on services of documents through official channel of the Convention, services of documents through postal channel to abroad parties, through Vietnamese overseas diplomatic and consular channels; provision on hearing the case without defendant's appearance and ensuring right to appeal of the defendant in case the defendant has not appeared;[2]

- Vietnam Prime Minister promulgated the Plan to implement La hay Convention 1965 on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters, nationally;[3]

- Based on Government Plan, Chief Justice of the Supreme People's Court issued the La Hay Implementation Plan for entire court system.[4] Based on the Plan, the following activities will be conducted:

- To issue guidance on the implementation of the Convention in the system;

- To increase awareness of the court officials on the Convention and its roles in serving abroad judicial and extrajudicial documents;

- To conduct training courses, seminars in order to strengthen capacity of court officials in understanding and carrying out service abroad of judicial and extrajudicial documents in Civil or Commercial Matters.

- Supreme People's Court of Vietnam in collaboration with Ministry of Justice, Ministry of Foreign Affairs, issued a joint circular guiding the process of serving documents through official serving channels provided in the Convention;[5]

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[2] Article 474 and Article 477 of the Civil Procedure Code 2015 and Article 303, Article 305 of the Administrative procedure Law 2015.
[3] Decision No 2312/QĐ-TTg on 29 November 11, 2016 of Prime Minister approving the Plane for Implementation of La Hay Convention 1965 on service abroad of judicial and extrajudicial documents in Civil or Commercial Matters of Vietnam.
[4] Decision No 25/QĐ-TANDTC on 9/3/2017 of Chief Justice of the Supreme People's Court of Vietnam approving the Plane for Implementation of La Hay Convention 1965 on service abroad of judicial and extrajudicial documents in Civil or Commercial Matters in court system.
[5] Joint Circular No 12/2016/TTLT-BTP-BNG-TANDTC on 19/10/2016 of Ministry of Justice, Ministry of Foreign Affairs and Supreme People's Court.

- To conduct training activities to improve the capacity of staff have been implemented by Supreme People's Court through in-country seminars and trainings, and dispatched staff to participate in international conferences and forums by the Hague Conference.

- The Supreme People's Court, in collaboration with Ministry of Foreign Affair, in 2017, will issue a joint Circular guiding the implementation of serving documents through Vietnam diplomatic and consular agents in foreign states.

- In addition, the Ministry of Justice and the Supreme People's Court pay particular attention to the training, retraining and capacity building for officials directly involved in the implementation of the Convention on the service abroad of judicial and extrajudicial documents in Civil or Commercial Matters (To collaborate with training provisions of the Civil Procedure Code 2015 and the Civil Code 2015); Actively prepare human resources and software upgrades to ensure good service of the process of serving the documents under the new process of serving the convention.

Thank you for your attention./.

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HCCH Asia Pacific Week 2017

SESSION 2.

Child Abduction

Moderator

Chul-Won Lee
Attorney at Kim & Chang (Korea)

Presenter

Victoria Bennett
Judge of Family Court of Australia (Melbourne Registry)

Panelist

Minhui Gwak
Associate Professor at Sookmyung Women's University (Korea)

Hajime Ueda
Director of Hague Convention Division, Ministry of Foreign Affairs (Japan)

Mary Sheffield
Chief Judge of the Missouri Court of Appeals (USA)

Sunmi Lee
Judge of Seoul Central District Court (Korea)

Moderator

Chul-Won Lee

Attorney at Kim & Chang (Korea)

Education

- LLM, Faculty of Law, University College London
- Master of Law, College of Law, Seoul National University
- Graduate Judicial Research and Training Institute
- Bachelor of Law, College of Law, Seoul National University

Work Experience

- Lawyer, Kim & Chang
- Director of International Affairs, Korea Private International Law Association
- Arbitrator, Korea Commercial Arbitration Board
- Judge, Seoul Southern District Court
- Judge, Seoul Central District Court

Published Books

- A Guide to International Arbitration for Korean Companies (in Korean), Revised Edition (Co-author, Ministry of Justice of Republic of Korea, 2014.12.)
- Transnational Litigation (A Practioner's Guide, Co-Author, Oceana Publications, Inc., 2014)
- Review of English Case Laws on SAJ Shipbuilding Contract Form, The Journal of Korea Maritime Law Association Vol. 35, No. 1 (Korea Maritime Law Association, 2013.4.)
- Inherent Vice of Nature of the Subject Matter Insured under Marine Cargo Insurance, Business Finance Law, No. 56 (Center for Financial Law, Seoul National University, 2012.11.)
- Lis Pendens Rule under EU Regulation and Its Implication upon Korean Law, The Journal of Korea Maritime Law Association, Volume 34, No. 2 (Korea Maritime Law Association, 2012.11.)
- The Treatment of Fraudulent Insurance Claim under English Law, Korean Insurance Law Journal Vol. 6, No. 1 (Korean Insurance Law Association, 2012.6.)

Presenter

Victoria Bennett

Judge of Family Court of Australia (Melbourne Registry)

The Honourable Justice Victoria Bennett was appointed to the Family Court of Australia, in Melbourne, in November 2005. She is the senior judge in the Melbourne Registry.

Her Honour's first judicial appointment was in 2004 as a Federal Magistrate sitting across all areas of that court's wide jurisdiction. Prior to her Honour's judicial appointments, she was a member of the Victorian Bar for 17 years. In 2015 her Honour accepted a five year appointment as a Presidential Member of the Administrative Appeals Tribunal.

Justice Bennett represents the court on the cross-jurisdictional committee on family violence convened by the Chief Justice of the Supreme Court of Victoria, the taskforce on family violence convened by the Chief Magistrate of Victoria and on the judicial indigenous cultural awareness committee convened by the Supreme Court and the Judicial College of Victoria.

Her Honour has had many years of experience in transnational family law with a particular interest is the 1980 and 1996 Hague Conventions. She regularly lectures on both Conventions domestically and internationally. Since 2008 Justice Bennett, together with our Chief Justice, has been designated as a judge of the International Hague Judicial Network for Australia.

Panelist

Minhui Gwak

Associate Professor at Sookmyung Women's University (Korea)

Education

- Doctor of Laws(ABD), Tokyo University, Tokyo, JAPAN (2016)
- Doctor of Laws, Seoul National University, Seoul, KOREA (2010)

Work Experience

- Professor, College of Law, Sookmyung Women's University in Seoul, KOREA (2012-Present)
- Member of Immigration Policy Committee, Ministry of Justice (2013-Present)
- Finance Director, Korean Society of Family Law (2014-Present)
- Guest Researcher, Tohoku University Global COE Program, Tohoku, JAPAN (2010-2012)

Published Books

- Immigration Law, Korea Immigration Service Foundation, Pakyoungsa(2016)
- Best Interest of Child in International Family Law, The Legal Studies Institute of Chosun University(2016.08)
- Incorporating a "Best Interests of The Child" Approach into Korean Immigration Law and Procedure, Chunpa Law Review(2016.02)
- An Analysis of the Child Abduction Cases on International Child Abduction Database(INCADAT), The Journal of Legal Stuidies of Gyeonsang National Univserity(2016.01)
- International Parental Child Abduction by Marriage Migrant Women and Application of the Hague Convention on the Civil Aspects of International Child Abduction, Gachon Law Review(2015.12)
- Korean Enforcement Law and Japanese Enforcement Law of the Hague Convention on the Civil Aspects of International Child Abduction, Korean Journal of Family Law(2014.07)
- "Grave Risks", Exceptions to return provide for under Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction and the Best Interests of Child, The Korean Journal of Civil Law(2014.06)
- Visitation rights of grandparents for grandchildren in French Law, The Korean Journal of Civil Law(2013.11)
- The evaluation of Korean Legislation for implementation of the Hague international Child Abduction Convention, Journal of Legislative Evaluation(2013.10)
- Le titularité et l'exercice de l'autorité parentale dans le droit français, The Korean Journal of Family Law(2012.11)
- Le statut du conjoint survivant dans le droit français de la succession, The Korean Journal of Civil Law(2012.06)
- Adult guardianship system in France and self-determination supporting system, Chungan Law Review(2012.04)
- The Hague International Child Abduction Convention and the EU Legislations-Brussels II bis and Rome III Proposal-. The Korean Journal of Family Law(2011. 07)

Awards

- Best Paper Awards(2012), The Korean Society of Family Law

- The Hague International Child Abduction Convention and the EU Legislations-Brussels II bis and Rome III Proposal-. The Korean Journal of Family Law(2011. 07)

Panelist

Hajime Ueda

Director of Hague Convention Divison, Ministry of Foreign Affairs (Japan)

Education

- BA in Law, Sophia University, Japan
- BA in History, Carleton College, USA

Work Experience

He joined the Ministry of Foreign Affairs of Japan (MOFA) in 1995 and has served in the Philippines, the United States (Permanent Mission of Japan to the United Nations, New York) and Iran. He has been the Director of Hague Convention Division since August 2016.

Panelist

Mary Sheffield

Chief Judge of the Missouri Court of Appeals (USA)

Education

She received her Doctor of Jurisprudence (JD) from the University of Miami Law School in Coral Gables, Florida, and received her Bachelor of Arts (BA) from North Carolina State University at Raleigh, North Carolina. She studied abroad at Magdalen College in Oxford, England.

Work Experience

- Law Clerk – Law Firm of Knecht and Holland, Coral Gables, FL, April 1979 – June 1980
- Gene Gulinson Law Offices – Salem, MO, September 1980 – June 1982.
- Mary W. Sheffield Law Offices, July 1982 – January 1983.
  Elected Associate Circuit Judge and Probate Judge, Division 1, Phelps County, Missouri in January 1983. Re-elected for six consecutive terms.
- Elected Circuit Judge of the 25th Judicial Circuit, Missouri, November 2004. December 2004 - January 2012. Served two terms as presiding judge.
- Appointed to the Missouri Court of Appeals, Southern District in 2012. Currently serves as Chief Judge.
- Appointed to serve as one of four U.S. Hague International Liaison Network Judges for the Hague Convention on Child Abduction, 2003 – present.

Published Books

- Served on the Commission on National Probate Court Standards under a grant from the State Justice Institute, the National College of Probate Judges, and the Center for State Courts which resulted in the 1993 publication of the National Probate Court Standards.
- In 1994, presented an article entitled Missouri Probate and Trust Procedure Against the Backdrop of the National Probate Court Standards to the Sixth Annual William K Fratcher Trusts and Estates Symposium.
- In 1994 was joint presenter at the National College of Probate Judges Fall Conference, titled Mock Trial on Guardianships.
- Presented at the National College of Probate Judges Spring Conference, 1995, in Newport, Rhode Island on Supervision of Guardianships.
- Presentation to Advanced Elder Law Institute for the National Academy of Elder Law Attorneys in Colorado Springs, Colorado in 2000, co-prepared and presented Appellate Argument on Order Denying Petition for Distribution of Ward's Funds to Implement Medicare Planning.
- At the 2001 American Bar Assoc. meeting in Chicago IL, presented Eccentric, Independent, or Incompetent? Litigating Mental Capacity Cases under the Section of Individual Rights and Responsibilities.
- Panel presenter on How Would You Handle This? Open Discussion with Panel and Membership on Current Issues and Ethics in 2001 at the National College of Probate Judges Fall Conference and again in 2002 at the NCPJ Spring Conference.
- In August 2009, as a Hague Convention Liaison Judge of the U.S. at the Common Law/Commonwealth International Family Justice

Judicial Conference in Windsor, England, presented The State of International Family Law Issues: A View from the United States.

- In 2009 presented United States Implementation of 2007 Hague Child Support Treaty to the International Family Justice Conference in Cumberland Lodge, England.
- The State of International Family Law issues: An Updated View from the United States, presented June 2012 at the University of Iowa College of Law.
- International Hague Network of Judges, the American Experience of Liaison Judges in Hague Parental Abduction Cases, presented in 2012 at Hong Kong International Family Justice Judicial Conference.
- Hague Convention on International Child Abduction, presented 2005 at the Missouri Judicial College
- May 2014 Presented International Hague Judicial Network of the United States in Arusha, Tanzania
- In 2015 presented Report of the U.S. International Liaison Network Judges for the Hague Convention on the Civil Aspects of International Child Abduction, in Hong Kong and in Australia
- Presented The American Experience with Judicial Communications in the International Hague Network of Judges in Switzerland, Slovakia, Trinidad and Tobago.
- Presented Misunderstandings and Miscommunications and Empirical Examination of Problems Arising under the Hague Convention on the Civil Aspects of Child Abduction at the World Congress in Dublin Ireland in 2017

Awards

- Selected and honored in Washington, D.C. as one of the Ten Outstanding Young Women in America. In 1986.
- One of 32 state leaders from across the USA selected for the Henry Toll Fellowship Program in 1991.
- One of 35 women selected to participate in the Leadership American Program in 1992.
- Woman of Distinction Award from the United States Girl Scouts of America in 1993.
- Good Life Woman of the Year Award for establishing the CASA program in the 25th Judicial Circuit in 1995.
- Optimist 2000 Bramlett-Light Award for establishing the Phelps County Teen Court in 2000.
- Received the first Chief Justice's Award for Outstanding Service to the Judiciary in 2002.
- Received the Athena Award in 2004 from the Rolla Area Chamber of Commerce, which annually recognizes an accomplished community woman who has worked to improve the quality of life in Rolla, MO.
- Received the CASA Hope Award in 2011.
- Received the Missouri Lawyers Weekly; 14th Annual Women's Justice Award for Public Service in 2012.

Panelist

Sunmi Lee

Judge of Seoul Central District Court (Korea)

Education

- Mar. 2001 – Aug. 2010 Master of Law, Department of Civil Law, Seoul National University School of Law
- Mar. 1997 – Feb. 2001 Bachelor of Law, Seoul National University College of Law

Work Experience

- Feb. 2017 - Judge, Seoul Central Dirstict Court
- Feb. 2009 – Feb. 2017 Judge, Seoul Family Court
- Feb. 2007 – Feb. 2009 Judge, Seoul Central District Court
- Feb. 2005 – Feb. 2007 Apprentice Judge, Incheon District Court

Published Books

- 'Suggestions for Improvement of Family Law Mediation', The Korean Society of Family Law, Nov. 2016
- 'Analysis of the 2014 Seoul Family Court cases on Division of Property', The Korean Society of Family Law, Jul. 2015
- 'A Study on the Contributory Portion of Spouses at the Division of Succession', Family Court 50th anniversary Dissertation, Seoul Family Court, Sep. 2013
- 'Petition for Divorce Filed by the party who is to blame for the destroying of the matrimonial union – focusing on the present situation and future legislation– ' master's thesis, Seoul National University, Aug. 2010

SESSION 2.

Presentation

Framework and Operation of the 1980 Convention including Interaction with the 1996 Convention

Victoria Bennett

Judge of Family Court of Australia (Melbourne Registry)

HCCH Asia Pacific Law Week Conference 2017

FRAMEWORK AND OPERATION OF THE 1980 CONVENTION INCLUDING INTEREACTION WITH THE 1996 CONVENTION

The Honourable Justice Bennett[1]
International Hague Network Judge
Family Court of Australia, Melbourne, Australia[2]

Seoul, July 2017

TABLE OF CONTENTS

[1] I wish to express my gratitude to Ms Jess (Hee Sung) Shin, Asian Law Centre (Korea and Japan Program), Melbourne Law School, University of Melbourne and currently in my chambers for her assistance in preparing this paper, for which we have drawn on earlier papers of mine.

[2] The views of this paper are my own views; they do not represent the views of the Family Court of Australia or other judges. These views do not indicate how I would decide a case after having the benefit of the argument.

I INTRODUCTION

1. My power point presentation at the second session of this conference in HCCH Asia- Pacific Law Week will provide an overview of the 1980 Convention.[3] However, this paper is intended to provide a more extensive discussion on the practical application of the 1980 Convention and the context in which it operates. That is, in conjunction with the 1996 Convention,[4] mediation and the International Hague Network of Judges. This paper focuses on international parental child abduction but I will deal briefly with access cases under the 1980 Convention.

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[3] Full title of which is *The Convention on the Civil Aspects of International Child Abduction,* opened for signature 25 October 1980 (entered into force 1 December 1983) ("1980 Convention").
[4] Full title of which is *The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, opened for signature 19 October 1996 (entered into force 1 January 2002) ("1996 Convention").

II THE 1980 CONVENTION: INTERNATIONAL PARENTAL CHILD ABDUCTION

A *International parental child abduction under the 1980 Convention*

2. The 1980 Convention is a forum selection treaty between Contracting States, of which there are currently 97.[5] A status table of state parties called "Contracting States" is maintained by The Permanent Bureau of the Hague Conference on its website. The 1980 Convention obliges the courts of the country to which a child has been taken to return the child promptly to the state of habitual residence in all but exceptional cases.

3. The interpretation of the 1980 Convention by courts can include reference to supplementary materials including its Explanatory Report which was prepared by Professor Pérez-Vera[6] because of the general and supplementary rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties to which Australia is a party,[7] in particular, Articles 31 and 32 of the Vienna Convention which are set out at Annexure A.

B *Central Authorities*

4. A central cohesive element of the operation of the 1980 Convention is the **Central Authority**. Central Authorities are concerned with the day to day operation of the 1980 Convention. The Central Authority's principal function is to accept and process individual applications and to find and secure the safety and location of children pending return. A country is required to designate the body which will be its Central Authority before it can become a contracting state. The role of the Central Authority is to co-operate with other Central Authorities.

5. The tasks and responsibilities of the Central Authority are set out in Article 7 and include:-

   a) to discover the whereabouts of a child who has been wrongfully removed or retained;

   b) to prevent further harm to the child or prejudice to interested parties by taking provisional measures or causing such measures to be taken;

   c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

   d) to exchange, where desirable, information relating to the social background of the child;

   e) to provide information of a general character as to the law of their state in connection with the application of the Convention;

   f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, to make arrangements for organising or securing the effective exercise of rights of access;

   g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

   h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

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[5] HCCH, *28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (December 2016) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.
[6] http://www.hcch.net/index_en.php?act=publications.details&pid=2779&dtid=3.
[7] Australia acceded to the 1969 Vienna Convention on the Law of Treaties on 13 June 1974 and it entered into force in Australia on 27 January 1980. The Vienna Convention entered into force in South Korea on 27 May 1992.

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

6. Unfortunately, some contracting states have treated the provisions of Article 7 as aspirational rather than obligatory. One or two states did not constitute a Central Authority or have set up a Central Authority with insufficient powers, autonomy or resources with the effect that the designated tasks are not performed. Where there is no Central Authority or no properly functioning Central Authority, the 1980 Convention does not operate in any practical way.

7. The rapid return mechanism does not apply to all children who are removed or retained across the international borders of contracting states. It is available only where the removal or retention is "wrongful within the meaning of Article 3" of the 1980 Convention. The rapid return remedy does not apply to "access" cases under the 1980 Convention which I will discuss later.

C *Wrongful retention*

8. The rapid return mechanism does not apply to all children who are removed or retained across the international borders of contracting states. It is available only where the removal or retention is "wrongful within the meaning of Article 3" of the 1980 Convention. The rapid return remedy does not apply to "access" cases under the 1980 Convention which I will discuss later.

9. The pre-requisites for a removal or retention to be "wrongful" are:

a) the Convention must have entered into force between the states at the time of the removal or retention (Article 35); South Korea acceded to the 1980 Convention on 1 March 2013. Australia accepted Korea's accession on 18 March 2015 and the Convention entered into force between Australia and Korea on 1 June 2015.

b) the child must be under the age of 16 years at the point of return (Article 3);

c) the child must have been habitually resident in a contracting state immediately prior to the removal or retention (Article 4). I will return to the concept of "habitual residence" later in this paper under a discussion of fundamental concepts;

d) the removal or retention must be in breach of rights of custody under the law of the state of habitual residence (Article 3(a)). Rights of custody are defined in Article 5(a) as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". The rights of custody need not necessarily accrue to the applicant for return. They might repose in a court which has been held to be the case in wardship proceedings;[8] I will return to the "rights of custody" later in this paper under a discussion of fundamental concepts;

e) the rights of custody must have been actually exercised, either jointly or alone, at the time of the removal or retention or would have been so exercised but for the removal or the retention (Article 3(b)). Actual exercise of rights of custody has more significance is Europe, where guidance suggests that rights do have to be actively exercised.[9] In Australia, we consider that rights of

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[8] *Re H (Abduction: Rights of Custody)* [2000] 1 FLR 201; *Re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, [2000] 1 FLR 374, HL.

[9] *Re H; Re S (Abduction: Custody Rights)* [1991] 2 AC 476, [1991] 2 FLR 262; *W v W (Child Abduction: Acquiescence)* [1993] 2 FLR 211; *Re W (Abduction: Procedure)* [1995] 1 FLR 878; *Director General, Department of Community Services Central Authority & Crowe & Crowe* (1996) FLC 92-717; *Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] Fam 224 sub nom *Re F (Child Abduction: Risk if Returned)* [1995] 2 FLR 31.

custody can be exercised passively, including amounting to no more than holding *ne exeat* rights (the right to veto the removal of a child from the country).

10. "Wrongful" removal or retention does not mean an "illegal" removal or retention. The 1980 Convention does not create crimes. The imposition of legal sanctions around the wrongful removal and retention of a child is a matter for each contracting state both in the sense of whether the act is criminalised and what implications will flow to a taking parent on return. It is rare that an applicant for return can provide a taking parent with ironclad protection against prosecution. However, carefully thought out conditions to return, mediation and orders which enforceable in the state to which the child is returned can go a long way to providing sufficient comfort to a taking parent so that the risk of criminal sanctions will not impede the rapid return remedy.

D *Mandatory return*

11. If return proceedings are commenced within a year of the removal or retention, the return of a child to his/her state of habitual residence is mandatory unless the respondent establishes one of the five exceptions to return (set out in Articles 13 and 20). These are frequently referred to as "defences" or "exceptions to return".

E *Exceptions to mandatory return*

12. The exceptions to return are:

- where the person seeking return was not exercising rights of custody (Article 13(a)). I will discuss the concept of "rights of custody" later in this paper (see [45] to [56]); Here, the emphasis is on 'exercising' the rights. In Australia, we accept passive exercise whereas in Europe, I gather, the focus can be in the quality of the actual relationship and a parent who is demonstrated to have abandoned the relationship of carer parent would engage Article 13(a).
- where the person seeking return consented or subsequently acquiesced in the removal or retention (Article 13(a)); Consent and acquiescence must be clear, informed, unambiguous and unequivocal. It cannot be inferred lightly. It must be a permanent retention or removal. It must be based on fraud or a misunderstanding or a desire to resolve difference.
- where there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13(b)); It is the risk rather than the harm which must be eventually described as "grave." The situation must equate to an intolerable situation.
- where the child objects to being returned to the country of habitual residence and has attained an age and degree of maturity at which it is appropriate to take account of the child's views (Article 13); Note, this is an objection to return to the state of habitual residence and not necessarily a return to the requesting parent.
- where the return would not be permitted by the fundamental principles of the state in which the child is present relating to the protection of human rights and fundamental freedoms (Article 20).

Of these exceptions, the grave risk of harm (Article 13(b)) is the most litigated exception and protection of fundamental freedoms is the least litigated.

13. Where return is sought in respect of more than one child, any exception must be demonstrated in relation to each individual child. Also consider that one exception may give rise to another exception.

For example, if an older sibling was found to object to return (within the meaning of Article 13) and the return is refused, the court may consider that it would be intolerable (within the meaning of Article 13(b)) for a younger sibling to be separated from his or her older sibling.

14. The circumstances which give rise to grave risk of harm include, but are certainly not limited to, domestic violence or no access by the returning parent to courts in the home state; where the taking parent (usually the mother) will be separated from the child or will be unable to care for the child upon return *and* has been the child's primary carer; and separation of siblings. The Permanent Bureau of The Hague Conference is currently working on a Guide to Good Practice for Article 13(b). It should be published in 2018. I commend it to you, in advance.

15. Each of the five exceptions to return could be the topic of an entire lecture. I refer you to good texts in which they are discussed including International Movement of Children 2nd Edition and a free online publication of The Law Council of Australia. Details of these publications are included in the recommended reading annexed to this paper.

16. If the return proceedings are instituted within a year of the wrongful return or retention and no exception applies, the court must "order the return of the child forthwith" (Articles 13 and 20).

F *Exercise of discretion to refuse return*

17. If an exception to return applies, the court has discretion to refuse return (Articles 13 and 20). Generally speaking, once an exception to return has been made out, common law states concern themselves more how the discretion to refuse return is to be exercise than civil law states. My impression is that, absent the operation of Brussels II *bis*, civil law states are more inclined to refuse return if an exception is made out.

18. The 1980 Convention is silent on the factors to be considered when exercising discretion to refuse return. However, the welfare of the particular child can, and should, be taken into account and inform the exercise of the discretion to refuse return as should the public policy considerations behind the Convention. Whether or not the domestic laws of the requesting state contemplate and have the potential to permit relocation of the child internationally will inform the exercise of discretion. Also, whether the child will necessarily be separated from the taking parent by reason of the taking parent being incarcerated; and/or whether the taking parent will receive a fair hearing of any application for parenting arrangements; and whether the best interests of the child will be a consideration for the courts in the state of habitual residence in determination of any parenting dispute. *TB v JB (Abduction; Grave risk of harm)* [2000] EWCA Civ 337 is an English decision which discusses factors to be considered after the exception of acquiescence had been established. The exercise of discretion to refuse return where an exception is made out under Article 13(b) can be found in *Re D (Abduction; Right of Custody)* [2006] UKHL 51.

G *Return proceedings after more than one year*

19. Where return proceedings are commenced more than one year after the wrongful retention or removal, the child must be returned unless it is demonstrated that the child "is now settled in its new environment" (Article 12). There is a divergence of judicial opinion on the consequences of a finding that a child has become settled. I hold the view that once a child is found settled in the context of Article 12, the 1980 Convention ceases to operate. This is consistent with the 1980 Convention as a "hot pursuit" remedy and that the return of a child to his or her habitual residence without an

examination of that child's best interests is only justifiable if done promptly. The alternative view, prevailing in the United Kingdom, New Zealand, Canada and Ireland, is that the court retains discretion to return a child who is "settled".

20. If a child, in respect of whom an application is made more than a year after the wrongful removal or retention, is not found to be settled within the context of Article 12, the child must be returned. However, there is no requirement that the return be "forthwith".

H *Prerequisites to relief and the onus of proving the prerequisites*

21. Before any consideration need be given to exceptions to return, the applicant bears the onus of establishing the jurisdictional facts[10] or prerequisites under Article 3 of the 1980 Convention. They are that the child was habitually resident in the requesting state at the time of the removal or retention, and that the removal or retention was in breach of rights of custody. Additionally the child must be less than 16 years old (Article 4).

22. Article 30 provides that documents submitted by a Central Authority will be admissible in evidence. This does not mean that the contentions of fact or law stated in those documents cannot be disproved, it merely overcomes an initial problem with hearsay. In Australia, pursuant to s 140 of the *Evidence Act 1995* (Cth), the standard of proof is to a balance of probabilities. In simple terms, that means that it is more likely than not that the fact in issue is true.

III FUNDAMENTAL CONCEPTS

A Habitual residence

23. Habitual residence is one of the most litigated issues under the 1980 Convention. It is a jurisdictional fact the absence of which results in the 1980 Convention not being applicable to the removal or retention of a child. So, if a child who is the subject of a return application is not found to have been habitually resident in the contracting state immediately before the removal or wrongful retention, the remedies under the 1980 Convention cannot be invoked.

24. Habitual residence is not defined in the 1980 Convention. We attribute an international autonomous meaning to the concept of habitual residence rather than apply any domestic meaning from national law.

25. Lord Wilson recently described habitual residence in *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* ("*B (A Child)*") [2016] UKSC 4 at [27] as "the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to [children]". As to its nature, Lady Hale and Lord Toulson observed recently in *B (A Child)* "[habitual residence] is a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact".[11]

26. There has been a discernible shift in Australia and England in the law in relation to habitual residence. Accordingly, care should now be taken about relying on older decisions or academic writings because they may no longer be good law.

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[10] A jurisdictional fact is "the criterion, the satisfaction of which enlivens the power of the decision maker". See *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135.
[11] [2016] UKSC 4, [57].

27. Until about ten years ago in Australia, the identification of a shared and mutual intention by parents to reside in a place dominated our jurisprudence about habitual residence. Australia followed English precedent which held that the purpose for which the child was present in a country and the fact of a shared parental intention to reside in a country for settled purposes was most relevant to a child's habitual residence. It followed that in the absence of shared parental intention to reside in a place for a settled purpose, habitual residence was not established. The focus was on parental intentions. A child's place of habitual residence could be identified as the last locale where the parents had both been habitually resident. That habitual residence could pertain notwithstanding that one parent moved away. The parental intention model was a construct, the application of which could produce highly artificial results.

28. In 2009 the High Court of Australia (our apex court) decided *LK & Director-General, Department of Community Services*[12] ("*LK & Director-General*"). The High Court made two preliminary observations. First, there are a wide variety of circumstances that bear upon where a child resides and whether that residence is habitual. Second, the past and present intentions of a child's parents will affect the significance to be attached to particular circumstances, such as the duration of a person's connections with a place of residence. Regarding intention, the High Court noted that a parent's intentions will usually be relevant to, but not necessarily be determinative of, habitual residence. The High Court noted that a person's intentions may be ambiguous.

29. In *LK and Director-General*, the mother had left Israel with the children on the understanding that if she and the father reconciled they would return to Israel, but if they did not reconcile she and the children would remain in Australia. The High Court found that it was appropriate to have regard to the steps the mother took before and after her arrival in Australia as supporting the mother's argument that it was her intention to move to Australia unless the marriage reconciled. The High Court made several points about parental intention (emphasis original):

> [32] … because the notion of habitual residence does not require that it be possible to say of a person at any and every time that he or she has a place of habitual residence, it is important to recognise that a person may cease to reside habitually in one place without acquiring a new place of habitual residence.
>
> [33] Secondly, because a person's intentions may be ambiguous, in asking whether a person has *abandoned* residence in a place it is necessary to recognise the possibility that the person may not have formed a singular and irrevocable intention not to return, yet properly be described as no longer habitually resident in that place. Absence of a final decision positively rejecting the possibility of returning to Israel in the foreseeable future is not necessarily inconsistent with ceasing to reside there habitually.
>
> [34] Thirdly, when considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child. It will usually be necessary to consider what each parent intends for the child. When parents are living together, young children will have the same habitual residence as their parents. No less importantly, it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence. The assent of the other parent (or a court order) would be necessary. But again, if it becomes necessary to examine the intentions of the parents, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged.

[12] (2009) 237 CLR 582.

30. Our High Court endorsed the plurality in the New Zealand Court of Appeal case of *P v Secretary for Justice*, as follows:[13]

> Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called at [22], the underlying reality of the connection between the child and the particular state.

31. In its deliberations, the High Court *in LK v Director General* unanimously concluded that a closed set, or a hierarchical set, of criteria would not assist in making a decision which could potentially fall into a very wide range of circumstances.

32. In Australia, shared parental intention remains a relevant consideration but it is not determinative in the identification of whether, or where, a child will tend to be habitually resident. The absence of shared parental intention to relinquish or embrace a place of habitual residence *per se* will not leave the child in a vacuum.

33. In the United Kingdom, the Supreme Court's decision in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* ("*A v A*")[14] illustrates how English jurisprudence has also moved away from joint parental intention as a predominant factor.

34. In *A v A* the Supreme Court aligns the identification of habitual residence under the 1980 Convention with European authorities under the revised Brussels II Regulation[15] ("BIIr") and adopted by the European Court of Justice ("CJEU") in the case of *In Proceedings brought by A* ((2009) Case C-523/07) and affirmed by it in *Mercredi v Chaffe* ((2010) Case C-497/10 PPU). That is

> that habitual residence is 'the place which reflects some degree of integration by the child in a social and family environment'. Shared parental intention to reside in that place is relevant but not a necessary prerequisite to the establishment of habitual residence.

35. The European jurisprudence, as recently adopted in the United Kingdom, sits comfortably with the Australian approach from *LK & Director General* onwards.

36. In *In Proceedings brought by A* ((2009) Case C-523/07), the Supreme Administrative Court of Finland sought a ruling by the CJEU on the interpretation to be given to the concept of "habitual residence" within the meaning of BIIr art 8(1). The Finnish proceedings related to three children who had been living in Sweden since 2001 with their mother and step-father. In the summer of 2005 they went to Finland on vacation and lived in caravans and at a range of campsites. In October, 2005, the family applied for social housing accommodation. The mother and step-father returned to Sweden leaving the children in Finland with the step-father's sister. The children were taken into state care in November

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[13] *LK and Director-General, Department of Community Services* (2009) 237 CLR 582, quoting *P v Secretary for Justice* [2007] NZLR 40 at [88] and citing *SK v KP* [2005] NZLR 590.
[14] [2013] UKSC 60.
[15] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and recognition and enforcement of judgements on matrimonial matters and in matters of parental responsibility for children of both spouses which is colloquially known as "Brussels II". Brussels II was revised on 29 November 2002 by agreement of the Council of Ministers (Justice and Home Affairs). The revising law was Council Regulation (EC) No 2201/2003 of 27 November of 2003 and completely repeals BII. It is known variously as BII revised or BIIr or BII bis (bis meaning approximately encore).

2005 on the basis that they had been abandoned. The mother commenced proceedings to have the children returned to her care.

37. The CJEU, comprising the President of the Chamber, A. Rosas, the Rapporteur, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), and Judges U. Lõhmus and P. Lindh, stated in relation to art 8(1) of BIIr at [44]:

> … [T]he concept of 'habitual residence' under Art 8(1) of the regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

38. In the relatively early decision of *In the matter of LC (Children) (No 2)* [2014] UKSC 1 ("*In the matter of LC*"), the Spanish mother took the four children aged 13, 11, 9 and 5 to live in Spain. On return to England for the Christmas holidays with their English father the children did not return. It was alleged that the 13 year old objected to return within the meaning of Article 13. The Court of Appeal agreed that the oldest child objected in the relevant sense and that the lower court had erred in not exercising its discretion to refuse to order the eldest child to Spain. The father then appealed to the Supreme Court on the basis that the trial judge had not taken the views of the middle children into account interpreting them as merely preferences rather than objections to returning to Spain. The Supreme Court allowed the Appeal and in doing so said that a child's state of mind, particularly that of an adolescent, could be taken into account in determining habitual residence. In a minority judgment Lady Hale and Lord Sumption countenanced that the state of mind of each of the middle children (aged 10 and 8 at the trial) were relevant to whether that child had attained a degree of integration in the new state and thereby, a determination of the place of habitual residence of the children.

39. In 2015, in *AR v RN (Habitual Residence)*[16], the Supreme Court considered whether to return two girls to France who had been living temporarily in Scotland with their British/Canadian mother. The girls were born in France in August 2010 and June 2013, and lived there with their French father and mother. In July 2013, during her 12-month maternity leave, the mother and children temporarily relocated to Scotland where the maternal grandparents lived. The mother claimed that the intention was for the family permanently to relocate to Scotland after 12 months. She had moved into a rental property that both she and the father had inspected. During this time, the mother learnt of the father's infidelity and she decided to end the relationship. She commenced proceedings for a residence order in respect of the children and a prohibited steps order preventing the father from removing the children from Scotland. The father brought Hague return proceedings seeking a return order (to France). At first instance it was found that the children had maintained their habitual residence in France because there had been no jointly held parental intention to leave France permanently. This decision was reversed by an Extra Division of the Inner House of the Court of Session [2014] CSIH 95. On the basis that it had been incorrectly determined that a shared parental intention to move permanently to Scotland was an essential element in any alteration of the children's habitual residence from France to Scotland. The Extra Division found that the children had become habitually resident in Scotland. The father's appeal was dismissed by the plurality of the Supreme Court. The Supreme Court reiterated that habitual residence was a question of fact that required an evaluation of all relevant circumstances.

[16] [2015] UKSC 35.

It considered the situation of the child, with the purposes and intentions of the parents merely being among the relevant factors. The important element was the stability of the residence not the permanency of it. The Supreme Court held that there was no requirement that there should be a particular period of time that the children should have been resident in Scotland before acquiring habitual residence there, nor need there be an intention on the part of one, or both, parents to reside there permanently or indefinitely. It was held that, in failing to consider the stability of the mother's and the children's lives in Scotland, the Extra Division had not taken into account their social and family environment there. Lord Reed who delivered the judgment for the Supreme Court, noted at [16]:

> It is … the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

40. In the more recent case, *Re B (A Child)*[17] the United Kingdom Supreme Court considered the circumstances and point at which habitual residence was lost. Lord Wilson, with whom Lady Hale and Lord Toulson agreed, held that the subject children did not lose their habitual residence immediately upon removal from the jurisdiction, even where there was a settled intention that they would no longer live there. Their Honours' reasoning was that children lose their habitual residence when they achieve the required degree of disengagement from the jurisdiction. The parents were a same-sex couple who had been in a relationship until 2011. In February 2014, the respondent birth mother, a British national of Pakistani ethnicity, went to live in Pakistan with the aim of entering into a business partnership. On 13 February 2014, the other mother (who was the appellant) became aware that the daughter had been removed from her home but was unaware that she had been taken abroad. She issued an application under the *Children Act 1989* for leave to apply for shared residence of the child or to have contact with her. Both the High Court and the Court of Appeal were satisfied that the child had been lawfully removed by her birth mother who had a settled intention of making a new life abroad. The Court of Appeal upheld the first instance decision to dismiss the other mother's application for shared residence of the seven-year-old daughter on the basis that, by the time the application had been made by the other mother, the child had lost her habitual residence in England. Lord Wilson noted that two consequences flowed from the modern international concept of habitual residence. First, that it was not in a child's interests to be left without a habitual residence. Second, that the domestic interpretation of habitual residence should be consonant with its international interpretation. A third issue to consider was whether the point at which habitual residence was deemed to be lost required adjustment following the court's adoption of the European concept of habitual residence in *A v A* cited above. Lord Wilson stated:

> [45] I conclude that the modern concept of habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed [the child]. The concept operates in the expectation that, when a child gains a new habitual residence, he loses this old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or better, disengagement) from it.

[17] [2016] UKSC 4.

> [46] … The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:
>
> > 1. the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
> >
> > 2. the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
> >
> > 3. were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement.

41. Lord Wilson concluded his analysis based on the discussion at [44] in the Opinion of Advocate General Kokott in *In Proceedings brought by A*, that all the circumstances in the case must be taken into account where there is a change of place. He described the necessary process as follows:

> This should be a composite consideration of all the circumstances in the new environment and as a mirror image, in the old environment in order to determine whether habitual residence has shifted from the latter to the former.[18]

42. Taking into account the circumstances of the situation, Lord Wilson considered a range of factors that might lead to a conclusion of a level of disengagement from the old environment and integration with the new in order to determine the child's habitual residence. On weighing the factors, he found that the child was still habitually resident in England.

43. In their joint judgment, Lady Hale and Lord Toulson support Lord Wilson's decision and proceed to add a pragmatic perspective. They said: -

> [57] We agree fully with Lord Wilson's reasoning and conclusion on the issue of habitual residence. He has described the identification of a child's habitual residence as overarchingly a question of fact (para 46). At the risk of appearing pedantic, we would prefer to describe it as a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact. We do not, however, understand Lord Wilson to be laying down a rule of law that a child must always have a habitual residence: rather that, as a matter of fact, the loss of an established habitual residence in a single day before having gained a new one would be unusual. In this particular case, although the respondent said that her intentions were permanent, looked at from the child's point of view, on the relevant date they had been in Pakistan for only nine days, they had no home there, and she had not yet been entered into a school. Had the respondent then changed her mind and decided that the move was a bad idea, it is unlikely that a court would have held that the habitual residence of either of them had changed during those few days.

44. The most recent decisions of the UK Supreme Court have, in effect, adopted the CJEU concept of habitual residence which aligns with the view of the Australian High Court, particularly with regard to the downgrading of parental intention and the abolition of the "one parent cannot unilaterally change a child's habitual residence" rule and the upgrading (so to speak) of an examination of the extent to which a child has integrated into life in the new state. Older children may have views of their own about their degree of integration as was discussed above in relation to *In the matter of LC*. There is

[18] *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4 [54].

likely to be a correlation between the age and maturity of the child and the weight to be accorded to the child's views with the views of a younger child would be accorded less weight than an older child.

B Rights of custody

45. Not every removal or retention of a child from its habitual residence across an international border without the consent of the other parent is entitled to relief under the 1980 Convention. An essential element to a wrongful removal or retention, and a return of a child to the country of habitual residence under the 1980 Convention, is proving that there has been a breach of custody rights under the law of the state of habitual residence. If this jurisdictional fact cannot be established then the application for return will fail.

46. A right of custody is distinguished from a right of access under the 1980 Convention. Article 5 states:

> (a) 'rights of custody' shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence.
>
> (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

47. The meaning of a right of custody under the 1980 Convention was always intended to be autonomous and, thereby, is distinct from domestic rights of custody which are in force within Contracting States.

48. A parent will not have rights of custody unless he or she has the right to determine where a child will live pursuant to the law of the state in which the child was habitually resident. In Australia, a left-behind parent who has a right of veto (frequently referred to as "a *ne exert* right") pursuant to the laws of the state of habitual residence, and can prevent the other parent from relocating across international borders, is considered to have a right of custody. This is regardless of whether the left-behind parent only has a right to access or visitation under the law of the home state, or does not see the child at all.

49. The right of custody need not be attributable to the applicant or the person requesting return. Article 3 provides that the right of custody relied upon by the applicant may be attributable to "a person, an institution or any other body."

50. Lord Donaldson MR in the United Kingdom Court of Appeal in *C v C (Abduction: Rights of Custody)* [1989] 2 All ER 465, offered a definition at 473:

> 'Custody', as a matter of non-technical English, means 'safe keeping, protection; charge, care, guardianship' (I take that from the *Shorter Oxford English Dictionary*); but 'rights of custody' as defined in the convention includes a much more precise meaning, which will, I apprehend, usually be decisive of most applications under the convention. This is 'the right to determine the child's place of residence'…

51. In *Re D (A child) (Abduction; Custody Rights)* [2007] 1 ALL ER 783 Lord Hope of Craighead said at [9] to [10]:

> [9] It has come to be appreciated in most, but not all, contracting states that for the convention's purposes a right to grant or withhold consent to the child's removal from the state where he resides is a right of custody. Article 5 states that for the purposes of the Convention 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. To understand what this means reference must be made to art 3, where the words 'rights of custody' are used to define the circumstances in which the removal or retention of a child is to be considered wrongful — 'wrongful' because the convention

> proceeds on the assumption that welfare issues are best dealt with in the state where the child is habitually resident.
>
> [10] The key to what the phrase means lies in these facts. The convention is an agreement between states. It seeks to address the problems that arise where a child is moved across international borders. It does not concern itself with disputes about the exercise of custody or access rights within the country of the child's habitual residence. The right to determine the child's place of residence has to be seen in that context. The word 'place' in the phrase 'the child's place of residence' must be taken, for convention purposes, to include the country of the child's residence. A right to object to the child's removal to another country is as much a right of custody, for those purposes, as a right to determine where the child is to live within the country of its residence.

52. In order to answer whether a parent has a right of custody it is first necessary to establish what rights the parent had under the domestic law at the time of the child's removal from that State. Having done so, the next step according to Australian law, is to determine whether such rights amount to "rights of custody" within the meaning of Article 3 (i.e. are the rights to determine place of residence, and/or the right of veto) according to our law.

53. In *Jiang and Director-General Department of Community Services* [2003] FamCA 929, the Full Court (Finn, Holden and Mushin JJ) outlined the following steps to identify right of custody:

> (a) the first task of the court is to establish, on the evidence before it, what rights, if any, the parent seeking the return had under the law of the foreign country in relation to the child at the time of removal;
>
> (b) the next stage is to resolve, as a matter of Australian law under the Regulations (being the law of the forum where the Convention has been invoked), whether those rights amount to 'rights of custody' within the meaning of the Regulations; and
>
> (c) finally, the question is whether or not the retention of the child was in breach of those rights, and therefore whether or not the removal was wrongful within the Regulations.

54. Therefore, as far as Australia is concerned, the right of custody relied upon must qualify as a right of custody within the meaning of Article 3 of the 1980 Convention in both the home state and in Australia.

55. Once the right of custody has been established, the applicant must demonstrate that the removal or retention of the child was in breach of that right, and that right was actually being exercised, or would have been exercised, but for the removal or retention. Our court has interpreted the exercise of custody rights liberally so as not to require that a requesting parent actually have care of the child or be involved in the child's day-to-day upbringing. In this sense the right of custody is closely identified with the left-behind parent's *ne exeat* right (to veto the child's removal from the jurisdiction) with the result that the removal or retention of the child across an international border will be sufficient to establish a breach of rights of custody.

56. In very many cases the right of custody is not contentious. However, in some cases the right of custody, or the breach of it, is not clear and is a jurisdictional fact which must be established by the applicant if the application is to proceed, let alone succeed. For instance, it can be necessary to determine whether an unmarried father, who does not have automatic parenting rights, obtained those rights within his home state by compliance with the legislative framework or by a chasing order consequent on the removal or retention. There are a number of ways to establish rights of custody and a breach thereof.

a) The requested court can access, read and interpret the law of the home state. Laws are accessible by internet although they may require translation.

b) Article 7(e) provides that Central Authorities shall take all appropriate measures to provide information of a general character as to the law of their State in connection with the application of the 1980 Convention. This means that information about the right of custody relied upon, and the breach of it, should be included in or provided in support of each application. Frequently this is by affidavit of an expert. However, regardless of form, the information should include the legal basis for the right of custody and a description of how the law applies to the facts of the case to establish a right of custody and how the right has been breached. You will recall that Article 30 relaxes the Rules of Evidence somewhat so that any relevant information provided will be admissible.

c) Article 15 of the Convention provides that the court before which the return application is made may request the applicant to "obtain from the authorities of the State of habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention". Such a declaration will obviously cover more than rights of custody. However, the removal or retention cannot be wrongful in the absence of a right of custody which has been breached. Personally, I would not recommend seeking an Article 15 declaration. There is no requirement that the respondent be a party to the declaratory proceedings in the home state. Absent a concentration of jurisdiction in the home state, declarations may be sought from courts which have no familiarity at all with Hague matters which, in turn, produces unhelpful if not unusual results. In my experience, the result is a decision which is equivocal or, quite correctly, identifies that it is a matter which can only be determined after all evidence is heard. A declaration is also not binding on the requested state even as to interpretation of the law in the home state. Most importantly, however, the process to obtain a declaration is time consuming and, unless supported by a high degree of cooperation and coordination between Central Authorities and/or Hague Network Judges, it may produce an inordinate delay of months or years for very little result.

C Place of the child in return proceedings

57. It is widely acknowledged that the 1980 Convention was negotiated and concluded with a view to rectifying a situation where a parent (usually the father) who was not the primary carer of the child was dissatisfied with parenting arrangements imposed in the home state and would unilaterally remove the child to, or retain the child in, a jurisdiction of his or her choice in the hope or expectation that the primary carer (usually the mother) could not assert his or her rights as successfully in that jurisdiction, or at all. This was the paradigm described in the Explanatory Report by Elisa Pérez-Vera[19] [11] to [13] as:

> … we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child … we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person … the child is taken out of the family and social environment in which its

[19] Elisa Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' (Report H*cc*H, 1982) < https://www.hcch.net/en/publications-and-studies/details4/?pid=2779>.

life has developed …by a person who, broadly speaking, belongs to the family circle of the child …

58. However, our experience is that the most commonly encountered abduction under the 1980 Convention is committed by a primary care giving parent (usually the mother) who wishes to return to his or her country of origin for a variety of reasons, the most commonly cited of which is to flee domestic violence at the hands of the other parent. Accordingly, there is somewhat of a mismatch between the circumstance the 1980 Convention was designed to remedy and the circumstances to which it is applied. The policy of "not pursuit remedy" is undoubtedly child focussed and correct. However, children can be disadvantaged by the disconformity and by the manner in which contracting states have, lawfully and with the best of intentions, interpreted the Convention.

59. Adults variously experience the return of the child as the panacea, or a remedy, or even as a punishment for the wrongful removal or retention. Both parents feel aggrieved. The left-behind parent and his or her supporters will feel victorious and the taking parent (who may be unsupported) will feel crushed, at least initially. Both parents will be emotionally and financially depleted by virtue of the withholding and the return and, unsurprisingly, be somewhat distracted from considering what is best for the child into the future.

60. From the perspective of a child, it is misleading to speak of the "return" of the child to the home state if the child will be placed in a situation which is radically different to that in which she lived prior to the removal or retention. For instance, the residence of the child may remain with the taking parent but have to live in a different city and attend a different school, dislocated from his or her previous life. The return may mean that child is separated from the primary caring parent, required to live with the left-behind parent with whom they are not too familiar and there may still be a change of school. In either case, there will almost invariably be a change in the power dynamic between the parents and the child will not be spared much of it.

61. There is a distinct possibility that the child will experience the 'return' as a forced placement, or a further abduction, which is even more traumatic than the initial wrongful retention or removal. Therefore, to the extent that the concept of a "return" carries a connotation of a *status quo* into which the child is restored we may be adopting an adult perspective which is not tenable. A wrongful retention or removal away from one parent and the child's home country probably changes the child's world view permanently and irretrievably. The return is a geographical rather than a psychological phenomenon. Accordingly, it is important to locate a place for the child in Hague return proceedings.

62. Whilst the aim of the 1980 Convention is to return the child to his/her habitual residence as quickly as possible so that parenting arrangements can be made in that country, we should recognise the following in the operation of the 1980 Convention:-

a) there is no requirement that proceedings of a judicial or administrative nature be taken in the country of habitual residence before or after the return;

b) the child must merely be returned to the country of habitual residence and not to the location at which the child last resided prior to the retention or removal;

c) there is no requirement that the child be handed over to the left-behind parent or that the left-behind parent even be apprised of the child's whereabouts within the country of habitual residence;

d) there is no requirement for parents or parties to mediate (although some contracting states provide otherwise) and others strongly encourage mediation;

e) there is no requirement for the child to be heard directly or indirectly at any stage of the proceedings although this may well exist as a matter of domestic law and be a component of how the 1980 Convention is implemented in a contracting state.

63. There is scope for a child to be heard at the point of an exception to return having been made out and the court is considering exercising its discretion to refuse return. The weight to be attributed to the child's views will depend on a number of factors such as the period of time that the child has been away from the home state, the amount of communication there has been between the child and the left-behind parent and the ability through that communication for the child to have formulated a realistic attitude to the left-behind parent. Principally, however, weight is likely to be determined by balancing the competing values around:

a) the age and maturity of the child and the weight customarily accorded the children's views in parenting matters in the requested state; and

b) the weight accorded by the requested court to what it perceives to be the underlying policy of the Convention, including but not limited to, deterrence.

64. My view is that the child's voice should figure in any Hague return proceeding to an extent consistent with the 1980 Convention being a forum selection treaty regardless of whether an exception to return applies. The introduction of the child's perspective into the prompt return mechanism under the 1980 Convention will not lead to it being contaminated by best interest principles and/or the proceedings being prolonged.

65. The overwhelming majority of contracting states to the 1980 Convention are signatories to the United Nations *Convention on the Rights of the Child,*[20] which requires that child have a right to give their opinion and for adults and relevant authorities to listen and take that opinion seriously (Article 12). The inclusion of the child's perspective into return proceedings in states where it is not already received as a matter, of course, will strengthen and further legitimatise, rather than weaken, the 1980 Convention. The child's voice can heard in a number of ways:-

a) Through an assessment by a social scientist; who writes a report and is cross examined;

b) Through direct representation;

c) By representation of the child's interests; This is what we use in Australia, called an Independent Children's Lawyer who must convey the child's view to the court but then conduct the proceeding consistently with the child's best interests (and not necessarily in accordance with the child's views);

d) By to talking a judge;

e) By giving evidence in person or remotely.

66. Judges from a number of countries speak directly to children. For example, Germany and the Netherlands. It is not commonly done in Australia because we have other mechanisms like a family/psychological report and the Independent Children's Lawyer. Australian judges are acutely aware that they are not trained to talk to children and the normal course is to refrain from doing so.

67. Whilst I do not favour me speaking to children who are the subject of proceedings, I do not exclude the possibility that I may do so in the future. For the time being, we should be vigilant to ensure that children are accorded the respect which they are themselves expected to show to others throughout

[20] Opened for signature on 20 November 1989, 1577 UNTS 44 (entered into force 2 September 1990).

their lives. This necessarily includes taking account of their views and opinions. As Lady Hale said, in 2006, in *Re D (A Child)*:[21]

> [57] … As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.
>
> [58] Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11.2 provides:
>
> > When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.
>
> Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is, in my view, of universal application and consistent with our international obligations under Article 12 of UNCROC. It applies, not only when a 'defence' under Article 13 of the 1980 Convention has been raised, but also in any case in which the court is being asked to apply Article 12 and direct the summary return of the child — in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his or her views.

68. Following these comments by Lady Hale it has been increasingly common if not routine for children who are subject to return proceedings to be interviewed by a CAFCASS officer and a report prepared for the court regardless of whether objections to return or settlement in the new environment are raised.

69. There is a difference between canvassing a child's views on a dispositive issue such as habitual residence, grave risk of harm and asking a child their views how the return or non-return could be made easier for him or her. Their perspective is respectfully received and considered but not necessarily followed. They have a voice not a choice. At a bare minimum, it seems to me that a child over the age of seven ought to be seen by a social scientist or psychologist who is impartial and receive the following:-

a) An explanation of the limited nature of Hague proceedings and limited available outcomes;

b) An assessment of his/her current mental state to exclude the possibility that the child may be anxious or reactively depressed or otherwise in need of psychological support;

c) An opportunity to establish electronic communication with the left behind parent, supervised if necessary;

d) Be asked, if a return is ordered, whether there is anything that the judge could order and/or the parents do to make that outcome easier;

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[21] *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51.

e) Be asked whether, if a return is refused, there is anything that the judge could order and/or the parents could do, to make that outcome easier;

f) To be enquired as to whether he/she feels like he/she would benefit from some counselling support, preferably delivered electronically.

70. Brussels II *bis* may be further revised next year. It is uncertain about its terms serve that, I understand, the revision will require European Union states to hear from children who are the subject of return under the 1980 Convention. We as a group of nations outside the European Union should be cautious about setting ourselves apart from practices with the European Union which are apparently successful and consistent with our obligations under other international treaties like UNCROC. To do so will corrode the principle that international instruments and treaties should be interpreted consistently by member states.

IV The 1980 CONVENTION: ACCESS

71. The 1980 Convention also seeks to secure protection for rights of access between contracting states. The access provisions of the 1980 Convention (Chapter IV) are discrete from the provisions which deal with the return of children (Chapter III).

72. Article 21 of the 1980 Convention provides that an application for organising or securing the effective rights of access may be made in the same way as an application for return. The Central Authorities are bound by the obligations of cooperation to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of the rights may be subject. The Central Authorities either directly or through intermediaries may initiate or assist in the institution of proceedings to organise or protect access rights.

73. By comparison with the return provisions, the rights of access provisions of the 1980 Convention have arguably failed to achieve the purpose for which they were intended. However, the 1996 Convention is a significant improvement on the 1980 Convention in relation to the establishment and implementation of access rights across international borders.

74. Before leaving rights of access under the 1980 Convention, I would like to mention secure pending proceedings arising from a request from Japan which enforcement of access rights in relation to child in Australia. It is a case which acutely demonstrates that Lady Hale's observation that a child's views may not necessarily be the same as the person in whose care they have been.

75. This is a long standing but productive access case before me at the moment. I cannot provide you with a citation because it is incomplete and I have not delivered final reasons. Factually, the case is unusual by Australian standards but, procedurally, it is a good example of how productive cooperation between contracting states and bilateral arrangements can be. The father is the requesting parent in an access application brought by the State Central Authority. The mother is 38 years old. The father is 46 years old. There is one child of the relationship, who I will call Aya (not her real name). Aya is 9 years old. The parents and Aya are Japanese nationals. The mother and father met whilst working for the same company. They married in October 2005 and were divorced in June 2010. Aya is the only child of either parent. She was just two months old when the parents separated and two years old when they divorced. The father described being involved in proceedings, which he alleged were delayed by the mother, which included two years of conciliation. The father spent very little time with Aya post separation and last saw her for only a few minutes when she was three years old. The parents reached an agreement whereby the father would have not contact with Aya until she turned seven years old and then … was not specified. The mother sent four photos of Aya to the father each year, as agreed. In

2014, the father made application to the family courts in Japan for arrangements whereby he could have access with Aya after April 2015 (when she turned seven) but the mother refused to engage in the process because she said it was too early. In March 2015 the father again applied to have access to Aya commencing after her 7th birthday in April 2015. Unbeknownst to the father, the mother had relocated to Australia with Aya and was living with Chinese Malaysian friends and studying English with the intention of studying nursing. Through the State Central Authority, the father sought orders entitling him to have access to Aya for one day each year. When the mother appeared before me she alleged that the father had perpetrated domestic violence against her, including financial abuse and that it would be contrary to Aya' interests to see the father. I ordered a psychologist report be prepared by the social science arm of our court. It is a lengthy document from which I provide the following extracts:-

> [72] The oddity here is this Hague application arises in the absence of one parent having spent time or communicated with their child and a persistent incapacity by both parents to negotiate about Aya spending time with her father and having the opportunity to develop an appropriate relationship. Currently the parent-child relationship is currently a biological connection in which the child has virtually no knowledge of the father, Aya had no even seen a photograph and information about the child's development was not supplied to the father. Both father and child exist in a vacuum developed by the mother and it is clear that her intention was that father and daughter should never develop any emotional connection nor spend time with each other.
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> [73] The mother's initial claims against return and resisting Aya spending time with her father are based claims of family violence allegedly perpetrated by the father but each parent provides alternative claims about the findings of the Japanese Court. The mother though does not present as a victim of enduring family violence, not only because her claims of family violence are vague and minimal she can offer no detailed evidence about a single event. The mother's emotional expression is not congruent with her explanations of events leading to the conclusion she has dramatized and exaggerated events and also minimizing her own role as a disputant in the family violence. It is clear the couple argued and it may well have been the case that objects were thrown, which is unacceptable, and the father does acknowledged striking the mother once but the conduct as described is more suggestive of couple instigated violence.
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> [74] By contrast the mother's conduct appears to be controlling and she has utilized claims of family violence to garner support from her family to leave her marriage and to maintain resistance to allowing Aya to spend time with her father. The mother provides a narrative in which she is both strongly focused on achieving her own goals and dependent on the good auspices of others. The mother, despite her claims about the difficulty being a single mother has worked for approximately 18 months only, since separation, and she has been otherwise engaged in study. The mother displays a history of seeking care from others, she left her family home for marriage and when this failed to meet her expectations she left marriage, without discussion. The mother ultimately resided with her grandmother in Japan and currently she resides with a host family and in each of these instances she has ceded the functional daily care of Aya to others whilst pursuing her own goals. Such a pattern suggests that despite early claims of Aya as "…unstable" it is not problematic for the mother to leave Aya in the care of others, including absolute strangers. The forgoing indicates the mother lacks maturity and focuses on her own needs to the exclusion of the needs of others, notably Aya, and her determination to remain in Australia despite being aware of Aya's unhappiness reflects this same self-focus. The mother today acknowledged her resistance to the father spending any time with Aya claiming her actions were to protect Aya from the possibility her own distress may impact on Aya who is sensitive to her mother's emotional world. Such an attitude reinforces the notion that the mother is not child focused and suggests that in their relationship Aya is parentified as it is her responsibility to support the emotional well-being of her mother.

> [75] The mother asserts her entitlement under Japanese law that having sole custody she is able to conduct her life with Aya at her discretion and without engaging Aya's father. But the issue of her willingness to comply with all aspects of Court Orders is called into question by her failure to make arrangements for the father to spend time with Aya and her unwillingness to support Aya having any relationship with her father, however minimal. The mother admitted she perceived her requirement to comply with Court Orders as discretionary "…dependant on the order" and there is the pervasive sense that the mother has orchestrated the current situation to maintain Aya at arm's length from her father, and he is to continue to be denied opportunity to engage with Aya.
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> [76] The mother is a caring mother but her goals appear self-focused and she is resident in Australia to pursue her own needs one of which appears to be to avoid accountability to the father. The mother is aware her daughter is unhappy in Australia but it is her needs that predominate, and her lack of empathy and understanding of Aya as having needs independent of her own is replicated in the mother's sense of entitlement about her right to obstruct the father from having a relationship with Aya. More significantly Aya is being denied the opportunity to have a relationship with a parent who has contributed financially to her welfare and who waits patiently on the sidelines of her life looking at her photographs, hoping the time has arrived when he is granted permission to spend time with his daughter.
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> …
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> [77] In a mechanical sense Aya is settled in Australia, as she attends school and has formed some friendships but despite having been resident here for 14 months she reports being unhappy in Australia and missing family and friends from home. More importantly she misses being Japanese and immersed in her language and her country and this has been an issue of long-standing she has shared with her mother.
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> [80] Aya is of tender years, rigid in her temperament but not without insight, intelligence and awareness that it would present difficulties for her mother if she were to express the view she would like to spend time with her father. The mother has not provided any overt information to Aya about her father, which is beneficial, but the absence of information has made it apparent to Aya that her mother does not want her to know or spend time with her father. The mother has allowed Aya to believe it is "…her choice" as to whether or not she would spend time with her father and in the absence of any knowledge about her father and awareness of her mother's distress Aya's alleged choice would conform to her mother's views. Aya's choice is also determined by an anxiety she might be taken away from the certainty of the only parent she has known, her mother. Aya was curious about her father and would like the opportunity to get to know him.
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> [83] Aya appears to value her cultural identify and her preference is to return to her country of origin, Japan. Regardless of her place of residence Aya needs the opportunity to enjoy relationships with her mother and her father as well as the extended family networks each parent brings to Aya. Aya herself identifies a need, regardless of her place of residence to be embraced by her culture.

76. The report writer was one of 13 professionals who travelled from our jurisdiction to Japan for two weeks in 2015 to undertake co-mediation training with similarly qualified Japanese experts.

77. There have been extensive negotiations since the report was published. The father has travelled to Australia to have access to Aya, and the mother took Aya back to Japan for two weeks over the last long summer school vacation, at which time she had several access visits with the father. Access between Aya and the father is being organised for the forthcoming Australian school terms holidays in June/July, 2017. Strict judicial management has meant that the proceedings have not been concluded

prematurely. Ironically, Aya has come to know her father perhaps even better than one could have expected had she remained residing in Japan. This case also demonstrates what Lady Hale said about the perspective of children not necessarily being the same of the parent in whose care they remain. It is a salutary lesson about the need to hear the voice of the child.

V THE 1996 CONVENTION

78. At another symposium,[22] on the well-being of the child through the children's conventions, Dr Christophe Bernasconi, Secretary-General of the Conference on Private International Law, provided an apt analogy in regard to the two Conventions. He likened the functional relationship between the 1980 Convention to that of an ambulance which transports the patient as quickly as possible to the hospital, and the 1996 Convention to that of the actual hospital or infrastructure at which the patient will receive appropriate treatment.

79. The 1996 Convention takes account of the wide variety of legal institutions and systems that exist around the world. Its purpose is to avoid legal and administrative conflicts and to build the structure for effective international cooperation in child matters. The 1996 Convention has broad application, covering both private and public measures of protection and care.[23]

A *Relationship between the 1996 Convention and the 1980 Convention*

80. Article 50 of the 1996 Convention provides that it "shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights".

81. The object of the 1980 Convention[24] is that, in all but exceptional circumstances, any child under the age of 16 years who is wrongfully removed or retained between contracting states will be returned promptly to his or her state of habitual residence so there is an opportunity for parenting arrangements to be made in accordance with the laws of their home state through courts, other authorities or by parental agreement. The 1996 Convention[25] operates to preserve pre-eminent jurisdiction to make parenting arrangements to the courts or authorities of the child's state of habitual residence by expressly providing for the continuing jurisdiction of judicial and/or administrative authorities in the state of the child's habitual residence. It provides for the recognition of orders between contracting states and cooperation between authorities in contracting states and for the preservation of parental responsibility. In doing so, the 1996 Convention significantly supports the operation of the 1980 Convention in a way which is relevant to our knowledge of childhood development as well as providing secure pathways for families for whom cross-border parenting has not involved abduction, has been sanctioned by the relevant court or is simply a matter on which the parents have agreed.

82. The 1996 Convention is more difficult to read and digest than the 1980 Convention but, once you crack the code, it operates intuitively and is a treasure trove for judges and practitioners who deal with

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[22] The Asia-Pacific Symposium of the Hague Asia Pacific Regional Office, Macau, June 2015.
[23] HccH, *Outline, Hague Convention on Child Protection* (September 2008) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

cross-border family disputes. However, the 1996 Convention can, sneak up on you because it operates widely and without needing to be expressly invoked and its expectation carries significant consequences. For instance, the curtailment of jurisdiction of a contracting state which is not the state of the child's habitual residence. A further curiosity of the 1996 Convention is the language. For our purposes, a competent authority includes a court and a "measure of protection" includes an order. In this paper, I will refer to courts and orders of courts.

83. The 1996 Convention is best understood when applied to factual situations rather than read article by article.

84. *State Central Authority & Thomas* was a 2014 case under the 1980 Convention in which it was alleged that the mother wrongfully removed the two young children from Austria to Australia in November 2012.[26] The return application was filed within 12 months of the removal and the only exception pressed was whether the father consented or subsequently acquiesced to the retention of the children in Australia. The father's position, as revealed to the courts in Austria, was that he did not oppose the children residing out of Austria but was emphatic that the children not be permitted to enter a Sharia law state, even temporarily. Another judge in our court handled this case between March 2013 and August 2013 and then transferred it to me in early 2014. The Hague proceedings were not finalised until August 2015 when the father withdrew his application. During the 18 months or so that the return application was pending in our Court, the mother had returned to Austria to participate in two appeals and one re-hearing of proceedings in Austria. It was accepted that Austria was the children's place of habitual residence. No exception to return under the 1980 Convention applied to the case. However, each successive decision by the courts in Austria was predicated on the children being entitled to remain in Australia. In short, it did not make sense to return the children to Austria under the 1980 Convention because, at all relevant times, the last made decision of Austrian courts countenanced the children remaining in the primary care of the mother in Australia.

85. There was extensive direct judicial communication between myself and the Austrian Network Judge and then between myself and the judge at first instance in Austria. I made clear that if the courts in Austria made an order requiring the mother to return the children to Austria forthwith. This is because Article 5 of the 1996 Convention accords Austria primary jurisdiction. Article 23(1) provides that orders (measures) made in one contracting state (i.e. Austria) shall be recognised by operation of law in all other contracting states (i.e. Australia).

86. At the point of recognition, the order can be observed by the parties to the proceedings in which it was made and is treated as an order made (or measure taken) in the other state. However, recognition does not equate to enforceability.

87. I would have considered the enforceability of any order (measure) made in Austria under Article 28 of the 1996 Convention which provides that: -

> [m]easures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

The consequence would have been that an Austrian's order must be enforced in Australia unless any of the grounds for refusal in Article 23(2) applied. The exceptions to enforceability under Article

[26] *State Central Authority & Thomas (No 1)* [2014] FamCA 195; *State Central Authority & Thomas (No 2)* [2014] FamCA 196.

23(2) can be summarised as orders being made without jurisdiction, without procedural fairness or natural justice or if they are contrary to public policy.

No order was ever made by the Austrian court so I did not feel impelled to return the children until the parenting proceedings in Austria were concluded.

88. In the Austrian *State Central Authority & Thomas*[27], the social science arm of our court prepared an extensive social science report to be used by the judge in Austria who was required to decide the final parenting case. The report was provided under Article 30 of the 1996 Convention which provides, *inter alia,* that Central Authorities promote cooperation amongst the authorities (including courts) to achieve the purposes of the 1996 Convention. In this case, the purpose was to facilitate the court with pre-eminent jurisdiction under Article 5 of the 1996 Convention, Austria, being able to make a decision about parenting arrangements for the children with the assistance of an up-to-date assessment by a court employed psychologist. The father was interviewed in Melbourne by one of our psychologists and was assessed in face-to-face meetings between himself and the children. The court psychologist, called a family consultant, published her report for the Austrian judge and the parties. In Australia, the assessment process must be independent and transparent. Natural justice and procedural fairness dictates that the parties must have notice of any and all evidence which a court entertains in making its determination. Our family consultant was available to give evidence by video link to Austria, if necessary. In the meantime, the judge in Austria made arrangements to interview the oldest child, who was of the age that an interview is mandatory in Austria. The interview was conducted by video link to Australia. The judge also requested that the younger child speak to her by video link and accepted a request by the requesting parent that the independent children's lawyer appointed in Australia also be present with the children.

89. The judge in Austria decided, without ambiguity or resulting points of appeal, that the children should reside in Australia. At this point, Article 7 of the 1996 Convention became relevant. Article 7 provides:

> (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
>
> > a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
> >
> > b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
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> …
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> (3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

90. The purpose of Article 7 is considered to be to remove incentive for the state to which the child is wrongfully removed or retained to refuse return on the assumption that it would then acquire jurisdiction to make parenting arrangements or orders for the child. In this Austrian case, upon losing

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[27] Ibid.

the proceedings in Austria, the father immediately instituted parenting proceedings in Australia which I regarded as him consenting to Australia's jurisdiction and acquiescing to Australia as the state of habitual residence of the children (who had by that time been in Australia since November 2012). Furthermore, within the meaning of Article 7(1), there was no pending request for return and the children were settled in their new environment (Australia) so there was no impediment to Australia assuming jurisdiction.

91. I will deal with other interactions between the 1980 and 1996 Conventions below.

B *Relationship between the 1980 Convention and 1996 Convention and Brussels II* bis

92. You will have heard of Brussels II *bis*. The earliest version of the Brussels Regulation was passed by the European Parliament and Council in 2000 and entered into force for European Union Member States in March 2002. It regulated jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It was revised to include decisions relevant to cross-border parenting.

93. Brussels II *bis* was modelled on, and follows the scheme and the principles of the 1996 Convention but in some respects goes further than the 1996 Convention in relation to the operation of the 1980 Convention.

94. Between member states, Brussels II *bis* takes precedence over national law and over the 1980 Convention (excluding Denmark). However, in overriding the 1980 Convention, Brussels II *bis* strengthens the 1980 Convention by the imposition of some general provisions.

- First, it requires rather than contemplates that return proceedings be concluded within 6 weeks (Article 11(3)).
- Second, a return application cannot be refused without providing the requesting parent with an opportunity to be heard (Article 11(5)).
- Third, as mentioned above, it requires the child be given an opportunity to be heard on any consideration of an exception to return or the issue of settlement after one year (Article 11(2).
- Fourth, a subsequent order made in the state of habitual residence within 3 months will take precedence over a refusal to order return and that the enforcement of the subsequent order can be expedited (Article 11(8)).

95. In relation to the grave risk exception under Article 13(b) of the 1980 Convention, Article 11(4) of Brussels II *bis* curtails the requested court's power to refuse return so that it cannot refuse return "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

96. For our purposes, you can assume that the provisions of Brussels II *bis* are not inconsistent with the 1996 Convention and that European decisions and guidance on the implementation of Brussels II *bis* is valuable for our interpretation of the 1996 Convention. The 1996 Convention brings some Brussels II *bis* principles to our Asian region.

97. Even though the 1996 Convention entered into force for the majority of European Union states later than was anticipated, in 2012 or thereabouts, it operates easily between those states and us because of the extensive experience of the European Union states under Brussels II *bis.*

C *Breadth of the 1996 Convention*

98. As its title describes, the 1996 Convention regulates a broad range of matters, including:

- parental responsibility;
- parental access and contact;
- public care and protection of children, as well as matters concerning the protection of children's property;
- procedural aspects of cases involving children.

99. The 1996 Convention addresses the exercise of jurisdiction by authorities within contracting states. Authorities include courts and administrative authorities. It refers to "measures of protection" which for our purposes are orders. A measure of protection is inclusively defined and goes far wider than the public law measures of child care and protection that we are familiar with. The "measures" or orders may deal with the person of the child or the property of the child and are described at Article 3 as follows:

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child's property.

100. Article 4 of the 1996 Convention provides that the Convention does *not* apply to the following:

a) the establishment or contesting of a parent-child relationship;

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

c) the name and forenames of the child;

d) emancipation;

e) maintenance obligations;

f) trusts or succession;

g) social security;

h) public measures of a general nature in matters of education or health;

i) measures taken as a result of penal offences committed by children;

j) decisions on the right of asylum and on immigration.

D *Concepts in common with the 1980 Convention*

101. Certain concepts contained in the 1996 Convention are familiar from the 1980 Convention. For instance:

- habitual residence;
- wrongful removal and retention;
- parental responsibility;
- rights of custody -

and the attribution of international autonomous meanings for terms used in the treaty.

102. As with the 1980 Convention, the 1996 Convention requires contracting states to appoint a Central Authority responsible for fulfilling the state's obligations of the Convention. However, the role of the Central Authority in the administration of the 1996 Convention differs to that under the 1980 Convention. The Central Authority might have no involvement at all. All communications and cooperation may be through government departments and without any court proceedings. Alternatively, proceedings may progress through a court and the Central Authority will be asked, with little or no notice, to provide information urgently. There are many variables.

103. The Central Authority for the 1980 Convention will not necessarily be the Central Authority for the 1996 Convention. Frequently they are, but not always, so you should check.

E *Differences between the 1980 and 1996 Conventions*

104. The 1996 Convention differs from the 1980 Convention with regards to the procedure for international accessions. Under the 1980 Convention, a contracting state must agree to other states parties' accessions or else the 1980 Convention will not apply between it and those states. In contrast, the 1996 Convention adopts an "opt-out" approach, where states are assumed to accept accessions by states unless they raise an objection thereto.

105. The 1996 Convention applies to all children from birth until they attain the age of 18 years,[28] unlike the 1980 Convention, which ceases to apply to children once they reach the age of 16 years.[29] The higher age limit in the 1996 Convention reflects the fact that the 1996 Convention covers much more than international parenting disputes, for instance, the protection of vulnerable children who do not have parents, displaced children and children's property.[30]

VI THE PRACTICAL RELATIONSHIP BETWEEN THE CONVENTIONS

A *Jurisdiction*

106. The basis for jurisdiction under the 1996 Convention is found under Articles 5 to 10 of the Convention.

107. Article 5 of the 1996 Convention provides that the state of habitual residence has pre-eminent jurisdiction "to take measures directed to the protection of the child's person or property".

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[28] 1996 Convention, Article 2.
[29] 1980 Convention, Article 4.
[30] For example, the right to recover under an insurance policy.

108. There are certain circumstances in which an authority or court in a state which is not the state of habitual residence can take measures or make orders in relation to a child. I will discuss them in detail below, but they can be identified briefly as follows:

a) Under Article 10, a court exercising jurisdiction to hear a divorce, legal separation or annulment of a marriage between parents can exercise primary jurisdiction to make parenting orders (or other orders) providing that the parents both consent to that state making orders, one of the parents is resident in that state and one parent has parental responsibility in relation to the child. Notably, this jurisdiction ceases as soon as the divorce or annulment power has been exercised.

b) Under Article 11, a court of a contracting state in which the child is present but not habitually resident may make an order in "all cases of urgency". Notably this order must be "necessary", will have extra territorial effect but will lapse as soon as the authorities with pre-eminent jurisdiction make orders or take measures required by the situation.

c) Under Article 12, a court of a contracting state in which the child is present but not habitually resident may make an order of a provisional character which has territorial effect confined to that state which is not inconsistent with orders or measures already taken by the state of habitual residence. As with urgent orders, a provisional order will lapse as soon as the authorities with pre-eminent jurisdiction make orders or take measures required by the situation.

109. Urgent and provisional orders are frequently referred to as an exercise of jurisdiction based on the presence of the child. The child need not be present in the state in which jurisdiction is invoked by parental agreement pursuant to Article 10.

110. Article 6 of the 1996 Convention confers jurisdiction on the state in which a child is present where the child is a refugee and is present in that state as a result of their displacement (Article 6(1)) or if a child is without a place of habitual residence (Article 6(2)).

111. Under Article 16 of the 1980 Convention, a court cannot make an order or determination to legitimise the position of the taking parent in the jurisdiction to which the child has been taken or is retained pending the hearing of the return application (Article 16). As seen in the Austrian case discussed above, Article 7 the 1996 Convention *prima facie* preserves the jurisdiction of the home state for a year after a Hague return application has failed.

112. Subject to Article 7, if a child's habitual residence changes, then pre-eminent jurisdiction over that child and that child's property changes to the new state of habitual residence.

113. In 2013, I had a matter[31] before me in which a child and her father relocated from Australia to the Netherlands shortly after the death of the child's mother. During the mother's illness, the parents had become estranged. The little girl was cared for by the maternal family, but as the mother's condition deteriorated, the father assumed more day to day care of the child. By the time of the mother's death, the child was living with the father and the mother's family were very opposed to him. After the mother passed away, the father facilitated access between the child and the maternal grandparents. There were no court orders. One day the father said that the little girl had another commitment and he cancelled the access arrangement with the maternal grandparents. The next day he was in the Netherlands with the child having decided that they should leave Australia permanently.

114. It was not contended that anyone other than the father had rights of custody or could decide the child's place of habitual residence. Accordingly, the 1980 Convention did not apply. However, the child's departure from Australia had involved subterfuge and was an incendiary step in the already fraught

[31] *Bunyon & Lewis (No 3)* [2013] FamCA 888.

relationship between the father and the maternal family and they immediately made application for various orders from our Court requiring the return of the child to Australia so the child could spend time with them or live with them. One judicial officer of our court ordered the father to return the child within 30 days. On appeal to another judge, that judge permitted the father to remain in the Netherlands pending a final hearing and then listed the matter for final hearing. Both judges missed the fact that when the little girls went to live in the Netherlands, her habitual residence became the Netherlands and pre-eminent jurisdiction in relation to her and her property vested in the Netherlands. Because of the 1996 Convention had entered into force between Australia and Netherlands by the time the father removed the child, Australia had no jurisdiction to make parenting orders about the child.

B *Transfer of jurisdiction*

115. Articles 8 and 9 permit a transfer of jurisdiction from the state of habitual residence to a state in which the child is present and has a particular connection.

116. Article 8 provides that, by way of an exception to Article 5, if a court or authority in a contracting state which has jurisdiction under Article 5 (state of habitual residence) or Article 6 (where a child who has no habitual residence is present), considers that a court or authority of another contracting state which has a connection with the child "would be better placed in a particular case to assess the best interests of a child", that court or authority may either request the other court or authority directly, or through its Central Authority, to assume jurisdiction to make orders about the child or the child's property or suspend consideration of the case and invite the parties to introduce such a request before the court or authority of the other state. The eligibility of the other state to which jurisdiction may be transferred is prescribed in Article 8(2) as being:

a) A state of which the child is a national;

b) A state in which property of the child is located;

c) A state whose courts or authorities are seized of an application for divorce, legal separation or annulment of the parents' marriage;

d) A state with which the child has a substantial connection.

The meaning of "substantial connection" in the context of the Convention has not been specifically defined. In the *Explanatory Report*, Paul Lagarde[32] suggests that Article 8(2)(d) "encompasses and exceeds" sub-paragraphs (a)-(c); that "it will permit, according to the case and always as a function of the child's best interests, the possible jurisdiction. It provides flexibility for the court to make an assessment of which court (or forum) the child's best interests would be better placed and facilitates the application of those principles that accord with the *forum conveniens* principle. For instance, determination of "substantial connection" may include the court's consideration of factors such as where extended family members who might support the child live; or the language of the parties to proceedings if different to the place of habitual residence; or where additional proceedings for the parties, such as divorce applications, are taking place.[33]

117. A decision in the High Court in the United Kingdom of Baker J in *JA and TH [2016] EWHC 2535 (Fam)* was delivered 14 October 2016. The Norwegian mother and English father had two children, aged ten and eight. The mother sought to take both children to live in Norway when the couple

[32] Paul Lagarde, 'Explanatory Report on the *1996 Hague Child Protection Convention*' (Report HCCH, 1998) <http://www.hcch.net/index_en.php?act=publications.details&pid=2943> [55].
[33] See Munby J's comments in *AB v JLB* [2008] EWHC 2965 (Fam) at [24].

separated in 2014. The father objected and at the dispute resolution hearing in United Kingdom in January 2015, a Contract was drawn up where the older child would remain with the father in United Kingdom and the mother could take the younger child to Norway. The parties' intention was to facilitate good working relationship between themselves in the interests of and consistent with the welfare of the children. However, such arrangement did not take place and each parent blamed the other for the failure with compliance of the contract. As a result, the mother initiated proceedings in Norway in respect of the younger child in February 2016 and the father applied under Article 15 of Brussels II *bis* for a transfer of those proceedings to the English court. However, since Norway is not a member of the European Union, the provisions of BIIR did not apply. Consequently, an application was later made for transfer under Article 8 and 9 of the Hague Convention 1996. The mother cross-applied for a transfer to Norway. Due to the result of the EU referendum ("Brexit"), it was possible that the provisions of BIIR would cease to apply and, therefore, that the 1996 Hague Convention would acquire greater prominence.

118. The United Kingdom court had jurisdiction to submit a request under Article 9 of the 1996 Convention due to the child being a United Kingdom national and having a substantial connection with United Kingdom. The child's habitual residence until 2015 was the United Kingdom and is still the habitual residence of his father and brother. Furthermore, the court found that it was manifestly in the younger child's best interests for a determination to be made by the same court as that engaged with determining the older child's contact arrangements. Accordingly, the court held that the courts in England were better placed to assess the best interests of the children. It requested that jurisdiction of the courts in Norway for both children be transferred to the English court for a determination to ensure consistent orders for both children. A request for a transfer of jurisdiction was duly made.

119. Article 9 provides that a court or authority in a state which is not the child's state of habitual residence but which qualifies under Article 8(2) may, where it considers that it is "better placed in the particular case to assess the child's best interests":

a) request the competent authority or court of the state of habitual residence of the child either directly or through its Central Authority to authorise its exercise jurisdiction over the child or the child's property; or

b) invite the parties to introduce a such request before the court or authorities of the state of the child's habitual residence –

and the court or authority making the request may exercise of jurisdiction in place of the court or authority of the habitual residence of the child only if the later accepts the request.

120. Where Articles 8 or 9 are sought be to invoked, the courts or authorities of the states "may proceed to an exchange of views".

121. Returning to *State Central Authority & Thomas,* the case with the little girl taken to the Netherlands by her father, apart from the imperative that she be able to maintain a relationship with the maternal family, there was a financial dimension. The child's mother had bequeathed about AUD$1.5 million to the child to be held on trust for the girl by a close friend. The trustee was wholly aligned with the maternal family and hostile to the father. The father was excluded from any inheritance. The father had failed to access to the monies in our state courts and the trustees of the child's interest in her mother's estate applied use part of the trust funds to pay legal costs for the proceedings against the father in the Family Court. Permission was denied. The father alleged that the trustees were using the funds nonetheless. In the context of the unresolved parenting arrangements and the situs of the child's trust funds being Melbourne, I considered an application by the maternal family to request a transfer of jurisdiction from the Netherlands to Australia pursuant to Article 9 of the 1996 Convention.

122. With the consent of the parties, I engaged in direct judicial communication with the Network Judges in the Netherlands and obtained details of precisely how proceedings would be conducted in the court at Dordrecht, the hours of sitting, who could attend, the language and some information about audio visual capabilities. Ultimately, I concluded that, whilst our Court, in Australia, was well equipped and well able to assess the child's best interests, I was not satisfied that we were "better placed" to do so than the courts in the Netherlands. I declined to request a transfer of jurisdiction from the Netherlands to Australia.

123. In relation to property of the child, in 2013, I decided a case[34] where the applicant was an Australian citizen and her former partner was a French national. They had been in a committed relationship since 2003 spending time together in each country. Their daughter was born in 2005 and lived with her parents in France and Australia. The father travelled to Australia to spend time with the mother and the child, and it was the mother's evidence that he intended to move permanently to Australia once he retired and had become eligible for his pension. However, in 2010 the father died in France intestate. Under French law the child inherited the father's estate, which in this case included monies in French bank accounts, payment under a life assurance contract and real estate in Paris.

124. In October 2013 the Guardianship Judge of Family Matters, of the Tribunal de Grande Instance de Paris determined that the French courts were best placed to take necessary protective measures concerning the child and invited the applicant "to make an application before the competent Australian authorities to lodge an application to authorise the Guardianship Judge of the Superior Court of Paris to exercise jurisdiction to take all measures to protect the assets of the minor child … forming part of the estate of the [father] and in particular the acceptance of the estate and where applicable the sale of assets of the estate". I received the mother's application. Australian legislation and the Regulations which implement the Convention for Australia require that I be satisfied of various jurisdictional facts before I am able to transfer jurisdiction to the court in France. In this instance, I was satisfied that:

    a) The child was habitually resident in Australia;

    b) The court had jurisdiction to make a Commonwealth property protection measure as sought by the applicant;

    c) The Convention was in force between Australia and France;

    d) France was a state in which property of the child was located and a state in which the child had a substantial connection within the meaning of Article 8(2) of the 1996 Convention.

125. I was satisfied on the facts and evidence before me that the French court was better placed to assess the child's best interests in relation to the child's interest in the estate of her late father and to take measures appointing, or deciding the powers of, a guardian for her property.

C *Orders in cases of urgency - based on the child's presence in the jurisdiction*

126. Article 11 of the 1996 Convention provides:

> "The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures."

[34] *Carrick* [2013] FamCA 1118.

127. The 1996 Convention does not provide a definition as to what constitute "cases of urgency". The *HCCH Handbook on the 1996 Convention*[35] observes that it will therefore be a matter for the courts in the state where the child is present to determine whether a particular situation is "urgent". The *Explanatory Report* states that a situation of urgency may be said to exist where, if measures of protection were only sought through the normal channels of Articles 5 to 10 (the general bases of jurisdiction), irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised.[36] The *Handbook* suggests that a useful approach for courts and authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his or her protection or interests compromised if a measure is not taken to protect the child in the period that is likely to elapse before the authorities with general, or pre-eminent jurisdiction, can take the necessary measures of protection. See also the Supreme Court's decision In *Re J (AP)* described below.

128. Article 11 can be used to secure conditions on return of the child which are to operate in the home state because measures taken under Article 11 have extra-territorial effect. Protective or safe harbour orders which can be made under Article 11 include orders which provide for immediate care arrangements for the child on return. This is particularly useful as the child should be spared the unseemly predicament of the left-behind parent seeking to remove the child from the abducting parent's care at, say, the airport or refusing to return the child to the abducting parent after a period of re-introductory access. Urgent orders may provide for where the child will live or when the child will have access with the abducting parent, what school the child will attend and if the child should attend upon a therapist or counsellor for mental health support. These may sound more medium than immediate or short term provisions but it is to be remembered that an order made in a case of urgency under Article 11 will lapse as soon as the court exercising jurisdiction under Article 5 or 6 makes a contrary order.

129. An urgent order, like other measures and orders, will be "recognised by operation of law in all other contracting states" (Article 23(1)). This means that it has force of law in another contracting state without the parties being required to take any legal proceedings. However, recognition is not the same as enforceability. Obedience of a recognised order is voluntary. The order or measure can be observed by relevant parties. Furthermore, recognition can only can be "refused" on limited grounds under Article 23(2). If you are contemplating an Article 11 order as a condition of return in the context of a safe harbour order, it is prudent to ensure that the recognition of the order will not be subsequently refused in the other contracting state by using the procedure in Article 24. Once you have a decision on recognition or non-recognition, the order should be rendered enforceable under Article 26.

130. In *Re J (AP),*[37] the United Kingdom Supreme Court considered the particular meaning of "urgency" in Article 11 of the 1996 Convention in the context of whether the United Kingdom had jurisdiction to order the return of a child to Morocco. In this case, J was born to Moroccan and British parents in 2007. They were living in Morocco when the couple divorced and the mother was granted residential custody by the Moroccan courts. In September 2013, the mother removed J to England without the consent of the father. The 1980 Convention had not entered into force between Morocco and England. The father made an unsuccessful application for residential custody to the Moroccan courts. His

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[35] Permanent Bureau, *Practical Handbook on the Operation of* the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children Convention (2014) The Hague Conference on Private International Law, 67 <https://www.hcch.net/upload/handbook34en.pdf>.
[36] Lagarde, above n 17.
[37] [2015] UKSC 70.

application failed because the child had already left the jurisdiction of the Moroccan Courts. He then appealed to the English court in March 2014 for an order for J's return under the 1996 Convention. The judge directed the mother to return the child to Morocco to enable the courts there to resolve issues relating to J's welfare. The mother appealed. The Court of Appeal held that the English courts did not have jurisdiction under the 1996 Convention or on any other basis to make a return order on the facts of the case and set aside the order.[38] The father appealed to the Supreme Court which reversed the decision of the Court of Appeal. In summary, the Supreme Court held that "urgent" does not necessarily mean urgent and that the relief does not necessarily have to be available in the home state either. The guidance stated by Lady Hale is as follows:

> [34] It is obviously consistent with the overall purposes of the Convention that measures of protection which the child needs now should not be delayed while the jurisdiction of the country of habitual residence is invoked. On the other hand, the article 11 jurisdiction should not be used so as to interfere in issues that are more properly dealt with in the home country. It is a secondary, and not the primary, jurisdiction. Thus it is one thing to use the article 11 jurisdiction in support of the home country, for example, by facilitating a return there after a wrongful removal. It is quite another thing to set up the article 11 jurisdiction in opposition to that of the home country (as happened in Detiček). Clearly it was not intended for that purpose.
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> [35] We have received very helpful written submissions from three interveners: Reunite International Child Abduction Centre, the AIRE Centre, and the International Centre for Family Law, Policy and Practice. All are broadly supportive of the above approach. Reunite argues that, in cases of wrongful removal or retention, no left-behind parent should be shut out from invoking the jurisdiction under article 11. It is then a question for the court whether the circumstances are such that a return order is necessary. At this stage, questions of long delay, or possible objections to return, analogous to those in article 13 of the 1980 Convention, may become relevant. In this way, the position under the 1996 Convention would broadly mirror that under the 1980 Convention in child abduction cases.
>
> [36] On the other hand, this view of the matter does not emerge either from the *Explanatory Report* on the 1996 Convention by Paul Lagarde (HCCH Publications 1998) or from the *Practical Handbook on the Operation of the* 1996 Hague Child Protection Convention , the most recent edition of which is dated 2014. The Lagarde Report points out, at para 68, that the Convention does not define the notion of urgency, but as it is a derogation from the normal rule it ought to be construed "rather strictly". It might be present "where the situation, if remedial action were only sought through the normal channels of articles 5 to 10, might bring about irreparable harm for the child". However, he later puts it more broadly, when explaining the justification for this concurrent jurisdiction. "If this jurisdiction had not been provided, the delays which would be caused by the obligation to bring a request before the authorities of the state of the child's habitual residence might compromise the protection or the interests of the child". The examples he gives are an urgent surgical operation or the rapid sale of perishable goods.
>
> …
>
> [38] Two comments seem appropriate. First, it would be unfortunate if words in the Explanatory Report were treated as if they were words in the Convention itself. There is a world of difference between "irreparable harm" and "compromising the protection or interests of the child". Neither expression is in the Convention, which merely asks whether the measure is necessary and the case urgent. Secondly, the Report and the Handbook clearly have abduction in mind, but only in the context of proceedings for return under the 1980 Convention. In that context, both interim contact

[38] [2015] EWCA Civ 329 [72].

orders and “safe harbour” orders are contemplated. Abduction in cases where the 1980 Convention does not apply is not considered, yet the 1996 Convention clearly provides for wrongful removal and retention in article 7. Far from derogating from the jurisdiction of the home state in these circumstances, the use of article 11 would be supporting it. It would be extraordinary if, in a case to which the 1980 Convention did not apply, the question of whether to order the summary return of an abducted child were not a case of “urgency” even if it was ultimately determined that it was not “necessary” to order the return of the child.

[39] While I would not, therefore, go so far as to say that such a case is invariably one of “urgency”, I find it difficult to envisage a case in which the court should not consider it to be so, and then go on to consider whether it is appropriate to exercise the article 11 jurisdiction. It would obviously not be appropriate where the home country was already seized of the case and in a position to make effective orders to protect the child. However, as Lord Wilson pointed out in the course of argument, the courts of the country where the child is are often better placed to make orders about the child's return. Those courts can take steps to locate the child, as proved necessary in this case, and are likely to be better placed to discover the child's current circumstances. Those courts can exert their coercive powers directly upon the parent who is here and indeed if necessary upon the child. The machinery of going back to the home country to get orders and then enforcing them in the presence country may be cumbersome and slow. Getting information from the home country may also be difficult. The child's interests may indeed be compromised if the country where the child is present is not able to take effective action in support of the child's return to the country of his or her habitual residence.

D *Provisional orders - based on the child’s presence in the jurisdiction*

131. The other temporary order which is based on the presence of the child rather than habitual residence is a provisional measure (order) under Article 12 of the 1996 Convention. There are distinctions between urgent orders under Article 11 and provisional orders under Article 12. Urgent measures (orders) have extraterritorial effect and can be made after a child has been wrongfully removed or retained. Provisional measures (orders) cannot be taken after a wrongful removal or retention. There does not need to be any pressing circumstance, or urgency, for a provisional measure but a provisional measure (order) cannot be inconsistent with a measure (order) already taken in the state of habitual residence. Provisional orders have no amenity as safe harbour orders because of the lack of extra-territorial effect.

E *Recognition of orders and advance recognition of orders*

132. The 1996 Convention provides a mechanism for the recognition and enforcement of orders made in one contracting state in all other contracting states. Article 23(1) states that “the measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States”. So, as between Australia and the United Kingdom, an order made in Melbourne could operate as if it is an order made in London.

133. Recognition of an order or measure occurs by operation of law and without the parties having to take further proceedings in the home state (Article 23(1)). However, recognition can also be refused. Article 23(2) lists several grounds upon which recognition of a measure (order) can be refused. They include:

    a) The order was made without jurisdiction (Article 23(2)(a)).

b) Except in the case of urgency (where Article 11 would apply), the order was made without the child having an opportunity to be heard *and*, that is in violation of fundamental principles of procedure in the requested state (Article 23(2)(b)). There is no such fundamental principle in Australia but, say, in Germany a child over the age of 3 years must meet personally with the judge.

c) Except in the case or urgency, at the request of a person who claims that the order infringes his or her parental responsibility and that person was not given an opportunity to be heard (Article 23(2)(c)).

d) If recognition and enforceability "is manifestly contrary to public policy of the requested state, taking into account the best interests of the child" (Article 23(2)(d)).

e) If the order is incompatible with a later measure taken in the non-contracting state of habitual residence and the order fulfils the aforementioned requirements of Article 23 (Article 23(2)(e)).

f) Where a child is sought to be placed in another contracting state but the state of habitual residence has not provided the intended state with notice under Article 33 (Article 23(2)(f)).

134. The basis upon which recognition can be refused are the same basis upon which enforceability can be refused.

135. Article 24 permits any interested person to request the authority of a contracting state to decide on the recognition or non-recognition of a measure taken in another contracting state. Article 24 states: "the procedure is governed by the law of the requested State". This is the advance recognition procedure and is an excellent means by which to obtain certainty around the recognition (and subsequent enforceability) in another Convention country of parenting orders. At all costs you would wish to avoid a situation in a return case or an international relocation case or a cross-border access case, where a child travels to another country on the basis that an order will be recognised in that other country only to find that, when challenged, recognition is subsequently refused.

136. Abductions aside, if permission is granted to a parent to relocate a child out Australia, it will be on the basis that the court has given careful consideration to what parenting arrangements can and will apply after the relocation. The advance recognition procedure available under Article 24 can be used to avoid the insecurity of waiting for recognition or enforcement to be challenged. Accordingly, in relocation proceedings, the court could pronounce orders (measures) but make the relocation contingent upon the parties first obtaining advance recognition of the order on the basis that, if advance recognition cannot be obtained, the relocation order will be set aside and the matter returned to court for further consideration. Even where the international relocation of a child is refused, the applicant may still want to travel with the child to the other country to see his or her family of origin or his or her new partner. Where relocation is permitted, the left-behind parent will require the security of orders in the other country which facilitate access arrangements. Either outcome requires the parents and their lawyers to understand how to obtain "mirror" or complimentary orders in the other country. In abduction cases, Article 24 can be used to obtain safe harbour orders which are enforceable in the home state.

137. Article 26 provides that where a measure (order) made in one contracting state requires enforcement in another contracting state, the measure shall, on request by an interested party, be declared enforceable or registered for the purposes of enforcement in the other state "according to the procedure provided for in the law of the other state". Article 26(2) provides that "[e]ach Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure." Article 26(3) provides that a declaration of enforceability or registration may only be refused for one of the reasons set out in Article 23(2). The disadvantage of weighting until regulation or enforcement is challenged in that

practical arrangements for access are likely to be frustrated and thwarted, to the disadvantage of the child.

138. In Australia of the advance recognition procedure has been employed to permit or entitle a parent to take the child to live overseas pending the hearing of the appeal on the basis that, if declared or registered as enforceable, our court was satisfied that the return of the parent and child to Australia could be compelled.[39] Orders were made by the trial judge and then the Full Court permitting the mother to relocate a child to Germany pending determination of an appeal against orders permitting the relocation, subject to the mother executing an undertaking as a protective measure pursuant to the 1996 Convention that she would return the child to Australia in the event that the father's appeal was successful. The mother could remove the child providing she first obtained, from a court of competent jurisdiction in Germany, either recognition of orders pursuant to Article 24 or a declaration of enforceability or registration pursuant to Article 26 of the 1996 Convention.

139. A second case was a matter before my Deputy Chief Justice ("DCJ").[40] The DCJ had ordered that a mother could relocate a child to Sweden. The father appealed the DCJ's decision to our Full Court and sought a stay of the relocation order. His Honour was satisfied that there were necessitous circumstances around the mother's health which justified her being able to leave with the child before the appeal was heard, provided she could first obtain advance recognition of enforceability of an order that she would return if required to do so. The request was made in September 2013 and the Svea Court of Appeal in Sweden made the declaration in February 2014.

140. As a trial judge, I would require parties to obtain orders in another country as a precondition to a child being removed from Australia. In my capacity as one of two Hague Network Judge's for Australia, I facilitate that process for my colleagues. For instance, recently, in a matter[41] that was finalised in the Family Court in South Australia, the parties to proceedings were seeking reciprocal orders to be made urgently between Australia and the United Kingdom so that the children could travel to the United Kingdom to have access with the father. Through the Hague Network, I made contact with the Judicial Officer for International Family Justice for England and Wales seeking reciprocity of these orders which were duly made. The paperwork to obtain enforceable orders in the United Kingdom is quite detailed and realistically requires certifications by a court official. The assistance of Tazeen Said of the office for International Family Justice for England and Wales was invaluable. The request was completed in two days.

F *Conditions to return under the 1980 Convention*

141. The 1980 Convention is implemented into Australian law by legislation which provides that the court may make such orders and conditions as it is satisfied give effect to the 1980 Convention. Our High Court has observed that if conditions are attached to a return order[42]

> *care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced*. (emphasis added)

142. My experience of deciding Hague return cases over the last ten years leads me to a number of conclusions about conditions to return. The conclusions are:

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[39] *Cape & Cape* [2013] FamCAFC 114.
[40] *Lasman & Lasman* [2013] FamCA 593.
[41] Under the pseudonym *Montjoy & Hillman*, unreported.
[42] *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* [40] per Gaudron, Gummow and Hayne JJ.

- Conditions to return must be simple.
- Conditions which stand to be fulfilled after the child has been returned are too risky to rely upon. Accordingly, a condition should be complied with prior to the child's return and, absent further order of the court, the child should not be returned if the condition is not met. It follows that I am talking about conditions precedent to return.
- The requested court should be vigilant to ensure that the returning parent does not obtain conditions which cannot be met with the consequence that a return order will be frustrated. If a condition is impracticable and cannot be fulfilled, it should not be imposed. If the subject matter of the condition is considered to be an imperative but cannot be achieved, whatever circumstance is sought to be addressed by the condition may give rise to one of the five exceptions to return.
- It is preferable to dispatch a child promptly after a return order has been made than to permit the parties, in the requested state, to quibble about matters which can be adjusted by the courts and authorities in the home state. This would include payment of a return airfare for the abducting parent as well as the child, or the provision of a modest amount of money to cover immediate needs for accommodation and food on return.
- If one party (usually the left behind parent) is not adequately involved or given a right to be heard on the imposition of conditions which he has to fulfil, he may request the imposition of conditions and try to undermine them after return, to the child's disadvantage.
- Mediation is an excellent environment to negotiate conditions to return.
- Very importantly, the conditions should not usurp the regular functions of the courts or authorities in the child's state of habitual residence. This is usually observed by making any conditions apply for a short time only.

143. Conditions to return are a delicate balance between not usurping the role of the court in the jurisdiction to which the child is returned and ensuring that what can be put in place to safeguard the child and the taking parent on return, is put in place. In every respect, conditions to return which cannot be met ought not to be imposed as a backdoor means of thwarting a return where a return is justified.

G *Undertakings*

144. In the early years of the operation of the 1980 Convention in Australia, our courts were receptive to undertakings by left-behind parents to do, or refrain from actions, once the child was returned to the home state. This was probably a by-product of our common law traditions but without adequate consideration being given to the fact that an undertaking is not enforceable.

145. A simple undertaking offers no meaningful protection for a child when the undertaking is given to a court in a jurisdiction to which at least one parent never thinks they will have to return. Accordingly, undertakings do not figure in my disposition of matters. An exception would be where I accept an "undertaking" to record an expression of intention about otherwise unenforceable matters such as a left-behind parent warranting that he or she will not cooperate with any criminal prosecution of the taking parent, in the home state. That may be of some evidentiary value.

H *Cooperation between international courts*

146. Chapter V of the 1996 Convention establishes protocols for cooperation between authorities in different contracting states. Since the Conventions were negotiated, we know more about child

development and the incidence of overseas travel is greater. With ease of international travel, children may find themselves living in a country other than the country in which both their parents live. Furthermore, with the focus of habitual residence now being on the integration of the child into the environment (rather than joint parental intention) a requesting parent may not be familiar with the child's environment or the child's situation in that environment. The 1996 Convention provides the basic framework for an exchange of information and for the necessary degree of corroboration between administrative authorities and judicial authorities in contracting states.[43]

147. Article 35(2) of the 1996 Convention provides a further preliminary mechanism to an access application. It enables a parent who is seeking to obtain or maintain access to a child in another contacting state to request of the Central Authority in his state "to gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised". It further provides that the evidence and information sent by the Central Authority of the requesting state "shall admit and consider such information, evidence and finding before reaching its decision". The Article 35(2) mechanism facilitates the transmission of independent and reliable information. It is silent on the degree to which the information can be scrutinised or tested. In Australia, we would expect that the transmission of information would be completely transparent and that the maker would be able to be cross-examined by electronic means. Article 35(2) is a valuable means by which independent evidence of the applicant's circumstances can be transmitted to the courts of the jurisdiction where access will be determined. It could go a long way to dispel the unknown elements of the applicant's case.

148. The 1980 Convention has not been very effective in the facilitation or establishment of rights of access. However, once the proceedings are contemplated, Article 34(1) of the 1996 Convention provides that the Central Authority in one country may "request any authority of another contracting state which has information relevant to the child to communicate such information". This is a valuable tool to demystify the circumstances of the child and progress an international access application. It is an effective means of gathering information in any access case but very much so where, say, the primary care parent is travelling from one country to another to avoid either the access application or the jurisdiction of child protection authorities.

149. Article 32 provides "that on a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

    a) provide a report on the situation of the child;

    b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child".

150. One of the problems encountered by a parent seeking access to a child in another country is that he or she seems remote and there has frequently been a complete breakdown of any communication between him or her and the child and the parental relationship is characterised by a lack of trust. The dislocation in parent/ child relationship may be something that the primary care parent exploits to the disadvantage of the applicant for access and, through him or her, the child. Oftentimes the requesting parent may have unrealistic expectations of what access should be ordered. Article 32 can be utilised by a parent who resides in a contracting state, other than the state of habitual residence, to request a

[43] HccH, *Outline, Hague Convention on Child Protection* (September 2008) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> 1.

report on the child's situation from which the remote parent can assess what access arrangements he or she should seek. Article 32 can also be used to assess the needs of children who are living remotely from their parents including runaway children

151. In 2016, I had a return application to Hungary. The mother had retained the child in Australia. The five year old son was removed from Hungary in May 2015 by the mother and the application was filed within one year of the alleged wrongful removal. Notably the child, the father and the mother were all born in Hungary and had lived there until 2015. When the mother left, the father retained care of an older child, a daughter, from the mother's earlier relationship. Before me, the mother alleged that she could not cope emotionally with the prospect of return and that she would not get a fair hearing because the father was a high ranking local government official. I rejected with both contentions under Article 13(b) of the 1980 Convention but I did require that the child be assessed by family consultant employed by our court. This was because the mother refused to accompany the child and I needed an expert assurance on how to make the return bearable for the child in the absence of the mother.

152. The family consultant gave expert evidence at court. During cross-examination she said:

> ---Your Honour, I have significant concerns for this child's emotional and mental health. And if he returns to Hungary without his mother returning also, he is, in my opinion, going to need professional therapeutic intervention. I don't know this child, but I spent, maybe, an hour, an hour and a-half with him. Certainly, from my observation, he strikes me as being a child who is more likely to internalise his distress rather than externalise it. And so, for his caregivers who may not know him intimately, it may be that they assess that he is okay, because he is quiet, he is not crying, he is not asking for his mother, he is compliant, he's doing what's asked of him. But in fact, he may be in some kind of internal turmoil that is just not evident because he's not acting out in any way, and if that's left unchecked, hypothetically, he could become severely depressed. He could – his emotions may become so intolerable for him that the only way that he can actually manage day-to-day is to disconnect, to dissociate from his emotions, if you like, which will then result in him being disconnected from his world, from his environment, from the people around him. It will impact on his ability to learn, it will impact on his ability to form any kind of trusting relationships and therefore his ability to take comfort from the adults around him and, you know, hypothetically, he could end up as a very significantly psychologically damaged child and into his teens, into adulthood.

153. I adjourned the hearing and ordered the applicant State Central Authority to introduce a request for information about what services would be available for the child in the event of return including the location of such services. The court received a letter prepared by a guardianship official at the Public Authority and Guardianship Department in relation to psychological supports that are available to the child in the event he returned to Hungary. It was extremely detailed and immensely helpful. I ordered the child be returned and the mother changed her mind and accompanied the child. Once in Hungary, the mother completed pending parenting proceedings. The Hungarian court confirmed its orders that the mother had sole parental responsibility for the young boy and she returned to Australia immediately. The father retained sole parental responsibility for the daughter and the mother did not see the daughter whilst in Hungary.

VII COOPERATION THROUGH THE INTERNATIONAL HAGUE NETWORK OF JUDGES

154. The operation of both Conventions, together or separately, can be facilitated by the International Hague Network of Judges.

155. There are 124 Network Judges designated by contracting states in respect of which the 1980 Convention is currently in force with Australia.

156. The Permanent Bureau of the Hague Conference also encourages countries which are not contracting states nominate judges to the Network. In our Asia-Pacific region, Singapore and Pakistan had a Network Judge for many years prior to its accession as a party. The Philippines have designated judges to the Network.

Countries in respect of which the 1980 Convention is in force with Australia with shading for contracting states which have designated judges to the Hague Network

Convention Country	Convention Country	Convention Country	Convention Country
Albania	Dominican Republic	Malta	Slovakia
Argentina	Ecuador	Mauritius	Slovenia
Armenia	El Salvador	Mexico	South Africa
Austria	Estonia	Moldova, Republic of	Spain
Bahamas	Fiji	Monaco	Sri Lanka
Belarus	Finland	Montenegro	Sweden
Belgium	France	Netherlands	Switzerland
Belize	Georgia	New Zealand	Thailand
Bosnia and Herzegovina	Germany	Nicaragua	The Former Yugoslav Republic of Macedonia
Brazil	Greece	Norway	Trinidad and Tobago
Bulgaria	Guatemala	Panama	Turkey
Burkina Faso	Honduras	Paraguay	Turkmenistan
Canada	Hungary	Peru	Ukraine
Chile	Iceland	Poland	United Kingdom
China, People's Republic of (Hong Kong & Macau)	Ireland	Portugal	United States of America
Colombia	Israel	Republic of Korea	Uruguay
Costa Rica	Italy	Romania	Uzbekistan
Croatia	Japan	Saint Kitts and Nevis	Venezuela
Cyprus	Latvia	San Marino	Zimbabwe
Czech Republic	Lithuania	Serbia	
Denmark	Luxembourg	Singapore	

157. While the Network was initially conceived of as a means of ensuring cooperation *vis-à-vis* the 1980 Convention, it has been of increasing assistance with regard to the operation of the 1996 Convention. In the guide, published by the Permanent Bureau, entitled, *Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial*

Communications, including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges direct judicial communication can facilitate a number of arrangements including scheduling a hearing in a particular court in the home state as well as safe harbour orders.

158. In Australia, direct judicial communication must be transparent and is only undertaken with the consent of the parties. It is usually effected by email and the emails are eventually put into evidence.

VIII MEDIATION

159. I cannot stress enough the importance of mediation in cross-border matters.

160. Mediation is a perfect opportunity for parties to prepare for outcomes. You will find parties disinclined to mediate the final disposition but hopefully, more willing to discuss for the benefit of the child(ren) what should happen by way of parenting arrangements if the child is or is not returned. This will go a long way to relieving the child's anxiety about what will happen after proceedings are concluded as well as equip the unsuccessful party with a plan to salvage what he/she can from an unsuccessful outcome.

161. Two important features of Hague meditations are:-

    a) Mediation must never delay the determination of a Hague return case so care must be taken with scheduling mediation sessions;

    b) Mediation should be free of charge to the user because payment of fees gives parties an excuse to cancel mediation sessions.

162. Even though the 1980 Convention does not mandate parties involved in international child disputes to participate in mediation, the Permanent Bureau encourages the use of mediation in to resolve international abduction disputes. It has published the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation* which is a helpful resource.

163. A note of caution: because acquiescence is an exception to return under the 1980 Convention (Article 13(a)), in a common law jurisdiction and it is prudent to order, prior to the mediation, that anything said or done in the mediation will not be received in evidence in the proceedings. Where time is of the essence, an argument about whether a requesting parent acquiesces in the course of negotiations is an unhelpful distraction which could frustrate a prompt return.

IX THE ADVANTAGES OF CONCENTRATED JURISDICTION TO HEAR AND DETERMINE INTERNATIONAL CASES

164. The protection of children in Hague return cases is enhanced when jurisdiction to determine Hague return applications and international relocation cases is confined to a few courts within a contracting state.

165. By concentrating jurisdiction to hear Hague abduction applications to the superior, specialist court, hearings can be allocated more quickly than they can be in the high volume trial court and they can be case managed by a judge. Expedient dispatch of Hague cases is important given that Hague returns should be "hot pursuit" remedies. Returning a child without any investigation of welfare

considerations, as distinct from the five exceptions to return, is only justifiable when it is done with some speed.

166. The other benefits of the concentration of jurisdiction to hear and determine Hague return applications include:

- the efficiency with which judicial education about basic Hague principles as well as recent developments within the Hague community is achieved;
- the ability to familiarise our judges with the operation of the International Hague Network of Judges and the ability to facilitate general or direct (case specific) judicial communications between our court and the relevant judge in the contracting state of habitual residence via the International Hague Network of Judges. This is particularly valuable to implement conditions for return, schedule a preliminary hearing in the home state and other safe harbour measures;
- the ease of delivery of information about mediation of abduction cases within our jurisdiction; and
- as a superior court of record, it is apparent to the courts of other contracting states that any determination of the Family Court is authoritative and not prone to reversal by multiple rulings after further contests in higher courts. The authoritative nature of our determinations assists enforcement, Article 15 requests and direct judicial communications around conditions for return and safe harbour measures.

167. In contracting states where jurisdiction is concentrated, the 1980 and the 1996 Convention appear to be implemented with a higher degree of cohesion between the executive and judicial arms of government. Furthermore, the judicial determinations from the courts in those states around core concepts of habitual residence, rights of custody and, say, grave risk of harm is more consistent more timely than those which emanate from states where jurisdiction is diffuse.

X INTERACTIONS WITH NON-HAGUE COUNTRIES

168. I have not dealt with the plight of a parent when a child has been removed to or retained in a non-contracting state or when a parent seeks access to a child who resides in such a state. This is a large topic deserving of a session itself. Where, neither Convention operates some states have bilateral treaties with non-contracting states but my understanding is that success is limited.

169. There have been some recent incidences involving Australian children whose left-behind parent has retained the services of so called 'recovery agents' some of whom even purport to operate with, or have been approved by, the Australian Government or the Family Court of Australia. That is not the case. This form of self-help is potentially very dangerous. It is not to be recommended.

170. The expert organisations in this very difficult space of international parental child abduction are:

a) Reunite International Child Abduction Centre ("Reunite International")[44] is a charitable agency based in the United Kingdom. It takes a proactive approach to mediation and negotiations. The staffs are dedicated and highly experienced. Reunite International will assist with international parental child abduction cases which have no link to the United Kingdom. The initial approach can be as informal as a telephone call to the advice line of Reunite International.

b) The International Social Service ("ISS") is an international NGO founded in 1924; today it is a network of national entities with a General Secretariat based in Switzerland that assist children and

[44] Reunite International Child Abduction Centre, Leicester LE1 7XX, United Kingdom, Tel: +44 116 255 5345.

families confronted with complex social problems across international borders. ISS has a presence in more than 120 countries and has become a global actor promoting child protection and welfare.[45] ISS also promotes international mediation which sometimes incurs a modest fee.

171. The Hague Conference facilitates the "Malta Process" which is a meeting every 3 to 5 years of experts from non-contracting states whose legal systems are based on, or influenced by Islamic law ("Sharia") and experts from contracting states. There are also smaller regional meetings. It is aimed at improving cooperation and building bridges to assist with solutions to cross-border disputes in the absence of any international legal framework. The Malta Process was instrumental in establishing a mediation working party and has played a key role in promoting accession of Sharia states to the 1980 and 1996 Conventions.

XI MORE THAN THE SUM TOTAL OF THEIR PARTS

172. Both Conventions are valuable and effective in their own right. When used in conjunction with each other, they are most effective. The 1980 Convention provides the prompt return remedy. The 1996 Convention softens the impact of the 1980 Convention on children and returning parents but does so without diminishing its effectiveness as a forum selection treaty or contaminating the implementation of the 1980 Convention with best interests of the particular child. The cooperation provisions of the 1996 Convention provide for the necessary exchange of information and offer a structure through which, by mediation or other means, agreed solutions or partial solutions can be found. The ability to make urgent and necessary orders under Article 11, and to seek advance recognition under Article 24 or enforceability of an order under Article 26, facilitate arrangements being made for the return of children which are consistent with what we now know about childhood development and the insidious impact of family violence and high parental conflict on children.

XII CONCLUSION

173. The 1980 and 1996 Conventions equip us to implement family law in an international context. With the representation of children's interests, hearing the child's voice, mediation, direct judicial communication through the International Hague Network of Judges and a concentration of jurisdiction, we are better placed now than we have ever been before to care for children across international borders and to obtain for our respective countries the maximum advantage and benefit offered by the Conventions.

The Hon. Justice Victoria Bennett
Family Court of Australia
June 2017

[45] ISS General Secretariat, *The International Social Service* (2014) <http://www.iss-ssi.org/index.php/en/>.

ANNEXURE A

1969 Vienna Convention on the Law of Treaties

Article 31: General rule of interpretation

174. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

175. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

176. (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

177. (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

178. 3. There shall be taken into account, together with the context:

179. (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

180. (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

181. (c) any relevant rules of international law applicable in the relations between the parties.

182. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

183. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

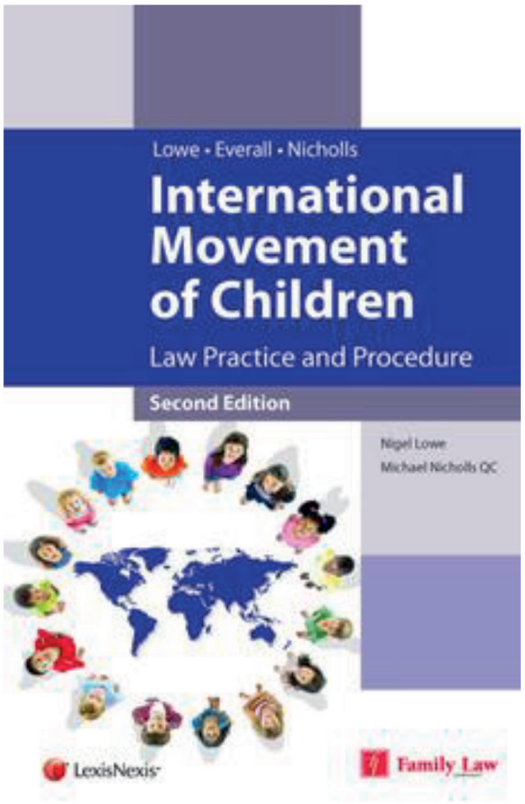
184. (a) leaves the meaning ambiguous or obscure; or

185. (b) leads to a result which is manifestly absurd or unreasonable.

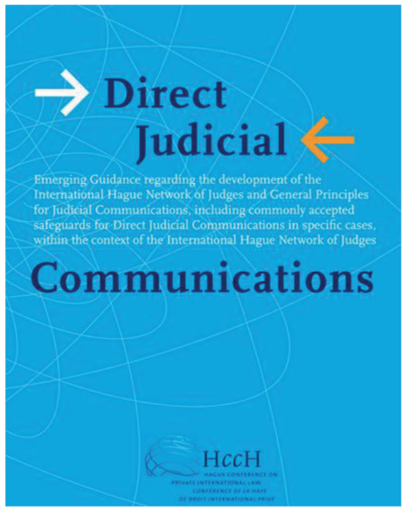
Recommended Reading on the 1980 Convention

Available soon from the publishers:

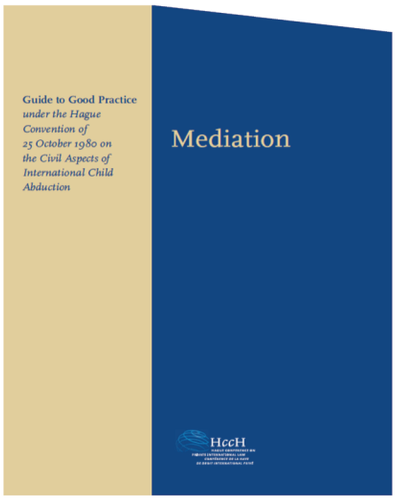
https://store.lexisnexis.com.au/product?product=international-movement-of-children-law-practice-and-procedure-2nd-edition&meta_F_and=9781846612466



1. **See the HCCH website for access to a range of helpful guides to good practice and the explanatory memorandum**

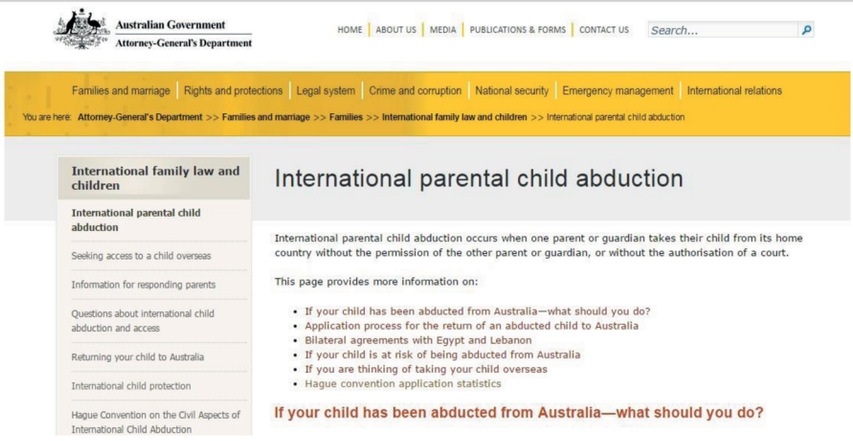


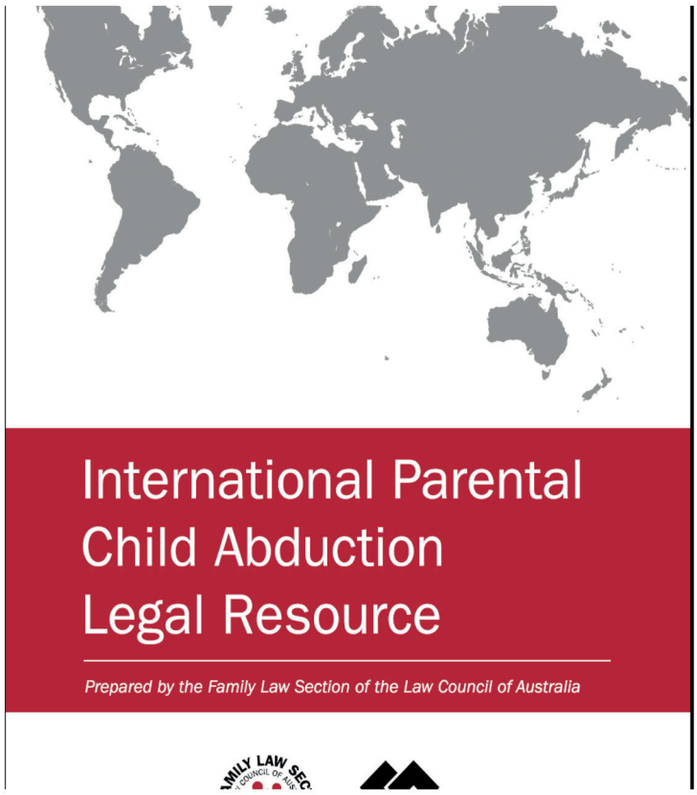
3.



5. It is useful to refer to government websites too. See for example Australia's Attorney-General's Department site:

6. https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFamilyLaw/Pages/Internationalparentalchildabduction.aspx





This publication is a valuable resource and contains good references to relevant cases. It can be found at: **https://www.familylawsection.org.au/publications**

SESSION 2.

Discussion

Hajime Ueda

Director of Hague Convention Division, Ministry of Foreign Affairs (Japan)

To better implement the 1980 Hague Convention: Efforts by the Japanese Central Authority

HCCH Asia Pacific Week
Seoul, 3 July 2017

Hajime Ueda
Director, Hague Convention Division
Ministry of Foreign Affairs (Central Authority of Japan)

Various Measures Taken for Victims of Domestic Violence

1. Measures taken in accordance with Japanese laws

- Non-disclosure of the whereabouts of the child and Taking Parent to Left Behind Parent (LBPs can file a petition for return of the child without knowing TPs' whereabouts.)
- Reports by JCA to the Child Guidance Centers etc if there is a potential risk of child abuses

2. Measures taken by the Japanese Central Authority (JCA)

- A case officer with experiences of working with DV victims to support those who may be DV victims.
- Networking with DV support organizations and connecting those with the organizations upon their requests.

3. Measure taken by the diplomatic missions abroad

- Contracting 8 local DV support organizations in the US and Canada (Japanese victims there can consult about DV in Japanese language).

4. Assistance for children and TPs after their return to child's habitual residence

When there is a risk of DV and child abuse after the child's return:

- The JCA may request the Central Authority there to take appropriate protective measures.
- Japanese diplomatic missions there would provide assistance when necessary.

The Role of the JCA Child Psychologist

1. Two child psychologists at the Japanese Central Authority

2. Mental health support for children and parents:

(1) Consultation for children and parents upon request.

(2) Follow-ups for a reuniting family after a child return.

(3) Approach to a Taking Parent after a return order was issued by Court.

3. Assistance upon a compulsory enforcement:

When enforcement is ordered after a Taking Parent's non-compliance with the Court' return order, the child psychologists may assist court enforcement officers on the site:

- by explaining the whole Hague situation to the child,
- by monitoring the stress level of the child and giving suggestions about it to the court enforcement officers, and
- by sustaining the child well-being during the course of enforcement.

Solution through Mediation and Co-mediation

1. Usefulness of Mediation - even if you have in-court conciliation system -

- Amicable solution matches better with the ideal of the Hague Convention as well as Asian ways of solution on family issues ? (than solution by court order).
- Benefits of mediation in comparison to in-court conciliation are; (a) flexible date setting, (b) on-line participation from foreign countries, and (c) use of foreign language.
  * The validity of the agreement is weaker than that of in-court conciliation, though…
- Mediation is compatible with in-court conciliation = For parties, more available options.
  * Australia, India, Japan, ROK, Singapore, Thailand and others have in-court conciliation system.
- JCA offers the parties up to 4 cost-free mediation sessions at one of 6 ADR organizations.

2. Benefits of promoting Co-mediation(*)

*Co-mediation: a form of mediation that uses two mediators from different ADR institutions.

- Co-mediation may work better when the other party hesitates to use mediation due to the difference of culture and language, because the existence of mediators from both countries enables easier use of co-mediation for both parties.

[Measures taken by JCA]

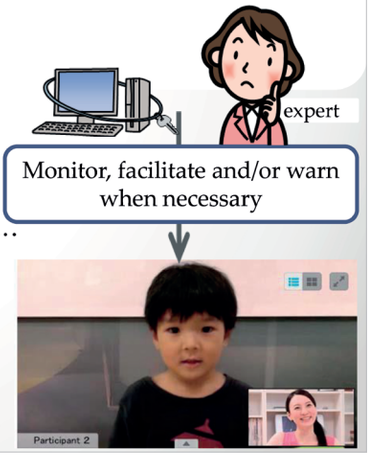
- Co-mediation with Victoria Legal Aid (Australia) : One case agreed on visitation (Mar 2016)
- Co-mediation with MiKK (Germany)(*ready for cases) / Reunite (UK) (*under negotiation)

Online *Mimamori* Contact (Online Contact Assisted by the Experts)

Characteristics

- **Secure system** (Different password each session, No disclosure of IP address/email address)
- During Online *Mimamori* Contact, **the visitation/contact experts**;
  - carefully **monitors the child's wellbeing**,
  - **facilitates communication** between the child and the parent, and
  - **warns or disconnects** the parent when needed.
- **Free of charge up to 4 sessions**.

  You only need PC or smartphone with Internet access.



What you can expect from Online *Mimamori* Contact

Useful as the initial step in realizing the visitation because there is…

- **Physical and emotional safety of the child** and
- **No need for direct interaction between the parents**

  Minimizing risk for parental dispute.

HCCH Asia Pacific Week 2017

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Four Seasons Hotel Seoul

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SESSION 2.

Discussion

Mary Sheffield
Chief Judge of the Missouri Court of Appeals (USA)

DIRECT JUDICIAL COMMUNICATION AND THE HAGUE NETWORK OF JUDGES

Presented by Judge Mary W. Sheffield
Missouri Court of Appeals, Southern District, United Sates
At the HCCH Asia Pacific Week 2017
Seoul, Korea
July 3 through July 6, 2107

NEW REPORTED AMERICAN ABDUCTION CASES 2016

Country	Number of Cases	Country	Number of Cases
Australia	13	Malaysia	1
Brazil	3	Micronesia	0
Cambodia	0	New Zealand	5
China	2	Philippines	6
Fiji	1	Singapore	2
France	7	Taiwan	1
Hong Kong	1	Thailand	1
Indonesia	3	United Kingdom	19
Japan	10	Vietnam	3
Republic of Korea	4		

THE INTERNATIONAL HAGUE NETWORK OF JUDGES

- Began in 1998
- In 2006 the fifth meeting of the Special Commission recommended developing principles for direct judicial communication
- The final document was drawn up by the Permanent Bureau in July 2012

ENLÈVEMENT D'ENFANTS / PROTECTION DES ENFANTS
CHILD ABDUCTION / PROTECTION OF CHILDREN

Doc. prél. No 3 A – révisé
Prel. Doc. No 3 A – Revised

Juillet / July 2012

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

LIGNES DE CONDUITE ÉMERGENTES RELATIVES AU DÉVELOPPEMENT DU RÉSEAU INTERNATIONAL DE JUGES DE LA HAYE ET PRINCIPES GÉNÉRAUX RELATIFS AUX COMMUNICATIONS JUDICIAIRES, Y COMPRIS LES GARANTIES COMMUNÉMENT ACCEPTÉES POUR LES COMMUNICATIONS JUDICIAIRES DIRECTES DANS DES AFFAIRES PARTICULIÈRES, DANS LE CONTEXTE DU RÉSEAU INTERNATIONAL DE JUGES DE LA HAYE

document établi par le Bureau Permanent

* * *

EMERGING GUIDANCE REGARDING THE DEVELOPMENT OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES AND GENERAL PRINCIPLES FOR JUDICIAL COMMUNICATIONS, INCLUDING COMMONLY ACCEPTED SAFEGUARDS FOR DIRECT JUDICIAL COMMUNICATIONS IN SPECIFIC CASES, WITHIN THE CONTEXT OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES

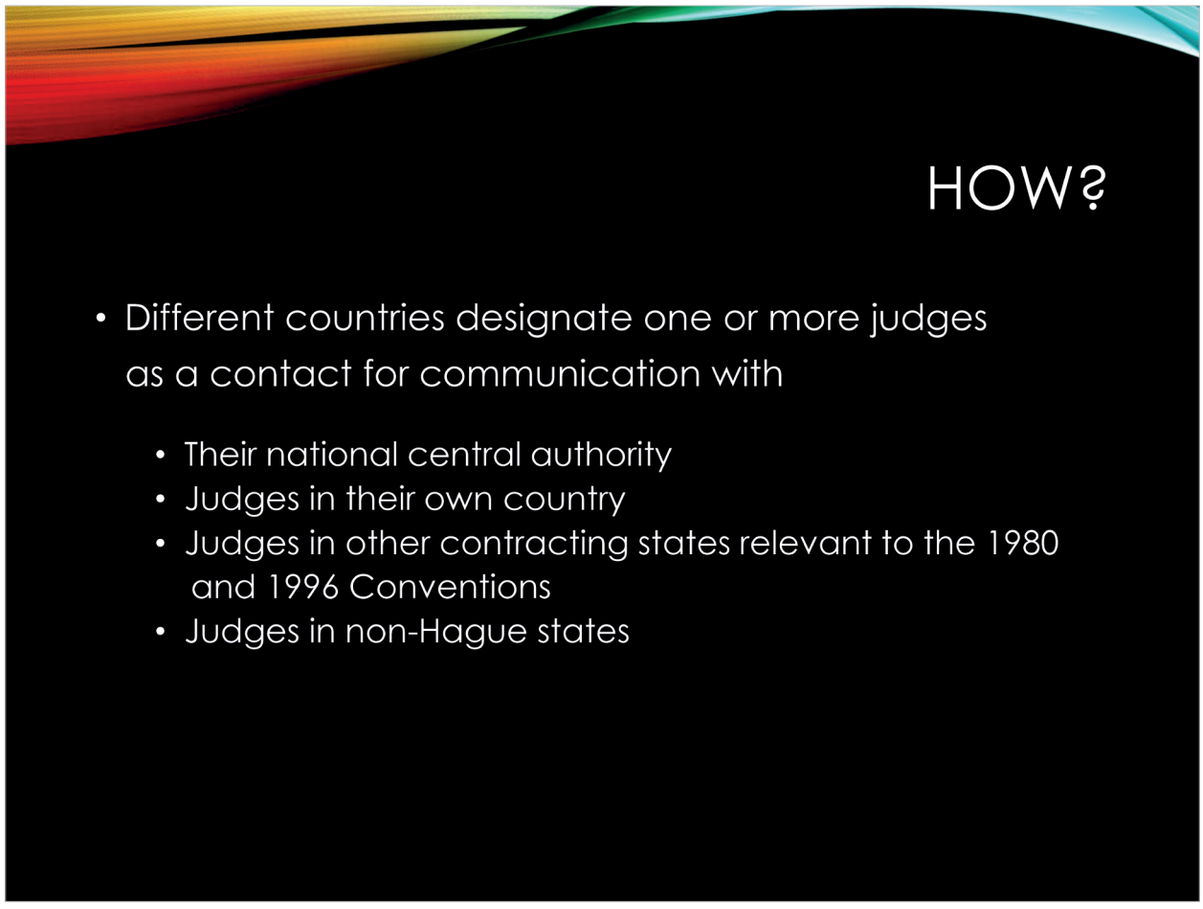
document drawn up by the Permanent Bureau

Document préliminaire No 3 A révisé de juillet 2012 à l'intention de la Commission spéciale de juin 2011 sur le fonctionnement pratique de la Convention Enlèvement d'enfants de 1980 et de la Convention Protection des enfants de 1996

Preliminary Document No 3 A Revised July 2012 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

Permanent Bureau | Bureau Permanent
6, Scheveningseweg, 2517 KT The Hague | La Haye The Netherlands | Pays-Bas
telephone | téléphone +31 (70) 363 3303 fax | télécopieur +31 (70) 360 4867
e-mail | courriel secretariat@hcch.net website | site internet http://www.hcch.net


WHY?
• Facilitate **COMMUNICATION** between judges at the international level to ensure the effective operation of the 1980 and 1996 Conventions
• Facilitate **COOPERATION** between judges at the international level to ensure the effective operation of the 1980 and 1996 Conventions


HOW?
• Different countries designate one or more judges as a contact for communication with
• Their national central authority
• Judges in their own country
• Judges in other contracting states relevant to the 1980 and 1996 Conventions
• Judges in non-Hague states

INTERNATIONAL HAGUE NETWORK

- 118 judges from 75 states
- Communication
  - Share information with Hague Network or Permanent Bureau with colleagues
  - Participate in international judicial seminars and national judicial seminars
  - Direct judicial communication with other Hague Network Judges with regard to specific cases
  - Direct judicial communication with domestic judges

PRINCIPLES

- Respect the legal requirements and due process of each country
- Preserve judicial independence
- Determine the basis for direct judicial communication

U.S. GOVERNING LAW: UCCJEA*

- Authorizes direct judicial communication
- Court must allow parties to participate
- Court must allow parties an opportunity to present facts and legal argument
- A record must be kept unless the communication is ministerial
- Foreign countries are treated as states

*Uniform Child Custody Jurisdiction and Enforcement Act

QUESTIONS FREQUENTLY ASKED

- What protective measures are available?
- Can the foreign court enforce conditions or undertakings?
- Can the foreign court issue a mirror order?
- What previous orders have been made?
- Are there any domestic violence findings?
- Is there an outstanding criminal warrant?
- Scheduling: how long will it take to obtain a hearing?
- What interim relief is available?

INAPPROPRIATE QUESTIONS

- Cannot ask the other judge to remove an arrest warrant
- Cannot discus the "merits" or substantive matters of the case

HOW TO INSTITUTE

- Contact a network judge
- Give a brief procedural summary
- Provide the questions or information sought
- Give identifying information about the foreign case
  - Case number
  - Parties
  - Name and location of the court
  - Name of the foreign judge if known

THE DIRECT COMMUNICATION

- Identify yourself as a Hague Network Judge and provide your contact information to the Hague Network Judge
  - Do not provide contact information to parties or their attorneys
- Provide identifying information for your case
- Advise whether the parties have consented to the communication
- Provide any time constraints
- Provide your availability
- Provide your specific questions
- Confirm that communication will be in accordance with legal guidelines
- Take advantage of technology
- If different languages are involved, have an interpreter available
- Keep personal, identifying information re parties and children confidential if possible
- Acknowledge receipt of written communication ASAP

THANK YOU!

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SESSION 3.

Child Adoption

Moderator

Mary Sheffield
Chief Judge of the Missouri Court of Appeals (USA)

Presenters

Laura Martinez-Mora
Principal Legal Officer of the HCCH

Kyung-eun Lee
Former Director of the Division of Child Welfare Policy, Ministry of Health and Welfare (Korea)

Panelist

Lisa Ellingson
Vice President of Korean Affairs, International Korean Adoptee Associations (USA)

Hyunhee Han
Judge of Sungnam Branch of Suwon District Court (Korea)

Ana Carolina Pedrosa Massaro
Professor at University Center Moura Lacerda (Brazil)

Welcome Remarks

Seunghee Kim

Member of the Health and Welfare Committee of the National Assembly

Education

- Sc.D. University of Notre Dame, Graduate School
- M.S. in Pharmacy, Seoul National University, Graduate School of Pharmacy
- B.S. in Pharmacy, Seoul National University, College of Pharmacy

Work Experience

- Member of Health and Welfare Committee in the 20th National Assembly
- Coordinator of Special Committee on Public Economy in the 20th National Assembly
- Deputy Chairperson, Liberty Korea Party, Health and Welfare Committee, Policy Coordination Committee
- Minister of Food and Drug Safety

Awards

- Order of Service Merit (Red Stripes)
- Presidential Citation

Introduction of Korean Adoption History

Susan Cox

Vice President of Policy & External Affairs, Holt International (USA)

Education

- Honorary Doctorate of Humanities, Northwest Christian University
- Aspen Institute Executive Seminar on Leadership Fellow
- Oregon State University

Work Experience

Holt International (1983-present) current position Vice President of Policy & External Affairs
Responsibilities at Holt have included: fundraising; development; communications; media; member of senior staff; Director of Heritage Camp; Led Heritage tours to Korea. Organized International Adoption & Child Welfare conference for Holt's 40th with Honorary Co-Chair First Lady Hillary Clinton; the 50th Anniversary Conference with Honorary Co-Chair First Lady Laura Bush; Holt 60th Anniversary in 2016 organized "Reunion of the First Generation of Korean Adoptees;" In 1999 founded the First International Gathering of Korean Adoptees in Washington D.C.; Reunion of Vietnamese Adoptees in 2000; was a principal of the first AdoptUSKids project in 2005.

Published Books

Sacred Connections, Editor; Voices from Another Place, Editor; More Voices, Editor; American Academy of Pediatrics adoption manual; Edmund S. Muskie School of Public Service; Yale Journal of Law & Feminism; Casey Family Foundation; Introduction to International Search for National Adoption Information Clearinghouse; Searching For A Past; Family Resource Coalition; Family Support Magazine; Ethic's in International Adoption; National Journal; Published numerous articles regarding child welfare and adoption in publications throughout the United States.

Awards

- Appointed by President Bill Clinton to the first White House Commission on Asian Americans and Pacific Islanders
- Participant to The Hague Conference on Private International Law Special Commission on the Practical Operation of the Hague Intercountry Adoption Convention
- Friend of Adoption Award, North American Council on Adoptable Children
- Designated by Korean Ministry of Health and Welfare as U.S. spokesperson for Korean adoption
- U.S. Representative to Women's Vital Voices Conference, Montevideo, Uruguay
- Appointed by Governor to Task Force on Adoption & Foster Care in Oregon
- Featured in United Airlines' Hemispheres magazine, "People Making A Difference,"
- Korean Society of Oregon Outstanding Leadership Award
- Friend of Adoption Award, Open Door Society of Massachusetts
- Angel in Adoption Honoree, Congressional Coalition of Adoption Institute
- Inducted into Adoption Hall of Fame through National Council for Adoption

HCCH Asia Pacific Week 2017
Seoul, 3-6 July 2017

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CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

History of Korean Adoption

Susan Soonkeum Cox
Vice President of Policy & External Affairs
HOLT INTERNATIONAL
Uplifting children. Strengthening families.

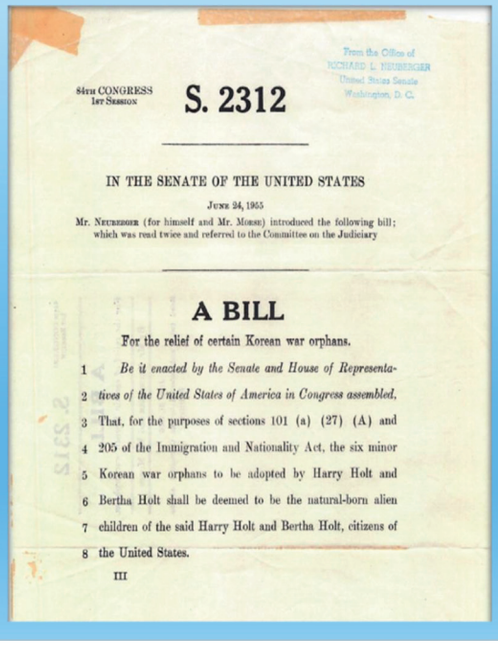
The Birth of Intercountry Adoption

1950-1953 Korean War

- Thousands of children orphaned and abandoned
- Many of them mixed race children fathered by U.N. soldiers

1955 Harry Holt, Oregon, USA visits Korea

1955 Holt Bill passed in U.S. Congress



84TH CONGRESS
1ST SESSION

S. 2312

From the Office of
RICHARD L. NEUBERGER
United States Senate
Washington, D. C.

IN THE SENATE OF THE UNITED STATES

JUNE 24, 1955

Mr. NEUBERGER (for himself and Mr. MORSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

For the relief of certain Korean war orphans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of sections 101 (a) (27) (A) and 205 of the Immigration and Nationality Act, the six minor Korean war orphans to be adopted by Harry Holt and Bertha Holt shall be deemed to be the natural-born alien children of the said Harry Holt and Bertha Holt, citizens of the United States.

III

"to allow the adoption of certain war orphans"

1956 Holt Adoption Program established in Korea

Since 1956, nearly 200,000 Korean children have been adopted abroad to the USA & Europe

More than 600,000 children have been adopted worldwide

-Peter Selman, Newcastle University, UK

In 1980's, to ensure the highest quality care, adoption agencies abroad were required by Korean government to establish local branch offices in states where they were placing Korean children with adoptive families.

This provided direct service between the placing agency and the family to ensure the highest level of post adoption support.

In 1988, Korea hosted the Olympic Games.

This put Korean overseas adoption into the public spotlight.

Cover of *Progressive* magazine

"Korean babies for sale, Korean make them ~ Americans buy them."

1990's Adoptive parents are required to travel to Korea for adoption

1996 Deadline established to end intercountry adoption from Korea (Later extended to 2015)

2002-2008 Incentive driven policies were established to keep Korean children in Korea

- Tax deductions were offered to encourage domestic adoption by Koreans.
- Single mothers subsidy of 400,000 won ($417USD) per month
- Domestic adoptive parents subsidy of 400,000 won ($104USD) per month
- Relaxed requirements for Korean adoptions
  - Allowed singles to adopt
  - Age restriction of 45 years difference between the parent and child from age 50 to age 60.
- Stricter marriage and income requirements for foreign adoptive parents.

2012 New Adoption Law passed to require Korean birth mothers to register their child in family registry

May 24, 2013
Korea signed Adoption Convention in The Hague

2014 The new Adoption Law is implemented

Highlights of Korean Adoption

Korea intercountry adoption program is considered the "gold standard" of adoption practices

Korea was the first country to place children with families in other countries & has led the way in post adoption services for children and families

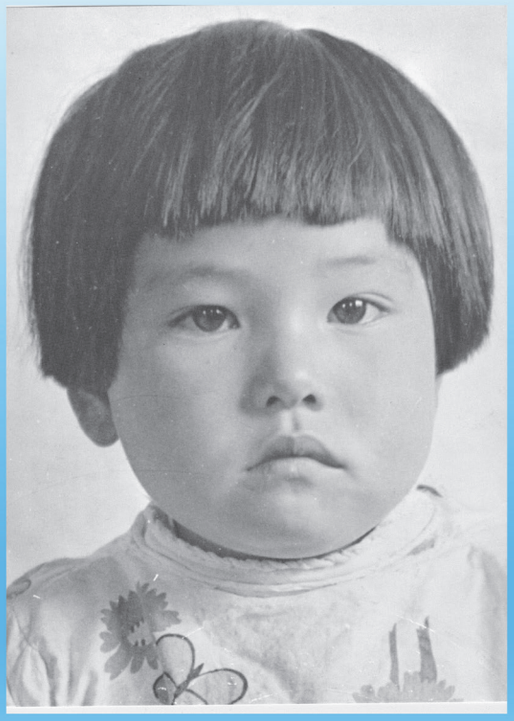
In the early 1970's, Motherland Tours to Korea for adoptees were established

Heritage tours have provided unique and important opportunities for Korean adoptees to connect to their birth country and culture.

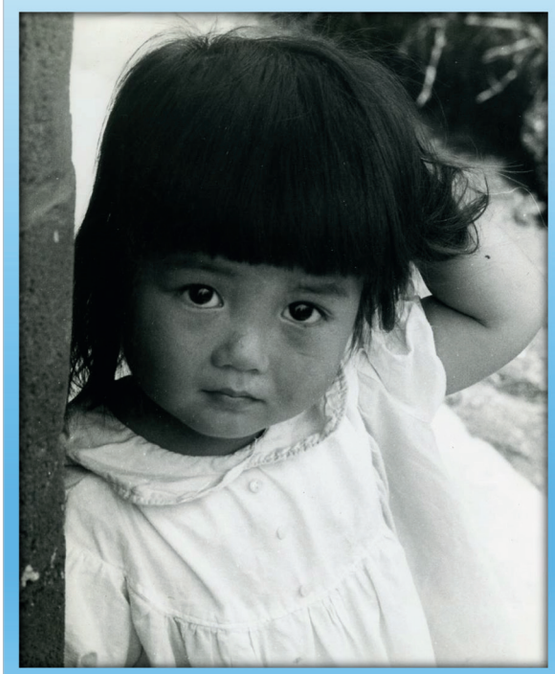
More recently, the Korean government sponsors tours for Korean adoptees

Including tours for
Korean adoptees with disabilities

Like other adoptees, I did
not leave Korea to
go to America.
I left Korea to go to a family.



Preamble to the Hague Convention



Recognizing that the child,
for the full and harmonious development
of his or her personality,
should grow up in a family environment,
in an atmosphere of happiness, love and
understanding,

Recalling that each State should take,
as a matter of priority,
appropriate measures to enable the child
to remain in the care of his or her family of origin,

Recognizing that intercountry adoption
may offer the advantage of a permanent family
to a child for whom a suitable family cannot be found
in his or her State of origin...

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Moderator

Mary Sheffield

Chief Judge of the Missouri Court of Appeals (USA)

Education

She received her Doctor of Jurisprudence (JD) from the University of Miami Law School in Coral Gables, Florida, and received her Bachelor of Arts (BA) from North Carolina State University at Raleigh, North Carolina. She studied abroad at Magdalen College in Oxford, England.

Work Experience

- Law Clerk – Law Firm of Knecht and Holland, Coral Gables, FL, April 1979 – June 1980
- Gene Gulinson Law Offices – Salem, MO, September 1980 – June 1982.
- Mary W. Sheffield Law Offices, July 1982 – January 1983.
  Elected Associate Circuit Judge and Probate Judge, Division 1, Phelps County, Missouri in January 1983. Re-elected for six consecutive terms.
- Elected Circuit Judge of the 25th Judicial Circuit, Missouri, November 2004. December 2004 - January 2012. Served two terms as presiding judge.
- Appointed to the Missouri Court of Appeals, Southern District in 2012. Currently serves as Chief Judge.
- Appointed to serve as one of four U.S. Hague International Liaison Network Judges for the Hague Convention on Child Abduction, 2003 – present.

Published Books

- Served on the Commission on National Probate Court Standards under a grant from the State Justice Institute, the National College of Probate Judges, and the Center for State Courts which resulted in the 1993 publication of the National Probate Court Standards.
- In 1994, presented an article entitled Missouri Probate and Trust Procedure Against the Backdrop of the National Probate Court Standards to the Sixth Annual William K Fratcher Trusts and Estates Symposium.
- In 1994 was joint presenter at the National College of Probate Judges Fall Conference, titled Mock Trial on Guardianships.
- Presented at the National College of Probate Judges Spring Conference, 1995, in Newport, Rhode Island on Supervision of Guardianships.
- Presentation to Advanced Elder Law Institute for the National Academy of Elder Law Attorneys in Colorado Springs, Colorado in 2000, co-prepared and presented Appellate Argument on Order Denying Petition for Distribution of Ward's Funds to Implement Medicare Planning.
- At the 2001 American Bar Assoc. meeting in Chicago IL, presented Eccentric, Independent, or Incompetent? Litigating Mental Capacity Cases under the Section of Individual Rights and Responsibilities.
- Panel presenter on How Would You Handle This? Open Discussion with Panel and Membership on Current Issues and Ethics in 2001 at the National College of Probate Judges Fall Conference and again in 2002 at the NCPJ Spring Conference.
- In August 2009, as a Hague Convention Liaison Judge of the U.S. at the Common Law/Commonwealth International Family Justice

Judicial Conference in Windsor, England, presented The State of International Family Law Issues: A View from the United States.

- In 2009 presented United States Implementation of 2007 Hague Child Support Treaty to the International Family Justice Conference in Cumberland Lodge, England.
- The State of International Family Law issues: An Updated View from the United States, presented June 2012 at the University of Iowa College of Law.
- International Hague Network of Judges, the American Experience of Liaison Judges in Hague Parental Abduction Cases, presented in 2012 at Hong Kong International Family Justice Judicial Conference.
- Hague Convention on International Child Abduction, presented 2005 at the Missouri Judicial College
- May 2014 Presented International Hague Judicial Network of the United States in Arusha, Tanzania
- In 2015 presented Report of the U.S. International Liaison Network Judges for the Hague Convention on the Civil Aspects of International Child Abduction, in Hong Kong and in Australia
- Presented The American Experience with Judicial Communications in the International Hague Network of Judges in Switzerland, Slovakia, Trinidad and Tobago.
- Presented Misunderstandings and Miscommunications and Empirical Examination of Problems Arising under the Hague Convention on the Civil Aspects of Child Abduction at the World Congress in Dublin Ireland in 2017

Awards

- Selected and honored in Washington, D.C. as one of the Ten Outstanding Young Women in America. In 1986.
- One of 32 state leaders from across the USA selected for the Henry Toll Fellowship Program in 1991.
- One of 35 women selected to participate in the Leadership American Program in 1992.
- Woman of Distinction Award from the United States Girl Scouts of America in 1993.
- Good Life Woman of the Year Award for establishing the CASA program in the 25th Judicial Circuit in 1995.
- Optimist 2000 Bramlett-Light Award for establishing the Phelps County Teen Court in 2000.
- Received the first Chief Justice's Award for Outstanding Service to the Judiciary in 2002.
- Received the Athena Award in 2004 from the Rolla Area Chamber of Commerce, which annually recognizes an accomplished community woman who has worked to improve the quality of life in Rolla, MO.
- Received the CASA Hope Award in 2011.
- Received the Missouri Lawyers Weekly; 14th Annual Women's Justice Award for Public Service in 2012.

Presenter

Laura Martinez-Mora

Principal Legal Officer of the HCCH

Education

Laura received her law degree from University of Valencia (Spain), a Master of Laws (LL.M) in International Law with a specialisation on child's rights and comparative family law from the University of London (UK), and a Diploma in Child Protection and Juvenile Justice from the University Diego Portales in Santiago (Chile).

She is fluent in Spanish, French, English and Italian.

Work Experience

Laura joined the Permanent Bureau of the HCCH in 2007 as Adoption Technical Assistance Programme Co-ordinator. Since 2012 she is the Principal Legal Officer in charge of the post-Convention services which the Permanent Bureau provides in relation to the 1993 Hague Convention on Child Protection and Cooperation in respect of Intercountry Adoption. She also coordinates the work on Parentage and International Surrogacy Arrangements done by the Permanent Bureau.

In this capacity, Laura is responsible for the organisation and preparation Special Commission meetings on the practical operation of the 1993 Convention, and any other meetings related to her subject of work. Laura has also extensive experience in providing legal and technical assistance and training to experts and professionals in different countries all over the world and carrying research and drafting documentation for the Permanent Bureau.

Before working for the Hague Conference, Laura worked for over three years for the International Social Service (Geneva, Switzerland) and for three years at UNICEF (Regional Office for the Southern Cone, Santiago, Chile). She has also worked on children's issues at the European Commission in Brussels (Belgium) and at the Council of Europe in Strasbourg (France).

Presenter

Kyung-eun Lee

Former Director of the Division of Child Welfare Policy, Ministry of Health and Welfare (Korea)

Education

- Graduate School of Law, Seoul National University (Seoul, Korea), Ph.D. (in International Law) Feb. 2017
- Fletcher School of Law and Diplomacy, Tufts University (Medford, MA. U.S.A.), MALD (Master of Art in Law and Diplomacy) May 2002
- Seoul National University (Seoul, Korea) BA (French Education) Feb 1991

Work Experience

- Director for Child Welfare Policy, Ministry of Health and Welfare (Seoul, Korea) 2011-2013
- Director for International Cooperation, Ministry of Health and Welfare (Seoul, Korea) 2009-2010
- Visiting Fellow, The Henry L. Stimson Center (Washington D.C., U.S.A.) 2008
- Deputy Secretary to the President for Overseas Communications, Office of the President (Seoul, Korea) 2006-2007
- Director for Guidance and Protection, National Youth Commission (Seoul, Korea) 2003-2005
- Deputy Director, Subcommittee for Social, Cultural & Gender Affairs, 16th Presidential Transition Committee (Seoul, Korea) 2003
- Officer, Prime Minister's Office & Ministry of Information (Seoul, Korea) 1995-2002

Published Books

- International Legal Protection of the Rights of the Child in the Intercountry Adoption, Ph.D. Thesis, Graduate School of Law, Seoul-National University, (2017)
- The Best Interests of the Child Principle of the UN CRC and the Child Protection Legislation of Korea, Legislation and Policy Studies, Vol.8(2), (2016)
- The Success of Your Presidency is Determined before Inauguration: Guidebook for the Presidential Transition, Joong-Ang Books (2012, Seoul, Korea)

Awards

- Service Merit Medal of Honor, Republic of Korea (2005)

Panelist

Lisa Ellingson

Vice President of Korean Affairs, International Korean Adoptee Associations (USA)

Education

Juris Doctor degree from the University of St. Thomas School of Law, Minneapolis, MN, USA
Bachelor of Arts degree from the College of St. Catherine, St. Paul, MN, USA

Work Experience

Associate Attorney at Winthrop & Weinstine, Minneapolis, MN, USA - 2014 to present
American Attorney at LK Partners, Seoul, South Korea – 2012-2014
Associate Attorney at Dorsey & Whitney, Minneapolis, MN, USA – 2008-2010

Panelist

Hyunhee Han

Judge of Sungnam Branch of Suwon District Court (Korea)

Education

- 2008 Seoul National University(M.A.)

Work Experience

- 2015. Judge, Suwon District Court, Seongnam Branch
- 2011. Judge, Cheong-ju District Court

Panelist

Ana Carolina Pedrosa Massaro

Professor at University Center Moura Lacerda (Brazil)

Education

DOCTORATE IN CIVIL LAW – UNIVERSIDAD DE BUENOS AIRES, UBA – 01/2013 - 12/2018

- Student regularly enrolled in the intensive course of doctorate at the University of Buenos Aires, Argentina
- The study plan includes the elaboration of a final thesis on the topic: "Legal methods for containment of Reproductive Tourism".

SPECIALIZATION IN FAMILY LAW – FACULDADE DE DIREITO PROF. DAMÁSIO DE JESUS – 10/2014 - 04/2016

- Classes, attended until October 2015 (360 hours), covering various topic of Family Law, such as divorce, child custody, establishment of parentage and others. Great relevance has been ensured to comparative law, especially about cross board surrogacy and the determination of nationality and parentage.
- The study plan includes the elaboration of a final thesis on the topic: "Baby Business: The Legal Aspects Of Human Reproduction medically assisted".

SPECIALIZATION IN AGRIBUSINESS LAW – CENTRO UNIVERSITÁRIO DE ARARAQUARA, UNIARA – 09/2013 - 01/2015

- Classes, attended until September 2014 (360 hours), covering various topic of Agribusiness Law, such as agro-industrial groups, family agriculture and others.
- The study plan included the elaboration of a final thesis on the topic: "The Importance of Family Agriculture for Brazilian Agribusiness".

SPECIALIZATION IN PROCEDURAL LAW – FUNDAÇÃO ARMANDO ÁLVARES PENTEADO, FAAP – 09/2008 - 09/2010

- Classes, attended until July 2010 (360 hours), covering various topic of Brazilian Procedural Law, such as appellation, Tribunal's procedures and others.
- The study plan included the elaboration of a final thesis on the topic: "The Exceptional Granting Of Suspension Effect in Special Appeal".

GRADUATION IN LAW – FACULDADE DE DIREITO DE FRANCA, FDF – 01/2002 - 12/2006

- Bachelor's Degree in Law

Work Experience

LAWER – Marcussi, Jamel & Massaro Advogados – 06/12 - present

- Working alongside highly-respected family law attorneys in a law firm, I practiced exclusively in the area of divorce, child custody, and family law, working on a variety of complex cases including substantial trial and appellate experience

ADJUNCT PROFESSOR OF LAW – Centro Universitário Moura Lacerda – 08/15 -present

- Adjunct Professor of Law at Centro Universitário Moura Lacerda, teaching family law, private international law, biolaw, bioethics and human rights.

MEDIATOR AND CONCILIATOR IN THE FIELD OF FAMILY LAW

- Mediator and conciliator in matters of family law.
- Work in the Court of Justice of the State of São Paulo.

INTERN – The Hague Conference on Private International Law – 12/16 – 02/17

- During the internship, my responsibilities were related to the post-Convention services which the Permanent Bureau provides in relation to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the 1993 Hague Convention") and to the legislative work of the Organisation towards a possible future international convention on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (the "Parentage / Surrogacy Project")

Published Books

- THE THOUGHTLESSNESS AND THE BANALITY OF EVIL, BASED ON THE HANNAH ARENDT'S THOUGHT, REFLECTED IN THE JURISDICCION POWER. Published on Journal of Law School of Goias Federal University (UFG), v.38, p.207 - 222, 2015.

Home page: [http://revistas.ufg.br/index.php/revfd/article/view/34625/18275]

ABSTRACT: The scope of this article is to analyze the exercise of adjudicative power from the conceptualization of Hannah Arendt on the thoughtlessness and consequent banality of evil. Indeed, it is intended, through this study, to make a comparison between the observations Arendtian on how irrational simply obey orders and follow a code of ethics predetermined, without reflecting on the outlet duct, leading to the trivialization of poorly described by the philosopher when the Eichmann trial, with decisions handed down by judges in general, often to rigorously apply the law to this case, fail to understand the real needs of the parties and the reasons that led them to seek the Judiciary and do not contribute to the attainment of justice, in more ordinary sense of the word.

KEYWORDS: The banality of evil, thoughtlessness, adjudicative power, Ethics.

- THE BRAZILIANS COURTS IN FRONT OF THE DYNAMISM OF FAMILY LAW AND THE UPGRADING OF LEGAL ARGUMENTATION. Published on Legal Journal Brazilian Portuguese of Lisbon Law School, v.3, p.171 - 200, 2015.
- [http://cidp.pt/revistas/rjlb/rjlb-2015-03]

ABSTRACT: This article has the purpose to analyze the improvement of the legal argument is needed to meet legislative omissions, considering the dynamism of Family Law and the requirement of effective responses of Brazilian courts, making for both a detailed analysis of the judgment of the Superior Court of Justice, regarding the abandonment Affective, from the influence of the consumer market in the establishment of interpersonal relationships.

KEYWORDS: Law, Family, Affection, Court and Legal Argumentation

- BABY BUSINESS: THE INTERNATIONAL INDUSTRY OF SURROGACY UNDER THE HAGUE CONVENTION EYE. Published on Legal Journal of Brazilian Law Institute of Lisbon Law School , v.8, p.5767 - 5806, 2014.
- [http://www.idb-fdul.com/uploaded/files/2014_08_05767_05806.pdf]

ABSTRACT: This academic work is intended to address a succinct and direct manner the issue of reproductive tourism and evil consequences resulting from lack of regulatory guidance and unification of private international law on the issues surrounding assisted human reproduction border. Indeed, through the explanation of concepts and everyday factual situations experienced by couples seeking in countries like India, Ukraine and the USA, more flexible law, women willing to "cede" their bodies and low prices for such services, if it will make a demonstration of the urgency to materialize international cooperation aimed at curbing abuses and protect the interests of minor children by these women and medical techniques that lend themselves to be "surrogates". More than that, it will be explained in the course of this study, how necessary it is the development of a multilateral legal framework that ensures the preservation of human dignity, regardless of where born or who give birth to a son.

KEYWORDS: Gestational surrogate; parentage; nationality; Private International Law.

- FAMILIES IN VITRO: AN ESSAY ON ADJUSTMENT BETWEEN THE RIGHT OF SINGLE

PERSON AND GAYS PLANNING A FAMILY AND THE CHILD'S RIGHT TO HAVE A FATHER AND A MOTHER. Published on Legal Journal of Brazilian Law Institute of Lisbon Law School. , v.7, p.5065 - 5109, 2014.

[http://www.idb-fdul.com/uploaded/files/2014_07_05065_05109.pdf]

ABSTRACT: The scope of the article in vogue is to analyze the possibility of harmonization between the right to family planning and homoaffective parent families - especially considering the biotechnological advances - and the right to primacy of the best interests of the future child, before the supposed need for access the biparentality to guarantee their healthy mental and physical development. In this context, it is questioned the possibility of putting limits on the free family planning to avoid an alleged injury to children that would be born without the necessary figures of a father and a mother, to be biological children of gay couples or single people. Indeed, it is clear that at present unmarried or same sex people can raise a family in a planned manner, given that the reproduction project resulting therefrom will be nothing more than a deliberate decision of whether single or married parent with another person of the same gender. However, as detailed in this study, the care of the best interests of the child is not related to the sexual orientation of their parents, nor the suitability for marriage that exercising parenting in isolation, but rather the responsibility and commitment of the father / mother unveiling her affection and care and care in ensuring the overall development of their child's personality. Thus, the aim of this scholarly work is to propose a reflection naked of any prejudices, in order to raise the debate on the scientific aspects that the theme requires.

KEYWORDS: family planning, parent families, gay families, fundamental reproductive rights.

- THE LEGAL AND PROFESSIONAL ETHICS IN FRONT OF THE DESIRE OF HAVE A SON REALIZED FROM THE HUMAN REPRODUCTION MEDICALLY ASSISTED. Co-author: Patrícia Dreyer and Tânia Vainsencher. Published on the book: Latin American Law Studies. 1 ed. Jundiaí: Paco Editorial, 2015, v.3,

p. 243-264. Book reference: ISBN: 9788546200023

ABSTRACT: This scholarly article is to analyze the scope of legal and professional ethics in the face of the desire for a child brought from medically assisted human reproduction. It is intended to show the paths taken by ethics, transitioning between Bioethics, Biopower and the Biolaw to finally frame the legal reasoning in socio-cultural and legal measures to curb abuses perpetrated postures and bound before the biotechnological advances and search unmeasured by artificial reproduction.

KEYWORDS: Ethics, assisted human reproduction, biopower and biolaw.

SESSION 3.

Presentation

The 1993 Hague Adoption Convention : Achievements and Challenges

Laura Martinez-Mora

Principal Legal Officer of the HCCH

The 1993 Hague Adoption Convention: achievements and challenges

HCCH Asia Pacific Week 2017
Seoul, 3-6 July 2017

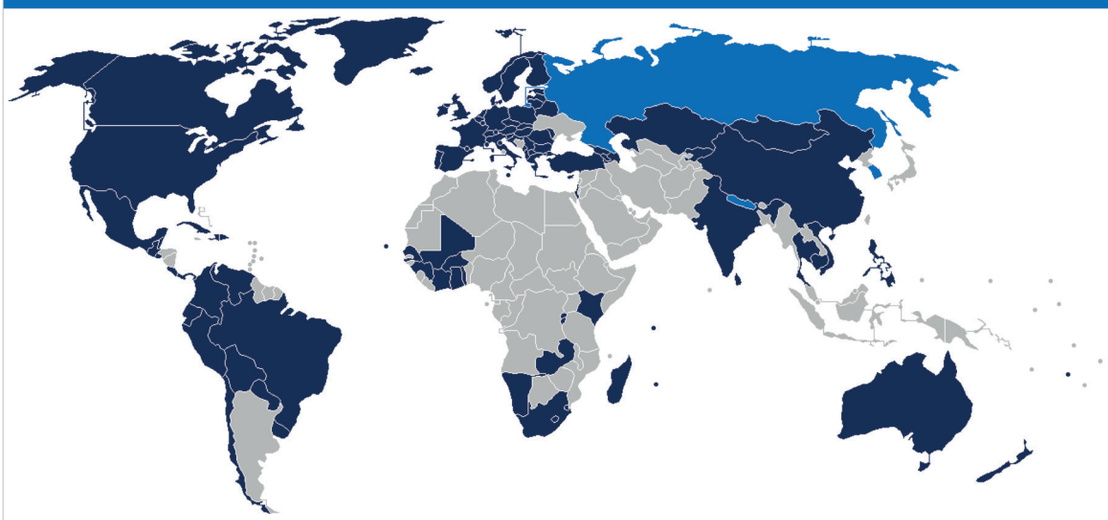
Laura Martínez-Mora
Principal Legal Officer

The objectives of the 1993 HC

- ✓ To give effect to Art. 21 of the **UN Convention on the Rights of the Child**
- ✓ To **establish minimum standards** for the protection of children who are the subject of intercountry adoption (ICA)
- ✓ To **establish a system of co-operation** amongst Contracting States to ensure the protection of those children – competent authorities and bodies
- ✓ To **prevent the abduction, the sale of, or traffic in children**, and to eliminate profiteering and other abuses associated with intercountry adoption
- ✓ To **secure the automatic recognition** of adoptions made in accordance with the Convention in all Contracting States

How can we measure the improvements made by, and the challenges remaining under, the 1993 Hague Convention?

Almost 100 States parties to the 1993 HC



States parties (98)

Only signatories (3)

NB: Boundaries on this map are based upon those used by the UN Cartographic Section. The number of States reflects the Parties as recorded by the Depositary (NL MFA). Neither should be taken to imply official endorsement or acceptance.

Some statistics

Major States of origin and total number of ICAs*

1998	2004	2008	2015
China Russia Vietnam Korea **COLOMBIA** India Guatemala **ROMANIA** Brazil Ethiopia	China (13 405) Russia (9 384) Guatemala (3 427) Korea (2 242) Ukraine (2 019) **COLOMBIA (1 714)** Ethiopia (1 524) Haiti (1 159) **INDIA (1 079)** Kazakhstan (877)	**CHINA (5 875)** **GUATEMALA (4 186)** Russia (4 132) Ethiopia (3 888) Viet Nam (1 721) **COLOMBIA (1 608)** Ukraine (1 569) Korea (1 367) Haiti (1 332) **INDIA (756)**	**CHINA (3 055)** Russia (778) Ethiopia (684) **COLOMBIA (519)** Korea (431) **VIETNAM (429)** **BULGARIA (421)** **PHILIPPINES (401)** Ukraine (383) Congo (RD) (383)
31 710 ICAs (21 receiving countries)	45 383 ICAs (24 receiving countries)	28 844 ICAs (24 receiving countries)	12 201 ICAs (24 receiving countries)

In capital letters and blue, States Parties to the 1993 Hague Convention (from the year of the entry into force).

* Sources: HCCH website and P. Selman, *Key Tables for Intercountry Adoption: Receiving States 2001-2015 and States of Origin 2003-2015,* Newcastle University, 2017. This data is subject to possible future updating.

Domestic legislation adopted in line with the Convention?

Many States parties have **enacted laws** to implement the Convention

Increasing number of ICAs done **according** to international **standards**

IMPLEMENTATION IS KEY

Political will – give priority to children's issues

In some cases the adoption process can be **too bureaucratic**

Functional, trained and staffed authorities and bodies?

Central Authorities, **competent authorities, AABs**

Easier to know who does what

Better coordination and **co-operation**

More **monitoring** and **supervision**

Appropriate funding?

Is the system **too complicated?**

Lack of coordination?

Too bureaucratic?

Properly linking ICA within the child protection system?

Better support of biological parents

Clear regulation of consent

Promotion of **domestic permanent family solutions**, when children cannot be raised by their families of origin

The difficult balance between:

- Supporting the biological family – gate keeping system
- Providing a solution in the best interests of children in a timely manner

...Principle of subsidiarity

- States that take decisions on adoptability too quickly without ensuring the necessary safeguards have been complied with may:
  - Face problems and abuses
  - Ultimately end up closing ICA if they see that they cannot cope with the problems
- In States which do not take decisions in a timely manner:
  - Children may remain in institutions
- Are the best interests of the child adequately safeguarded in any of these cases???

Slower adoption procedures?

Time to implement the guarantees

The Convention says that **authorities shall act expeditiously**

Certificate of conformity of ICA (Art. 23) should expedite the process

Necessary time vs **too much time**

Time is key for children

Adoptions are more expensive?

A **professional service** needs to be paid **reasonable, transparent and lawful fees and costs**

Prevention of **improper financial gain**

Paying for **other things that are not strictly adoption**

Many of the problems in ICA come from the financial issues

Increasing number of children adopted with the necessary guarantees

The **nice stories** that we do not hear so much

The 1993 HC has been **key to stopping abuses** and **illicit practices** in some States as it provides the legal background to stop them

Further prevention of, and addressing, illicit practices

Ensure that the **guarantees are in place before re-starting ICA in a country**

Is it feasible to have a **perfect system to re-start ICA?**

Summing up

- The **challenge is not the Convention** as such, **but its implementation** by States Parties
- It needs **financial and human resources**…not only for the Central Authorities but for **all actors** in the child protection system
- We need to **link ICA with the whole child protection system** of a country ….we cannot only undertake ICAs

18

Why become party to the 1993 HC?

It is important for States to become party to the Convention because it can benefit from…

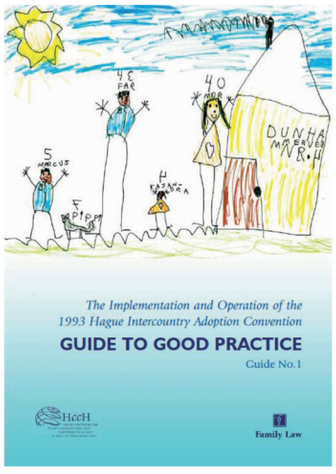
- Greater safeguards established by the Convention:
  - ✓ Children, birth families and adoptive families benefit from those greater safeguards
  - ✓ These safeguards reinforce and indeed give effect to the principles of the **UNCRC** (Art. 21(a))
- A streamlined process allowing adopted children to relocate to the receiving State more easily
- Automatic recognition of adoptions in all States Parties

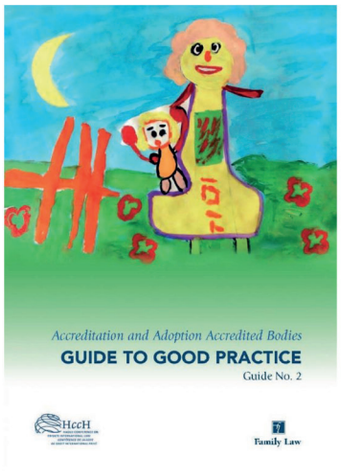
Why become party to the 1993 HC?

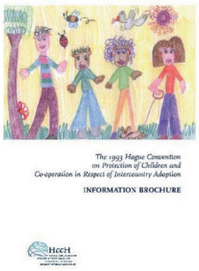
- The recognised international **network** of authorities and bodies linked through the Convention =
  - ✓ greater co-operation,
  - ✓ prevents issues, and
  - ✓ can expedite the process
- A legally binding international tool that helps States to:
  - ✓ prevent the abduction, the sale of, or traffic in children, and
  - ✓ to eliminate profiteering and other abuses that may otherwise be associated with intercountry adoption

Publications

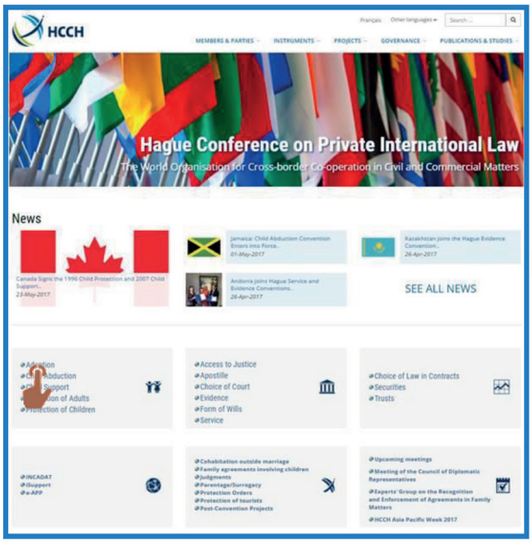
GGPs and Brochure







www.hcch.net



Thanks for your kind attention

Laura Martínez-Mora – lmm@hcch.nl

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SESSION 3.

Presentation

Hague Convention on Intercountry Adoption in Asia Pacific Perspective of Sending Countries

Kyung-eun Lee

Former Director of the Division of Child Welfare Policy,
Ministry of Health and Welfare (Korea)

Hague Convention on Intercountry Adoption in Asia Pacific
Perspective of Sending Countries

Kyung-eun Lee
Ph.D. in International Law

Republic of Korea,
Director for Child Welfare Policy (2011-2013)

1

Intercounry Adoption and International Legal Documents

- 1967 European Convention on the Adoption of the Child
- 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Specific Reference to Foster Placement and Adoption Nationally and Internationally
- 1989 United Nations Convention on the Rights of the Child
- 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption
- 2000 Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography

2

Intercountry Adoption in Media
(late 1980's to 1990's)

- "Babies for Sale: South Koreans Make Them, Americans Buy Them," Rothschild, *Progressive* (Jan. 1988)
- "The Romanian Bazaar," Hunt, *New York Times* (Mar.24, 1991)
- "China's Horrific Adoption Mills," Burkhalter, *New York Times*, (Jan. 1996)
- "The Lie We Love," Graff, *Foreign Policy*, (Nov.-Dec. 2008)
- UNICEF, HCCH, Human Rights Watch, SC.

3

Limitation of the effect of UN CRC

- International Minimum Standard vs. Cultural Pluralism
  - Article 21 Introductory Clause
- Too generous reservations made States parties obligation less strict
  - Korea's reservation of Art.21 (a)
- Family Law Tradition vs. Child Protection System
  - U.S.A. did not ratify UN CRC

⇒ Need to regulate private parties; Limitation of public international law

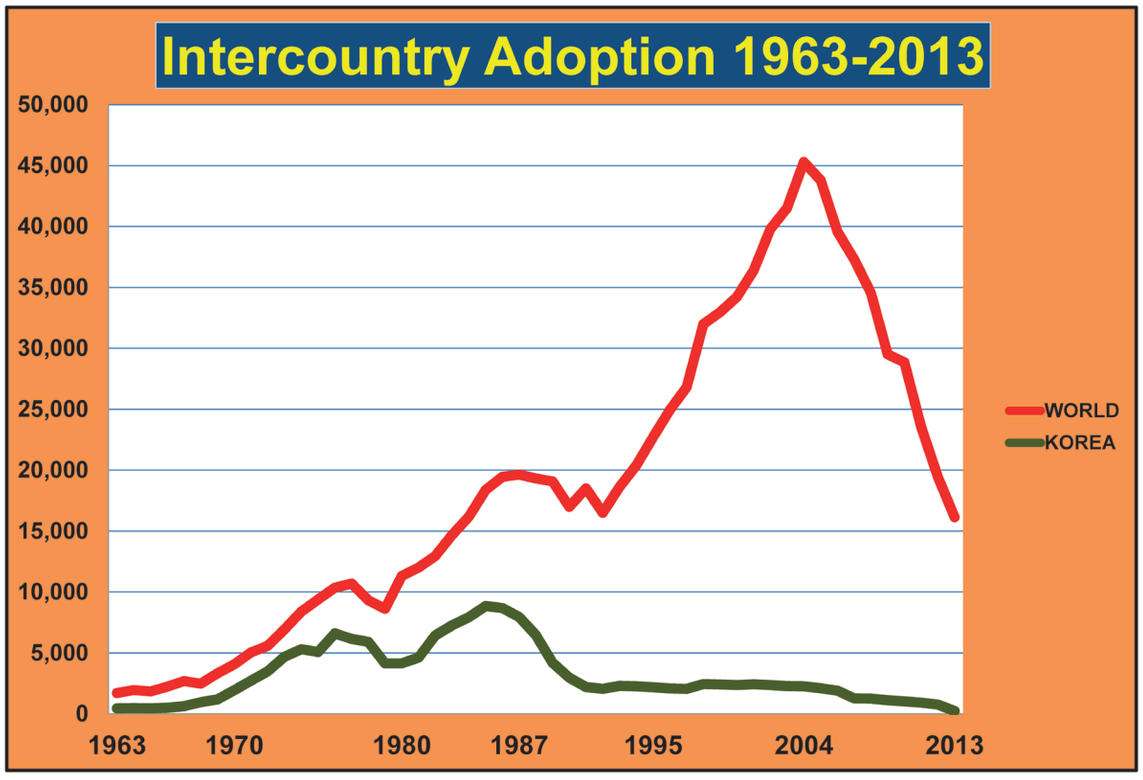
4

1993 Hague Convention

- Did it make a difference?
- Remarkable changes in numbers of ICA worldwide
  - 1993-2004: sharp increase
  - 2004-present: 45,383('04) ->11,185('14)

- Factors for effectiveness from a sending country's perspective

5



Source: P. Selman, "20 years of Hague Convention: A Statistical Review" (Jun.2015), HCCH

6

Effective Factors of HC 1993

- Regulation of private parties (i.e., adoptive parents, adoption agencies) through the Central Authority
- Procedural regulation of all activities in the child adoption process
- *Hard Law;* No permission of reservation (Art.40), No effect between Parties with objection (Art.44(3))
- Move intercountry adoption from *private regime* to *government's treaty obligation*

7

Hague Process

- After 20 years of implementation, Hague Convention created a standardized procedure
- If not taking this procedure, the doubt of trafficking exists
- More focus on *regulating receiving countries*

8

Critics on the effects of HC

- Some say the HC is blocking adoption with the "red tapes" by inefficient bureaucracy
- Others say HC provides "formal legitimacy" on the ground that a certain adoption fulfilled the procedural requirement of the Convention, regardless of the actual lawfulness

9

Perspective from Sending Countries

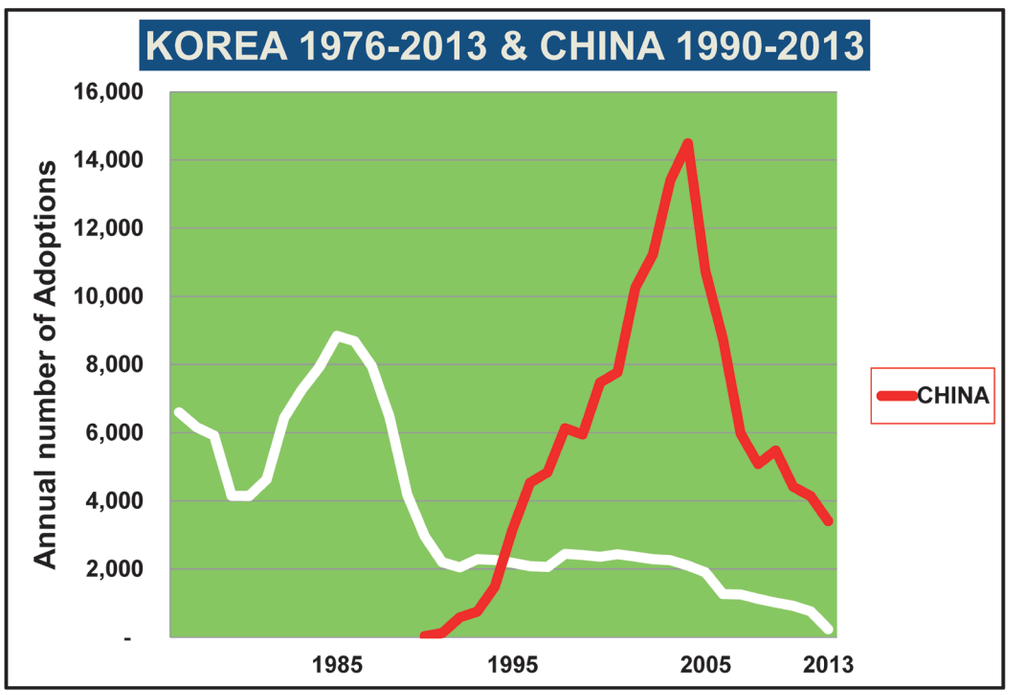
- If HC was effective so far, it was mainly because it could regulate receiving countries' adoption procedure

10

History of ICA and Asia

- Asia is the birthplace of intercounty and inter-racial adoption after the Korean War in 1950s.
- In 1980's Asia sent 73% ('81) to 47% ('89) of the adopted children.
- Until 1990, Korea was the main source of children for ICA. Since 1998, China has been the most important source.

11



Source: P. Selman, "20 years of Hague Convention: A Statistical Review" (Jun.2015), HCCH

12

HC 1993 in Asia Pacific

- Member states: Australia (1998), China (2000), India (2003), New Zealand (1999), Philippines (1995), Sri Lanka (1995), Viet Nam (2010)
  - Korea signed in 2013 not ratified yet
  - Japan, Malaysia, Singapore neither sign nor rarify.
- Non-member states: Fiji (2012), Mongolia (2009), Thailand (2004)
  - Nepal signed in 2009, not ratified yet
  - Cambodia (2007). Three states parties raised objections to the accession of Cambodia, so HC 1993 does not have effect b/w Cambodia and these 3 countries

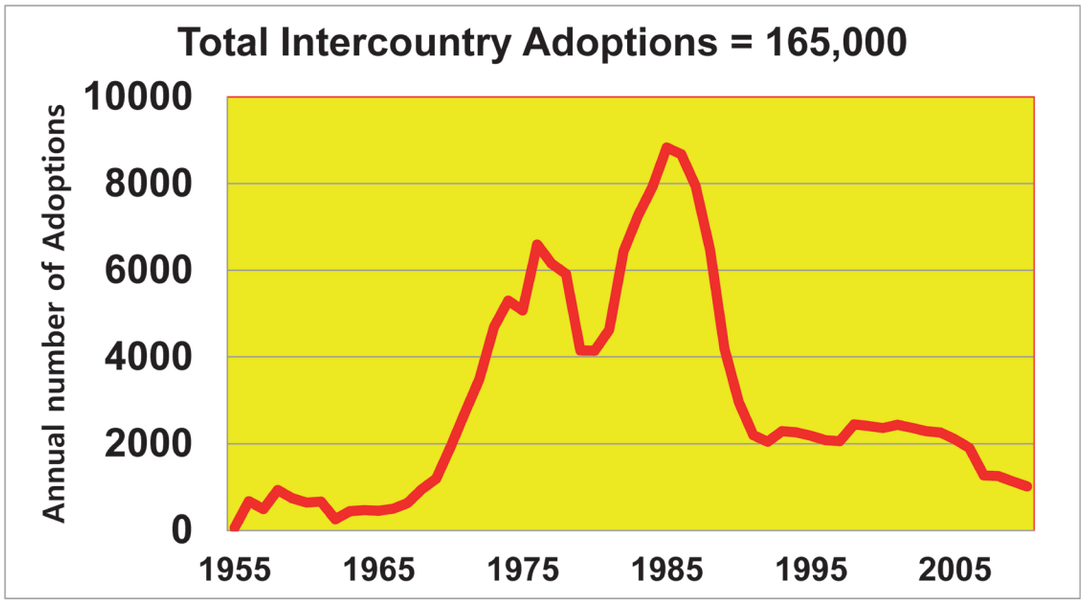
13

Why it is so difficult for a sending country to get in the HC 1993

- Article 4 obligation
- HC provisions have effect of making each action taken along the child adoption process the obligation of the government of the state of origin or the receiving state
- Main obligation of the state of origin is the Article 4
  - Decision of the "adoptability of a child"
  - Decision that an intercountry adoption fits the best interests of the child (subsidiarity principle)

14

SOUTH KOREA 1953-2010



Source: P. Selman, "20 years of Hague Convention: A Statistical Review" (Jun.2015), HCCH

15

1993 HC Art. 4

- An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -
- *a)* have established that the child is adoptable;
- *b)* have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

16

Article 4(a) Adoptability

- Adoptability of a child should be established by the competent authority of the state of origin
- Voluntary relinquishment vs. Abandonment Recognition
- Legal effect of the consent of birth parents
  - inconsistency b/w Family Law & Special Procedure Act for Adoption
- Process of deciding the adoptability of a child remains a legal vacancy in Korea

17

Compared w/ UN CRC Article 21 (a)

- (States Parties) Ensure that the adoption of a child is authorized only by competent authorities who determine (…) that the adoption is permissible (…)
- Distinction b/w the final decree of the adoption of a child and decision of the adoptability of a child is not clearly noticeable
- 1993 HC is the important International legal document indicating that decision of the adoptability is a separate and independent sequence in the adoption process

18

Article 4(b) Subsidiarity Principle

- Development of subsidiarity principle
  - 1986 Child protection declaration
  - 1989 UN CRC
- 1993 HC Article 4(b): the competent authority of the State of origin has determined that an intercountry adoption is in the child's best interests
- Also demands 'due consideration' be paid to the possibilities for placement of the child within the State of origin by the competent authority

19

What is "Due Consideration"?

Process to determine the best interests of the child

- Birth registration
- Parental care
- Special protection for children out of parental care
- Guardian appointment
- Alternative care
- Determination of adoptability
  severance from birth parents
- Domestic adoption
- Intercountry adoption

- Birth registration law
- Family law
- Child protection law

- Adoption law

- Intercountry adoption procedural law

20

Obligation under Article 4 of the Hague Convention

- Family support (child care) → Limit parental rights →
  Abuse? Guardianship?
  Alternative care → Family Reunification →

  Establish adoptability of the child →
  (Permanent severance from birth parents)

  Domestic Adoption → Intercountry adoption

- Connect "child protection system" to "intercountry adoption"

21

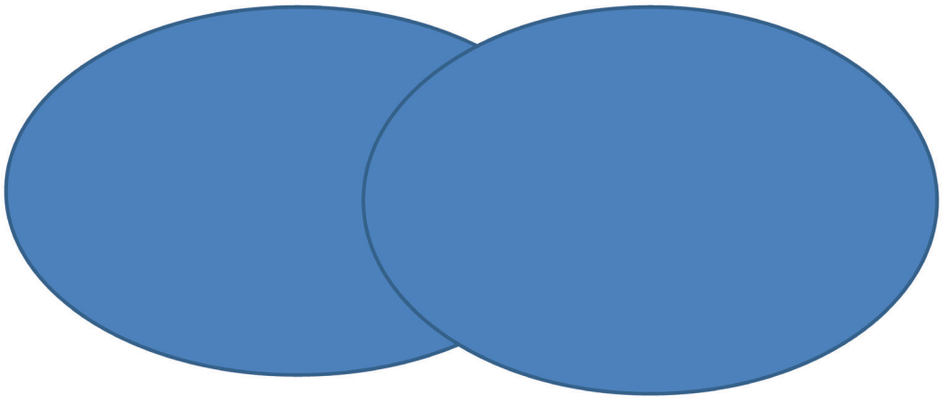
Child Protection System

- According to UNICEF, child protection systems compromise the sets of laws, policies, regulations and services needed across all social sectors – especially social welfare, education, health, security and justice – to support prevention and response to protection-related risks. These systems are part of social protection, and extend beyond it. At the level of prevention, their aim includes supporting and strengthening families to reduce social exclusion, and to lower the risk of separation, violence and exploitation (UNICEF Child Protection Strategy, 2008).

22

Ideal Legal Structure

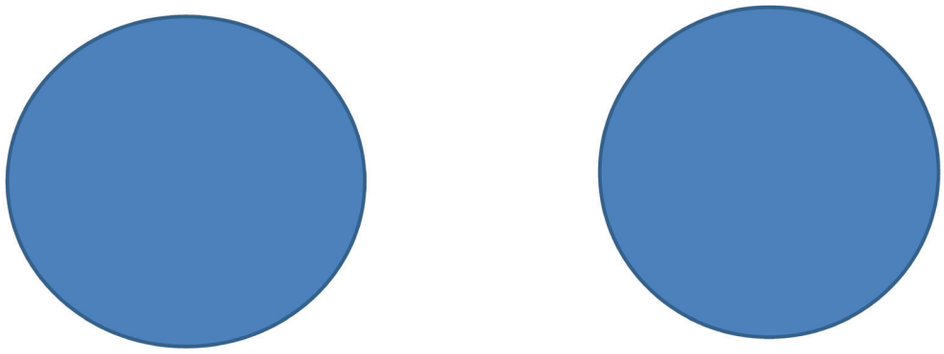
Private Law – Public Child Protection system



23

Reality in many sending countries

- Legal vacancy between private law and public child protection system



- Children once out of the protection of their birth parents remain extremely vulnerable

24

Weak Points or Vacancies in the sending countries legal system

- Birth Registration
- Intervention to Parental Rights
- *Parens Patriae* jurisdiction
- Authority & Procedural law to decide the Best Interests of the Child
- Guardianship appointment procedure
- Privatization of Child Protection and Adoption Procedure
- Segregation of adoption procedure between intra family adoption & orphan adoption

25

Effect on Sending Countries'

- Experience of being a sending country can have a critical effect on diminishing the capability of the government's child protection and welfare policy, including the policy for the adoption of a child

26

Focus on sending countries' capability of child protection

- 1993 HC did make a difference in the worldwide ICA
- This achievement is mainly due to the regulation of receiving countries' practice and modification of their legal system
- However, the protection of the children in sending countries remains to be fixed
- Cooperative measures to enhance the law, policy and practice for child protection, as well as the adoption law, of sending countries should be a new focus of the international legal forum for the rights of the child

27

UN & HCCH

- 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- 2010 Guidelines for the Alternative Care of Children (A/RES/64/142)
- 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

28

HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul

SESSION 3.

Discussion

Lisa Ellingson
Vice President of Korean Affairs, International Korean Adoptee Associations (USA)

International Korean Adoptee Associations

Suggestions for Post Adoption Services

July 2017

By

The International Korean Adoptee Associations (IKAA)

Adopted Koreans' Association (Sweden)
Adoption Links, DC (USA – DC, Maryland, Virginia)
AK Connection (USA – Minnesota)
Also-Known-As, Inc. (USA – New York, New Jersey, Connecticut)
Arierang (The Netherlands)
Asian Adult Adoptees of Washington (USA – Washington)
Association of Korean Adoptees of Southern California (USA – California)
Belgian Adoptees from Korea (Belgium)
Korea Klubben (Denmark)
Korean Adoptees of Chicago (USA – Illinois)
Korean Adoptees of Hawai'i (USA – Hawai'i)
K.O.R.i.A. (Italy)
Racines Coréennes (France)

Introduction to IKAA

The International Korean Adoptee Associations (IKAA) is the first and largest international network of organizations for adult intercountry adoptees. The IKAA network was first established in 2004. Its founding members are Korean adoptee associations from Europe and the United States. Today, the IKAA network has thirteen organizational members located in seven different countries. Our member associations collectively reach out to more than fifteen thousand adult adoptees worldwide.

The mission of the IKAA network is to enrich the global adoption community, promote the sharing of information and resources between adult adoptee associations, strengthen cross-cultural relations, encourage scientific research, and innovate Post Adoption Services for the broader international adoptee community. In particular, IKAA is working to identify needs for Post Adoption Services and create strategies to improve these services.

IKAA fully supports the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("Hague Adoption Convention") and the ongoing efforts to protect the rights of adopted children and adults.

Learning from the collective experience of adult adoptee associations

Korean adoptees constitute the oldest and largest group of adult intercountry adoptees. An estimated 150,000 – 200,000 Koreans have been adopted to North America, Europe, and Australia. Today, most of these adoptees are adults and many are expressing their thoughts about their adoption experiences.

Based on a shared interest in their country of origin, Korean adoptees have established peer groups all around the world. The oldest Korean adoptee association was founded in Sweden in 1986 followed shortly thereafter by associations in Denmark, Norway, The Netherlands, Belgium, France and throughout the United States. Throughout the years, these organizations have seen many of the same types of requests and needs among adult adoptees. The associations have developed similar tools and services to assist adoptees.

Having existed for over 15, 25, and 30 years, the IKAA associations have accumulated an abundance of institutional knowledge and experience related to Post Adoption Services. IKAA is using this experience to better serve the broader adult adoptee community. In many respects, IKAA represents grassroots Post Adoption Services in action. IKAA aspires to share knowledge with all parties involved in the adoption process

Post Adoption Services provided by the IKAA associations
The IKAA associations offer Post Adoption Services such as mentorship; information regarding biological family searches; discussions regarding biological and adoptive family relations; education about race, identity, and adoption issues; and access to country of origin culture and travel guidance. The associations also facilitate regular contact with other adoptees, as well as peer support which helps build a stronger community of adoptees. All IKAA member associations are run on a purely volunteer basis.

In addition, the IKAA associations organize regular conferences around the world known as "Gatherings" where adult intercountry adoptees can connect with each other both locally and globally. Large-scale IKAA Gatherings in Korea occur once every three years and bring together 500-600 adult adoptees and their families from around the world. Other shorter and smaller-scale conferences occur once every six months, drawing up to 200 attendees from a more regional base of adoptees. Gathering programs include Research Symposiums, Business Forums, Art Exhibits, Workshops, Sports and Family Activities, as well as various cultural and social activities.

From these Gatherings, IKAA has learned the great importance of providing global networking opportunities for adoptees. Post Adoption Services should not be limited to counseling or biological family searches. As intercountry adoptees grow older, have families of their own, and make connection with their biological families, it is becoming clear that facilitating cultural, educational and professional bridges to countries of origin are also essential Post Adoption Services.

The need for more Post Adoption Services
The IKAA associations receive a significant number of inquiries from adult adoptees, adoptive and biological families, and third parties seeking various Post Adoption Services. However, due to our limited resources and volunteer organizers, we cannot assist everybody who expresses interest, nor are we able to offer all services needed by the community.

To provide all adoptees with the Post Adoption Services needed, Central Authorities and all other parties involved in the adoption process, including the adoptee associations, are mutually dependent on each other. Openness to collaboration is of critical importance to respond to the needs of adoptees, adoptive families, and biological families to define and implement more and better Post Adoption Services.

Suggestions for Post Adoption Services
IKAA's suggestions for development of Post Adoption Services are as follows:

• **Academic research**
More extensive and reliable academic research in adult intercountry adoptee communities would help policymakers and service providers better understand those communities and their current needs and preferences. The results of that research would be invaluable to developing more

effective Post Adoption Services. Cooperation between Central Authorities, academia, service providers and adult intercountry adoptee organizations could provide optimal conditions for the further development of relevant academic research.

• Openness in adoption and records

The experience of IKAA is that a significant number of intercountry adoptees choose to search for biological family members. Many adoptees consider biological family to be an important part of their identities and health profiles. However, adoptees are often unable to locate biological family members due to lack of information or lack of access to information. IKAA believes that it is essential that adoptees who want to find biological family members have the resources necessary to conduct effective searches. Such resources include direct access to records, assistance in locating family members, reliable and secure DNA testing, translation support, and legal assistance. The contribution of resources from governments of Receiving and particularly Sending States would greatly improve the biological family search process for many adoptees.

- **Post reunion support**

Adoptees who make connections with biological family members often need continued services after the reunion. Cultural and linguistic differences can complicate post-reunion interactions between adoptees and their biological families. Ongoing translation services and cultural guidance can help to assist adoptees in their efforts to build sustainable relationships with their biological families. In addition, some adoptees are not only building long term relationships with their biological families, but also are creating connections between their biological and adoptive families. Providing Post Adoption Services in these situations would benefit the biological and adoptive family members as well as the adoptee.

• On-going support from Sending States

In today's globalized society, it is increasingly common for intercountry adoptees to return to their countries of origin as adults to visit and even to live long-term. It is important that Sending States recognize this trend and have adequate Post Adoption Services available for this growing population. In particular, IKAA believes the Sending States' Post Adoption Services should include support to accommodate the cultural and linguistic differences of returning adoptees so that they can participate meaningfully in the Sending State's society. It is also important that Sending States themselves recognize and work to educate their citizens about their own histories of intercountry adoption, the intercountry adoptees presently working to connect with their countries of origin, and the biological family members who have been affected by intercountry adoption.

• On-going support from Receiving States

The adult intercountry adoptee population continues to need government assistance from Receiving States. One recent issue of serious concern in the intercountry adoptee community in the United States, for example, is the issue of deportation of adult intercountry adoptees whose adoptive parents did not secure citizenship for them. Other issues include the need for support

for treatment for physical and mental health issues that arise in connection with intercountry adoption. IKAA believes that it is important that Receiving States have an ongoing relationship with adult intercountry adoptee organizations to understand the issues affecting those communities and develop ways to effectively provide support.

• Inclusion of future generations

Although many States are now sending fewer children for intercountry adoption, the tens of thousands of children adopted internationally from the 1950s to 1990s are now adults, and many have children (and grandchildren) of their own. Intercountry adoption has had a profound effect not only on the adoptees themselves but also on these future generations. The experience of intercountry adoption now goes beyond the individual experience of the adoptee. IKAA has found that the children and grandchildren of intercountry adoptees have many adoption-related questions and issues and would benefit from a specialized subset of Post Adoption Services. IKAA hopes that both Sending and Receiving States will continue to expand Post Adoption Services to these future generations as well.

SESSION 3.

Discussion

Ana Carolina Pedrosa Massaro

Professor at University Center Moura Lacerda (Brazil)

INTERNATIONAL ADOPTION. A COMPARATIVE PERSPECTIVE BETWEEN LATIN AMERICA AND EASTERN ASIA

Ana Carolina Pedrosa Massaro[1]

Good afternoon!

It is a great honor for me to have been invited to be a member of this table. I am very grateful for the invitation to attend this event and I would like to express my gratitude in the person of Judge Jyiong Jang, with whom I had the pleasure to work in the Permanent Bureau of the Hague Conference on Private International Law, in the Netherlands.

What brings us here this afternoon is the theme of international adoption, whose international and Korean perspectives have already been brilliantly addressed by the speakers and panelists who have spoken before me.

In addition to the previously discussed - and consider that I am the only representative of Latin America in this session of debates - I intend to draw a parallel between the international adoptions proceedings in Latin America and Eastern Asia, pointing out particular similarities and differences in/from each region.

Concerning the beginnings, it should be remembered that one of the first definitions to the term "adoption" is that presented by Cicero, in the first century BC, according to which: "To adopt is to ask to religion and to the law what from Nature could not be obtained" (Chaves, 1994a, p.23, LIBERATI, 2003, p.17)

The aforementioned definition brings the idea that the act of adopting is the result of divine deliberation - insofar as it creates bonds of affection proper to parenthood / filiation among unknown persons - as well as legal, since it establishes a kinship that does not come from the bonds of blood.

It occurs that the legal, political and socio-cultural implications of adoption have become much more complex when this figure crossed borders and collaborated for the transit of children and adolescents between the States. In fact, international adoption gained visibility and relevance from the mid-1960s and intensified in the 1970s and 1980s. The relatively recent phenomenon was first established in Asia, because of the armed conflicts in Korea and Vietnam, and it soon reached Latin America.

In this context, the international community has faced controversies and concerns involving various forms of abuse without any supervision, including sailing, trafficking,

[1] I am a Brazilian attorney specialized in family law, area that I have been working on for almost 10 years. I am a University Professor, teaching family law classes. I am a doctorate candidate at the Law School of Buenos Aires University - Argentina, and legal methods for preventing "reproductive tourism" is my research theme. I have authored and co-authored books and legal articles published in Brazil, Argentina, Portugal, and Italy, all within issues related to reproductive rights. I participated as a speaker at events and legal lectures in Brazil and abroad. I attended the Summer Courses taught by the Hague Academy of International Law in the areas of public and private international law.

kidnapping and falsification of children's birth records / statement of birth, especially perceived in Latin American and Asia, traditional providers of children.

In addition, international adoptions also found obstacles in the inability or unavailability of many receiving States to proceed to legal recognition of the aforementioned external adoptions, as well as the lack of control of the adoption procedure, because the competent Court could not be established for, nor the legislation to be applied to the specific case, which opened up undoubted scope for the practice of illicit.

Faced with this alarming prospect, the Hague Conference on Private International Law took on the task of creating mechanisms to protect children in international adoption, and - reaffirming the need to seek multilateral solutions to the issue, to enable legal cooperation between States - drafted the Convention on Protection and Cooperation in Respect of Intercountry Adoption, on 29 May 1993.

The purpose of this Convention is to preserve the best interests of the child to be adopted, while respecting their fundamental rights. To this end, rules have been stipulated that: (i) the child will only be submitted to a cross-border adoption if he/she has not been adopted in the territory of his/her nationality (principle of exceptionality); (ii) the State of origin must ensure that the child is adoptable; (iii) information about the child and his/her parents will be preserved; (iv) evaluate thoroughly the prospective adoptive parents; (V) match the child with a suitable family; among others.

The 1993 Hague Convention is implemented by 19 of the 22 Latin American States, besides South Korea, China and Mongolia, which represents 3 of the 6 Eastern Asian States. Not only is it important to note that both Latin America and Asia are regions that provide the highest number of children for adoption, but also to highlight that countries such as China, Colombia, Guatemala and South Korea are the most prominent ones in those regions.

However, there are different reasons why Latin America and Asia are the main regions of origin of children involved in international adoptions.

Indeed, in the Latin American case, despite the misinformation in the media, it is not abandonment, violence, negligence or rejection by parents that lead children to adoption, but rather the precarious conditions of life associated with poverty and lack of opportunities, leading to the desperate search for survival strategies, which often involve giving children to orphanages.

In Brazil, specifically, the excessive bureaucracy of the adoption procedure also leads to the criminal practice, in my country called "Brazilian adoption", of falsely registering the minor as the biological child of the adoptive parents.

Of course, the states of Eastern Asia do not face the same socio-economic reality described above, which is not why they are important countries of origin for children adopted internationally. In fact, this is due to population density or to issues of tradition and attachment to blood ties that prevent Asian children from being adopted by their countrymen and making them available for international adoption.

In any case, it should be pointed out that a number of public and institutional policies have been developed both in Brazil and in South Korea, with the purpose of encouraging national adoption, specially with regard to the elaboration of laws that discourage intercountry adoptions.

It means that Brazil does not have in common with South Korea only the recent impeachment of the representative of the government, a notorious fact that was widely publicized by the international media. Both countries defend the interests of children and constantly seek to align the protection of the rights of minors with the progressive increase of safeguards established in law.

Finally, I would like to express my satisfaction with the opportunity to be here, in South Korea, to discuss these issues. While it is true that a very large number of children are being delivered to international adoption in this country, it is also true that the issue has been courageously discussed here, representing a valuable contribution to creating legal mechanisms for international cooperation, which undoubtedly help to defend the child to be adopted, in accordance with the 1993 Hague Convention.

Thank you!

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SESSION 4.

Child Protection & Child Support

Moderator

Byungsuk Chung
President of the Korea Private International Law Association (Korea)

Presenter

Yuko Nishitani
Professor at Kyoto University (Japan)

Panelist

Yongping Xiao
Director of Wuhan University (China)

Anne-Marie Hutchinson
Partner of Dawson Cornwell (UK)

Marie Vautravers
Deputy head of Private International Law Unit of Ministry of Justice (France)
*Introducing iSupport

Kyungho Choi
Research Fellow of Korea Legislation Research Institute (Korea)

Moderator

Byungsuk Chung

President of the Korea Private International Law Association (Korea)

Education

- University College London (LL.M., 1987)
- Judicial Research and Training Institute of the Supreme Court of Korea (1980)
- Graduate School of Law, Seoul National University (1980)
- College of Law, Seoul National University (LL.B., 1977)

Work Experience

- President of Korea Private International Law Association (2015-Present)
- Adjunct Professor, Maritime Law, Seoul National University School of Law (2013-Present)
- Adjunct Professor, Korea University, School of Law (2013-Present)
- Member of the Committee to Reform the Private International Law, Ministry of Justice (2014.6.-Present)
- Member of the Committee to Reform the Provisions of the Korean Commercial Code on Marine Insurance, Ministry of Justice (2014.5.-2015.2)
- President of Korea Maritime Law Association (2012.4.-2014.4.)
- Member of the Committee for Transportation Law, Ministry of Justice (2011.2.-Present)
- Member of the Committee to Reform the Maritime Chapter of the Korean Commercial Code, Ministry of Justice (2004.9.-2006)
- Korean Delegate to UNCITRAL Working Group III on Transportation Law (2003.4.)
- Member of the Committee for studying the International Transactions Law, Ministry of Justice (2002.2.-Present)
- Member of the Committee for Reforming the Conflict of Laws of Korea, Ministry of Justice (2000.6.-2001.5.)
- Member of the Committee for Consulting the Policy, Ministry of Maritime Affairs & Fisheries
- Lecturer, Judicial Research and Training Institute of the Supreme Court Mediator, Seoul Central District Court (1998-Present)
- Arbitrator, Korean Commercial Arbitration Board (1994-Present)
- Associated with Haight, Gardner, Poor and Havens, New York (1987.9.-1988.3.)
- Kim & Chang (1980-Present)

Published Books

- European Lawyer Reference - Shipping & International Trade Law (Second edition 2014): "South Korea" chapter (Thomson Reuters, 2014)
- Transnational Litigation: A Practitioner's Guide (Co-author, Oceana Publications, Inc., 2003)
- Provisional Remedies in International Commercial Arbitration (Co-author, De Gruyter, 1994)

Awards

- Band 1, Chambers Asia-Pacific Awards 2017
- Leading Individual, The Legal 500 Asia Pacific 2017

Presenter

Yuko Nishitani

Professor at Kyoto University (Japan)

Education

- 1998 Ph.D. in Law (Heidelberg University, Germany)
- 1994 - 1997 Research at Max Planck Institute and Heidelberg University, Germany
- 1992 - 1994 Master Studies at Kyoto University, Japan (LL.M. in Law)
- 1988 - 1992 Undergraduate Studies at Kyoto University, Japan (B.A. in Law)

Work Experience

- Since 2015 Professor at Kyoto University, Japan
- 2011 - 2015 Professor at Kyushu University, Japan
- 1997 - 2007 Associate Professor at Tohoku University, Japan
- Since 2007 Visiting Professor at several universities (Duke University (US), Brescia University (Italy) and Tel Aviv University (Israel))
- Since 2017 Member of Curatorium of the Hague Academy of International Law
- Since 2003 Member of several Legislative Committees of the Japanese Ministry of Justice
- Since 2011 Representative of Japan in several projects of the HCCH

Published Books

- 2017 (forthcoming) (editor) "Treatment of Foreign Law - Dynamics towards Convergence?" (Springer, Jus Comparatum series) (English)
- 2008 (editor with Jürgen Basedow and Harald Baum) "Japanese and European Private International Law in Comparative Perspective" (Mohr Siebeck) (English)
- 2007 (editor with Karl Riesenhuber) "Wandlungen oder Erosion der Privatautonomie? – Deutsch-japanische Perspektiven des Vertragsrechts –" (De Gruyter) (German)
- 2000 (monograph) "Mancini und die Parteiautonomie im Internationalen Privatrecht - Eine Untersuchung auf der Grundlage der neu zutage gekommenen kollisionsrechtlichen Vorlesungen Mancinis -" (C.Winter-Verlag) (German)

Awards

- 1998 Lucia- und Rolf-Serick-Preis 1998 (award for doctoral thesis at Heidelberg University)

Panelist

Yongping Xiao

Director of Wuhan University (China)

Education

- 1988-1993 PHD, Wuhan University, China
- 1984-1988 L.B., Southwest College of Political Science and Law, China

Work Experience

- 2016-present Director, Wuhan University Institute of International Law, China
- 2014, 6-8 Visiting Scholar, Northeast University School of Law, USA
- 2013, 7-8 Visiting Scholar, University of Groningen Faculty of Law, the Netherlands
- 2012-present Cheung Kong Scholars Distinguished Professor, Wuhan University, China
- 2007-2016 Dean, Wuhan University School of Law, China
- 2006, 6-12 Senior Research Scholar, Birmingham University School of Law, UK
- 2005, 7-8 Visiting Scholar, Temple University School of Law, USA
- 2001-2005 Director, International Law Department, Wuhan University, China
- 2000, 7-8 Visiting Scholar, Max-Planck Institute of Foreign and Private International Law, Germany
- 1998-1999 Visiting Scholar, Harvard-Yenching Institute, Harvard University, USA
- 1997-present Professor, Wuhan University School of Law, China

Published Books

- Conflict of Laws in the People's Republic of China, Edward Elgar, UK, 2016
- Sports Disputes Settlement Models, High Education Press, China, 2015
- Private International Law, High Education Press, 3th Edition, China 2014 (editor of the revised edition)
- Legal Learning and Research Methods, Wuhan University Press, China, 2012
- Conflict of Laws from the Perspective of Jurisprudence, High Education Press, China, 2008
- Principle of Private International Law, Law Press, 2nd Edition, China, 2007
- Private International Law, People's Court Press, China, 2004 (with HAN Depei)
- Xiao Yongping on Conflict of Laws, Wuhan University Press, China, 2002
- A Treaties on the Conflict of Laws, Wuhan University Press, China, 1999
- A Course on Chinese Arbitration Law, Wuhan University Press. China 1997
- The Chinese Legislation on the Conflict of Laws, Wuhan University Press, China, 1996

Awards

- 2016 the leading talent in the philosophy and social science of China by the Central Publicity Department
- 2015 Third Class Award for Academic Achievement in Social Science among Chinese Universities, Ministry of Education of PRC

- 2012 Cheung Kong Scholars Distinguished Professor, Ministry of Education of PRC
- 2011 Second Class Award for Academic Achievement in Social Science, Hubei Province, China
- 2010 Member, the "Top-ten Outstanding Young Jurists of China", China Society of Law, China
- 2009 First Class Award for Legal Textbook and Academic Achievement, Ministry of Justice of PRC
- 2009 First Class Award for National Outstanding Teaching Achievement, Ministry of Education of P
- 2006. First Class Award for Teaching and academic Achievements, Ministry of Justice of PRC
- 2003 First Class Award for Teaching and academic Achievements, Ministry of Justice of PRC
- 2003 First Class Award for Academic Achievements in Social Science among Wuhan City, Wuhan, China
- 2001 Special Allowance of State Department of PRC

Panelist

Anne-Marie Hutchinson

Partner of Dawson Cornwell (UK)

Education

- BA International History and Politics, University of Leeds
- Nottingham Law School

Work Experience

- 1998-Present - Partner, Dawson Cornwell
- 1988-1998 – Partner, Beckman and Beckman

Published Books

- International Parental Child Abduction, 2003

Awards

- Doctorate of Laws honoris causa, University of Leeds, 2016
- Queen's Counsel honoris causa, 2016
- International Family Lawyer of the Year, Jordans Family Law Awards 2012
- Legal Aid Lawyer of the Year, 2004
- Order of the British Empire, 2002
- UNICEF Child Rights Lawyer Award, 1999

Panelist

Marie Vautravers

Deputy head of Private International Law Unit of Ministry of Justice (France)

Education

I hold a degree in Human Sciences (LL.L) and I am a graduate of "Sciences-Po Paris" (Political Sciences and Public Administration School of Paris) and the "Ecole Nationale de la Magistrature" (French National Judiciary School).

Work Experience

I am currently Deputy Head of the Private International Law and Judicial Cooperation Unit at the French Ministry of Justice, in charge of the European and Private International Law Department.

I have previously worked as the iSupport Legal/Project Coordinator at the Hague Conference on Private International Law. I was involved in the development of the iSupport case management and secure communication system for more than two and half years (Sept 2014-March 2017) and was responsible for coordinating administrative, financial and legal aspects of the project as well as the promotion of the system.

Before joining the Hague Conference, from 2006 to 2014, I was Family Judge in France (Court of Evreux and Nanterre).

Panelist

Kyungho Choi

Research Fellow of Korea Legislation Research Institute (Korea)

Education

- Doctor of Juridical Science (SJD), Indiana University Maurer School of Law, US, 2014

Work Experience

- 2015-Prsent Research Fellow, Korea Legislation Research Institute, S. Korea
- 2014 Lecturer in Law, Dong-A University College of Law, S. Korea
- 2014 Research Affiliate, Indiana University Center for Constitutional Democracy, US

Published Books

- Legal and Policy Issues on Eco-Friendly Energy Town, -With Discussion of Selected Countries, Public Land Law Review Vol. 75, 2016
- A Study on Legislation for Support of Climate Change Vulnerable Class, KLRI, 2016
- A Study on Legislation Trends of Logistics in Selected Countries for Coping with Climate Change, KLRI, 2016
- A Study on Recent Trend of Civil Litigations related to the UK Emissions Trading Scheme, KLRI, 2015
- A Study on Renewable Energy Law and Policy for Climate Change Adoption in the European Union (II) KLRI, 2015
- Affirmative Action for Supporting Racial Diversity in the Admissions of American Universities – With Reference to the U.S. Supreme Court's Recent Case, Fisher v. University of Texas(2013), Ewha Law Journal Vol. 19, 2014
- Constitutional Review of Same-Sex Marriage in Recent U.S. Supreme Court (United States v. Windsor and Hollingsworth v. Perry), Hanyang Law Review Vol. 31, 2014
- Pluralism Anxiety and Globalization: Development of Constitutional Law in the New Framework, Suffolk Transnational Law Review Vol. 37, 2014
- Korean Foreign Legal Consultants Act: Legal Profession of American Lawyers in South Korea, University of Hawaii Asian-Pacific Law & Policy Journal Vol. 10, 2010

SESSION 4.

Presentation

Child Protection and Child Support

Yuko Nishitani

Professor at Kyoto University (Japan)

Child Protection and Child Support

[Outlines]

Yuko Nishitani
(Kyoto University, Japan)

I. Introduction

Protection of Children; 1980 Child Abduction Convention & 1993 Intercountry Adoption Convention

⇒ 1996 Child Protection Convention + 2007 Child Support Convention & Protocol

II. Presence of Asian Countries at the HCCH

✧ 9 Members of the HCCH from Asia

✧ 1980 Convention (HK, Macao, Japan, Korea, Philippines, Singapore, Sri Lanka; Pakistan, Thailand)

✧ 1993 Convention (China, India, Philippines, Sri Lanka, Viet Nam; Cambodia)

✧ 1996 Convention; 2007 Convention & Protocol = None

III. 1996 Child Protection Convention

1. Framework of the 1996 Convention

✧ Wide range of subject matter: measures of child protection (private and public orders)

✧ (i) Competence of authorities, (ii) applicable law, (iii) recognition and enforcement of foreign decisions, (iv) cooperation through central authorities

2. Possible Impact in Asia

✧ Advantages: parental disputes over custody & access; measures of protection to support the 1980 Convention; unaccompanied minors; children in alternative care (fostering or *kafala*)

✧ Adjustment of domestic law (jurisdiction; applicable law; central authority)

IV. 2007 Child Support Convention & Protocol

1. Framework of the 2007 Convention & Protocol

✧ Child support and family maintenance

✧ (i) Cooperation through central authorities, (ii) recognition and enforcement of foreign decisions

✧ (iii) Applicable law (Protocol)

2. Possible Impact in Asia

✧ Advantages: effective cross-border recovery; wide scope of recognition & enforcement

✧ Adjustment of domestic law; need in practice; updating conflicts rules of the old Conventions

V. Conclusion

1989 UN Convention on the Rights of the Child

SESSION 4.

Discussion

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The Latest Developments of Guardianship Legal Issue in China

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I. The Two Important Acts

The GPCL of 2017 and the Conflicts Act of 2010

I.1 The New Developments of the GPCL

- To emphasize the principle of being in favor of the interests of ward
- To respects the right of self-determination of the ward.
- To add 3 forms of guardianship
- To clarify the duties of guardian
- To increases the situation of guardianship change

I.2 The Provision of the Conflicts Act

Article 30 reads that guardianship is governed by the law of either party's habitual residence or nationality, depending on which law is more favorable to the protection of the rights of the ward.

the deficiencies of this Article

- the scope of guardianship needs to be clarified
- the meaning of "one party" is controversial
- no standard of deciding the "law is more favorable to the protection of the rights of the ward"
- the intended guardianship needs consideration of the autonomy of parties

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II. A Survey of Judicial Practice on Foreign-related Guardianship in Chinese Courts

- the foreign elements are mostly attribute to foreign-related subject
- minor guardianship are more than adult guardianship among those cases
- the courts usually form a panel according to the ordinary procedure
- as the choice of governing law issue, only 1 judgment did not explain the choice-of-law process and basis, other 13 judgments explained the basis of choice of law. But all judgments applied Chinese law as the governing law

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II.2 The deficiencies in choosing law applicable to the foreign-related guardianship by Chinese courts

- Chinese courts usually apply the governing law of divorce to resolve the guardianship issue without distinction guardianship from divorce
- Chinese courts sometimes did not distinguish guardianship from parent-child relationship in the minor guardianship cases
- Chinese courts usually do not illustrate how to identify "which law is more favorable to the protection of the rights of the ward", just directly apply Chinese law when both parties located in China

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III My Suggestions for Perfection

III.1 In the level of substantive law

- To clarify the considering factors of " in favor of the ward" based on the different types of guardianship
- To specify the content of the personal guardianship and the property guardianship by the legislative model of summarization plus enumeration
- To clear-cut the difference among guardianship, maintenance and support parent
- To perfect the legislations on the content of custody of children after divorce and guardianship of elderly, and to consider the possibility of applying guardianship to some specific physical disability adults

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III.2 In the Level of Conflicts Law

- To clarify the scope of guardianship following the substantive law
- To make clear the meaning of "parties" in Article 30 of the Conflicts Act
- To estimate which law in favor of the ward according to lex fori. The criterion may refer to the relevant provisions of the substantive law
- To allow the parties to choose the applicable law in some specific kinds of guardianship
- To apply the conflict rule for guardianship preferentially when the conflict rules for the parent-child conflict and guardianship are coincidental

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Thank you for your attention and comments!

The Latest Developments of Guardianship Legal Issue in China

Yongping XIAO*

I. The Two Important Acts

Under Chinese legal system, The General Provisions of the Civil Law of the PRC of 2017 (the GPCL) and The Law of the PRC on the Laws Applicable to Foreign-related Civil Relations (the Conflicts Act) are the two important Acts regarding the guardianship legislation in China from substantive law and Conflicts law respectively.

I.1 The New Developments of the GPCL

The Chapter Two of the GPCL provides 14 Articles regulating guardianship, in contrast, the General Principles of Civil Law of 1986 had only 3 Articles. So guardianship system under the GPCL has been much improved in the following aspects:

First, the GPCL emphasizes the principle of being in favor of the interests of wards. Under Article 32, where the court, the residents' committee, the villagers' committee or the civil affairs department designates the guardian, the principle of being in favor of the interests of wards shall be followed. Article 36 also emphasizes this principle when it provides the responsibility of the guardian. In addition to the interests of the guardian, the guardian shall not dispose the property under guardianship.

Second, the GPCL respects the right of self-determination of the ward. Article 36 (2) and (3) provides that in carrying out guardianship duties for minors and adults, the guardian must respect the age and mental status of the ward and respect his thoughts. Especially in the adult guardianship, the guardian should protect the adult's independent civil legal act conform to his intelligence and mental health, and shall not interfere in his treatment he has the ability to handle affairs.

Third, the GPCL adds 3 forms of guardianship. They are the appointed guardianship by article 29, [1] the temporary guardianship by

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[1] Article 29 of the GPCL provides that parents of juvenile have the right to appoint guardians for

Articles 31(3) and 36 (2), [2] the intended guardianship by Article 33.[3]

Fourth, the GPCL clarifies the duties of guardian. Article 34 of the GPCL clearly guarantees the guardian's duties in 3 sections. The first section classifies the duties of personal care, property care and legal representation. In addition to the provisions of the guardian's legal liability for failure to fulfill the duty and infringement of the lawful rights and interests of the ward, this Article also stresses the protection of guardian's right to perform guardianship. By this way, Chinese law considers the guardianship as neither a simple right nor an absolute obligation, but a combination of rights and obligations.

Finally, the GPCL increases the situation of guardianship change by Article 36.[4]

I.2 The Provision of the Conflicts Act

Under Article 30 the Conflicts Act, guardianship is governed by the

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their children by wills.

[2] Article 31(3) of GPCL provides that whether it is in minor guardianship or adults guardianship, a temporary guardian shall be appointed by the residents' committees, the village committee, the civil affairs department or other organizations prescribed by law in the place where the persons under guardianship is located. Article 36 (2) stipulates that when the guardian's qualification is revoked, if necessary, according to the application of the individual or organization, the temporary guardianship measures shall be arranged by the court.

[3] Under the Article 33, an adult with full civil capacity may determine his guardian in written form in consultation with his direct relatives or other individuals or organizations who wish to act as guardians. When the adult loses or partially loses his capacity for civil conduct, the guardian under consultation shall execution of his guardianship duty.

[4] Article 36 list reasons to revoke the guardianship of the guardian, such as to seriously impair the physical and mental health of the persons under guardianship; being negligent in performing the guardianship duty, or unable to perform the guardianship duty and refusing to entrust the guardianship duty in part or in whole to others, causing the person under guardianship to be in a state of distress; performing other acts that seriously infringe upon the lawful rights and interests of the person under guardianship.

law of either party's habitual residence or nationality, depending on which law is more favorable to the protection of the rights of the ward. This Article demonstrates the principle of protecting the interests of the weak in private international law, embodies the legislative philosophy of human-oriented and conforms to the pursuit of substantive justice in contemporary private international law. In the guardianship relationship, the ward is often in a relatively weak position because of age, physiology and mental, so it can be tilted to protect the interests of the parties to some extent.

However, this Article has deficiencies as follows:

First, the scope of guardianship needs to be clarified. It is not clear that Article 30 only applies to personal care or both for personal care and the property guardianship; whether including both minor guardianship and adult guardianship or not. If adult guardianship is adopted, whether the new type of guardianship, such as the guardianship of the elderly, included or not. When the Conflicts Act passed, the Chinese guardianship system was far from perfect, such as the adults guardianship only covers the guardianship of mental patients. Since then, the content of adult guardianship has been supplemented in the GPCL. Therefore, the Conflicts Act may need to be further adjusted and crystallized whether it includes adult guardianship, especially the guardianship of the elderly.

Second, the scope of "one party" is controversial. Under Article 30, the governing law should be chosen from the law of one party's habitual residence or nationality, depending on which is in favor of protecting the rights and interests of the ward. However, it is not sure whether the "one party" refers to all parties to the dispute, or only refers to the guardian and the ward.

Third, there is no standard of deciding the "law is more favorable to the protection of the rights of the ward". It requires the judge to determine on the basis of the case's specific circumstances, but the judge enjoys much discretion to evaluate which right should be protected.

Fourth, the intended guardianship needs consideration of the

autonomy of parties in the level of conflict of laws. Considering the adult guardianship, especially the guardianship of the elderly was adopted by the GPCL, if the elderly signs a guardianship contract with a willing people, which contains a choice of law clause, the Conflicts law has reasonable reason to allow the parties to choose the applicable law for guardianship.

II. A Survey of Judicial Practice on Foreign-related Guardianship in Chinese Courts

In order to explore the judicial practice of Chinese courts on foreign-related guardianship after the implementation of the Conflicts Act, I found 14 judgments from April 1, 2011 to March 20, 2017 by retrieving the China Judgments Online (www.wenshu.court.gov.cn) and other official websites of the Provincial Courts provinces and city courts. To sum up the above 14 cases, the following characteristics can be found.

First, the foreign elements are mostly attribute to foreign-related subject, including 5 cases involving residents from Hong Kong, Macao and Taiwan.

Second, minor guardianship are more than adult guardianship among those cases. There are 4 foreign-related cases involving minor guardianship, while the cause of action is divorce disputes. Only 2 of 14 judgments involving the adult guardianship, while the cause of action is the declaration of a citizen's incapacity.

Third, the courts usually form a panel according to the ordinary procedure to hear the case involving foreign-related guardianship. Only in 2 cases, a summary procedure was used, and in 4 cases the special procedures were opened.

Finally, as the choice of governing law issue, only 1 judgment did not explain the choice-of-law process and basis, other 13 judgments explained the basis of choice of law. But all judgments applied Chinese law as the governing law.

After a detailed analysis of these judgments, it can be found that there are some deficiencies in choosing law applicable to the

foreign-related guardianship by Chinese courts.

First, Chinese courts usually apply the governing law of divorce to resolve the guardianship issue without distinction guardianship from divorce. In dealing with divorce disputes, if the parties present guardianship and custody issues, Chinese courts generally deal with divorce matters as well as the rights of guardianship and custody matters, and regard the issue of foreign-related guardianship as subsidiary issue of foreign-related divorce, so the governing law of foreign-related divorce may be applied to resolve the guardianship and custody issues.

Second, Chinese courts sometimes did not distinguish guardianship from parent-child relationship in the minor guardianship cases. Because the generalized concept of "guardianship" by Chinese substantive law did not distinguish parent-child relationship and guardianship, while Articles 25 and 30 of the Conflicts Act provide respectively two conflict rules for parent-child relationship and guardianship, Chinese courts are sometimes unaware of which rule to apply.

Third, Chinese courts usually do not illustrate how to identify "which law is more favorable to the protection of the rights of the ward", just directly apply Chinese law when both parties located in China.

III. My Suggestions for Perfection

My suggestions for perfection are also divided into two levels: substantive law and conflict of laws.

In the level of substantive law, I suggest

1. To clarify the considering factors of " in favor of the ward" based on the different types of guardianship. For minor guardianship, these consideration factors may include: father, mother or both parents' advice; the wishes of the minors; the relationship between minors and one or both parents, siblings and other of the best interests of affected people; fitness of family and school environment; gender, age and family; mental and physical health conditions associated with the above people; the discretion of the judge. For guardianship of adults, these factors are:

non-discrimination and equal consideration; considering all the relevant circumstances; considering the possibility of recovery; permitting and encouraging the ward to participate in decisions; consideration of the person's past and present wishes and feelings, beliefs and values; seeking advice from relatives, caregivers, or others to determine the guardian's willing.

2. To specify the content of the personal guardianship and the property guardianship by the legislative model of summarization plus enumeration.

3. To clear-cut the difference among guardianship, maintenance and support parent.

4. To perfect the legislations on the content of custody of children after divorce and guardianship of elderly, and to consider the possibility of applying guardianship to some specific physical disability adults.

In the level of conflicts law, I suggest

1. To clarify the scope of guardianship following the substantive law.

2. To make clear the meaning of "parties" in Article 30 of the Conflicts Act. Generally the "parties" refer to the guardian and ward when the guardianship establish, alter, terminate involving the status of the ward, but the "parties" shall be extensively interpreted as people involved in the dispute, when it relates to the specific content of guardianship.

3. To estimate which law in favor of the ward according to lex fori. The criterion may refer to the relevant provisions of the substantive law.

4. To allow the parties to choose the applicable law in some specific kinds of guardianship.

5. To apply the conflict rule for guardianship Preferentially when the conflict rules for the parent-child conflict and guardianship are coincidental.

HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
Four Seasons Hotel Seoul

SESSION 4.

Discussion

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Child Protection & Child Suport: 1996 Hague Convention

Anne-Marie Hutchinson OBE, QC (Hon.)
Partner

HCCH Asia Pacific Week
South Korea, July 2017

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Aims

•The 1996 Hague Convention aims to improve the protection of children in cross-border cases and came into effect in the United Kingdom on 1 November 2012.

•The Convention addresses a wide range of issues involving children and aims to create a more unified approach in international cases. It does not purport to harmonise substantive law.

Scope (Article 1)

The Convention deals with:

- Jurisdiction
- Applicable Law (General)
- Applicable Law (Parental Responsibility)
- Recognition & Enforcement
- Co-operation

Scope

Article 3 gives a non-exclusive list of measures of protection within the Convention's scope.

The following are included:

•Measures attributing / terminating parental responsibility
•Residence / Contact / Leave to remove
•Guardianship
•Child's representation / Wardship
•Placement in foster care / care by *kafala*
•Local Authority supervision
•Administration of child's property

Scope - Exceptions

Article 4

The Convention does not apply to –

a) the establishment or contesting of a parent-child relationship;
b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
c) the name and forenames of the child;
d) emancipation;
e) maintenance obligations;
f) trusts or succession;
g) social security;
h) public measures of a general nature in matters of education or health;
i) measures taken as a result of penal offences committed by children;
j) decisions on the right of asylum and on immigration.

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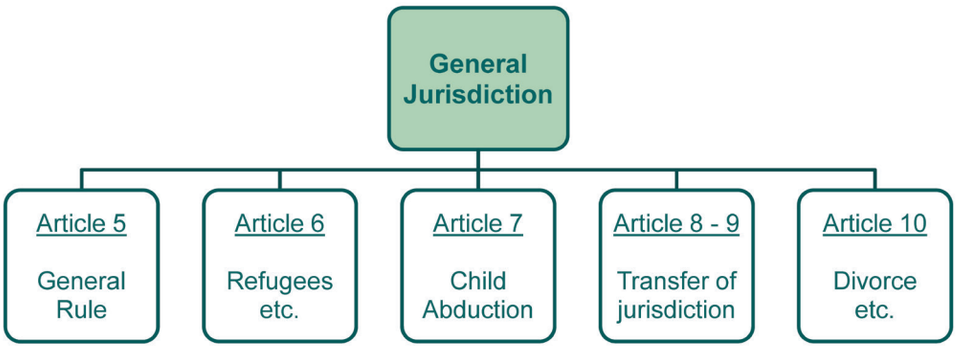
General Jurisdiction (Arts 5-10)



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The Starting Point – Article 5

Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Example 1

A 5-year old Australian national, Sam, lives with his mother in Australia. He has lived there continuously for the last 4 years. Sam's father is a Moroccan national who lives and works in London as a painter. He is married to Sam's mother but they are now separated. He wishes to apply for access as Sam's mother is refusing to let him see Sam.

The Contracting State where the child is **habitually resident** will have jurisdiction (Art 5(1)). This is Australia until such time as the child's habitual residence changes to another Contracting State (Art 5(2)), subject to Article 7 in relation to Child Abduction (see below).

General Jurisdiction (Arts 5 - 10)

Refugees – Article 6

Where a child is present in a Contracting State due to being:

- A refugee; or
- Displaced due to disturbances in their country

Or the child's habitual residence cannot be established…

The Contracting State where the child is present will have jurisdiction.

Child Abduction Article 7

General rule:

Where a child is wrongfully removed or retained, the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction.

Removal or retention will be considered wrongful according to law of Contracting State immediately before the removal / retention.

Child Abduction
Article 7

However, where a child has acquired a habitual residence in the new State, jurisdiction will shift if:

- Everyone who has rights of custody has acquiesced in the removal / retention

OR

- The child has resided in the new State for at least a year after the person / other body having rights of custody knew or should have known of the child's whereabouts;
- No request for return is still pending; and
- Child is settled.

Example 2

Sam's mother agrees that Sam can spend one week with his father in London. Two months have passed and Sam's mother has not heard from either Sam or his father. She makes an application for return under the 1980 Hague Child Abduction Convention. 10 months have now passed since the wrongful retention and the proceedings have still not concluded.

Providing the retention was wrongful according to Australian law, the Contracting State of habitual residence **immediately before** the retention keep their jurisdiction, i.e. Australia. Providing the mother has not acquiesced to the retention (Art 7(1)(a)) and as one year **since the mother had or should have had knowledge** of the retention (Art 7(1)(b)) has not passed, jurisdiction under the 1996 Convention will remain with Australia**.**

Child Abduction
Brussels II bis

There is no equivalent provision in the 1996 Convention of Article 11(6) to (8) in Brussels II bis (allowing an Order requiring the return of the child in the country the child was abducted from to take precedence over a judgement of non-return pursuant to Article 13 of the 1980 Hague Child Abduction Convention made in the State the child was abducted to).

Furthermore, Article 11(6) to (8) in Brussels II bis imposes an obligation on a court that has refused to order the return of a child under Article 13 of the 1980 Child Abduction Convention to transmit relevant documents to the State where the child was abducted from. **No such obligation** appears in the 1996 Convention, although the competent authorities may make a request for information under Article 34 of the 1996 Convention where a measure of protection is being contemplated.

Transfer of Jurisdiction
Articles 8 and 9

It is possible to transfer jurisdiction to a Contracting State where the child is not habitually resident but with which a child has a connection:

- Child is a national or has property located there;

- That State is seized of an application for divorce / legal separation / nullity; or

- Child has a substantial connection with that State.

Transfer of Jurisdiction
Articles 8 and 9

The provisions in **Article 8** (*requests for transfer made by State where child is habitually resident*) and **Article 9** (*vice versa*) are similar, but differ slightly.

In both situations:

- The requesting State must consider that the other State is better placed to assess the child's best interests; and
- The transfer should be in the child's best interests.

However, where a request is made by a State where the child is **not** habitually resident (Article 9), the authorities in the other State must expressly accept the request.

Example 3

The 1980 Convention proceedings have concluded, 11 months after the wrongful retention. The father successfully makes out a grave risk defence and a non-return Order under Art 13(1)(b) of the 1980 Convention is made. The mother then applies for custody in Australia.

As there has been no acquiescence and a year has not passed since the mother knew or should have known about the wrongful retention (Art 7(1)), jurisdiction remains with Australia notwithstanding that Sam may now be habitually resident in England. **However**, assuming habitual residence is in England, a transfer of jurisdiction to Australia may be made under Articles 8 or 9 as Sam is an Australian national (Art 8(2)(a) and 9(1)). The original 'home State' must use Article 8 and the 'new State' must use Article 9. In both cases, the requesting State must consider that Australia is **better placed to assess Sam's best interests** and the receiving State must consider that the transfer is in Sam's best interests.

Divorce etc.
Article 10

A Contracting State dealing with the parents' divorce / legal separation / nullity may have jurisdiction to deal with matters in relation to the child under the Convention…

… despite the fact that the child is habitually resident in another Contracting State

providing that the provisions in Article 10 are met (e.g. one parent is habitually resident in the State dealing with the divorce and both parents agree to that State having jurisdiction).

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Example 4

3 years have passed since the non-return Order and Sam and his father are now settled and habitually resident in England. Sam's father now wishes to divorce Sam's mother and initiates divorce proceedings in Morocco (where he is a national). He also wishes to relocate with Sam there, which Sam's mother fiercely opposes.

Assuming Morocco has jurisdiction to deal with the divorce, they will **not** have jurisdiction to deal with the relocation issue under Art 10. This is because **neither parent is habitually resident in Morocco** (see Art 10(1)(a)). England, however, will have jurisdiction under the 1996 Convention as Sam is now habitually resident there and Art 7(1)(b) has been satisfied.

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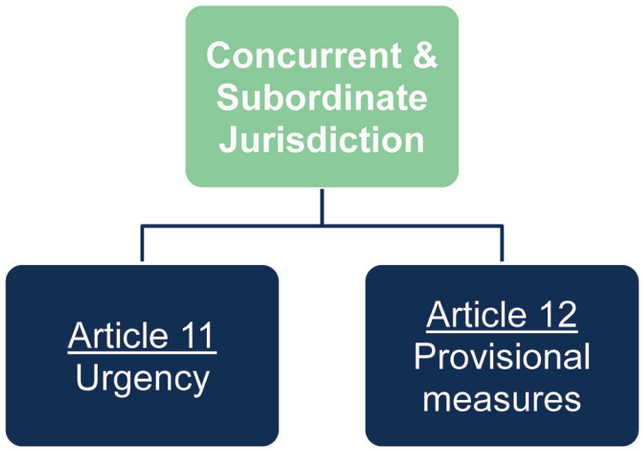
Concurrent and Subordinate Jurisdiction
Articles 11 - 12



Urgent Measures
Article 11

Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

Jurisdiction exercised under Article 11 is:

- Concurrent; and
- Subordinate

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Provisional Measures
Article 12

Article 12

(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

Jurisdiction exercised under Article 12 is:

- Concurrent; and
- Subordinate

Example 5

Sam's mother is furious and takes Sam away from his father in England, wrongfully removing him to Australia. Sam's father is concerned that she has not changed and will cause Sam irreparable harm by abusing him.

Notwithstanding that jurisdiction will remain with England (until Art 7(1)(a) or (b) are satisfied), Australia can take **urgent necessary measures** under Art 11 to protect Sam (but **not** provisional measures under Art 12; see Art 7(3)). These will lapse if and when the English authorities take measures required by the situation. Sam's father could either issue 1980 Hague Child Abduction proceedings or apply for an Order requiring return in England and rely on the recognition and enforcement provisions under the 1996 Convention (see below).

Jurisdiction
Article 13 - 14

Article 13: *Lis pendens*

Must abstain from exercising jurisdiction where same / similar measures in another Contracting State having jurisdiction under Articles 5 – 10 are still under consideration **unless** other State has declined jurisdiction.

Article 14: *Continuation of measures*

A measure taken when exercising jurisdiction under Articles 5 – 10 will remain in force after jurisdiction is lost **until** a new Contracting State has modified, replaced or terminated that measure.

The General Position

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

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Foreign Law

Article 15

(2)However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Note:

- This will only apply 'exceptionally'
- Application / consideration of foreign law should be in the child's best interests

Also note Article 15(3) regarding change of habitual residence.

Example 6

Sam is swiftly returned to his father in England. As Morocco does not have jurisdiction under Art 10 to deal with the relocation issue alongside the divorce, Sam's father issues an application for permanent relocation in the English courts.

The starting position is that the English authorities, in exercising their jurisdiction under Art 5, **should apply their own law** (Art 15(1)). However, they may decide to consider Moroccan law (Art 15(2)) and to frame any relocation Order with the terminology used in Moroccan law to try and ensure its smooth continuation.

Parental Responsibility
Article 16

(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.

(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

(4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Parental Responsibility

Terms:

- "**law of the State**" includes the law of non-Contracting States.

- "without the intervention of a judicial or administrative authority" excludes cases where the intervention is purely passive, e.g. involvement is limited to registering a declaration without exercising control over the matter's substance.

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Other Provisions

Article 19: Protection of third parties acting on false belief that someone holds parental responsibility.

Article 21: Exclusion of choice of law rules where foreign law applied, though see Article 21(2) in relation to the application / consideration of the law of a non-Contracting State.

Article 22: May refuse to apply designated law if *manifestly contrary to public policy.*

Example 7

Sam's father's relocation application is successful and they move to Morocco. The divorce proceedings have concluded and, two years later, Sam's father moves in with his new boyfriend, John, in Argentina, taking Sam with him. They all live there for a year before Sam's father and John enter into a same-sex marriage. They then all move to Morocco to live permanently.

Although Argentina is not a Contracting State, the provisions on applicable law applies to the law of non-Contracting States (Art 20). If Sam was habitually resident in Argentina and it can be shown that, by operation of the law in Argentina, John has parental responsibility (without intervention from a judicial or administrative authority), that parental responsibility will subsist in Morocco even after Sam becomes habitual resident there (Art 16(3)).

Since same-sex activity is illegal in Morocco, the Moroccan authorities may refuse to apply Argentinian law as it is manifestly contrary to public policy (Art 22). In taking this step, the Moroccan authorities must take Sam's best interests into account.

Recognition
The General Rule (Article 23 (1))

The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

Recognition
Non-Recognition

Article 23

(2) Recognition may however be refused –

a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

Recognition
Non-Recognition

Article 23

(2) Recognition may however be refused –

d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 has not been complied with.

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Advanced Recognition

Article 24

… allows any interested person to ask for a declaration confirming whether or not a measure will be recognised in another Contracting State.

May be useful in **relocation cases** where a parent seeks assurance that an Order granting them contact with their child will be recognised in another Contracting State.

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Enforcement
Arts 26 and 28

Enforcement proceedings may be initiated by any interested party where there is no voluntary compliance by requesting that a measure of protection be **declared enforceable** (or registered for enforcement).

State must employ a *simple and rapid procedure* for such a declaration of enforceability / registration.

Can only be refused using the same grounds for non-recognition.

Example 8

As part of the relocation proceedings that took place in England, Sam's mother was granted direct contact over the Summer holidays in Australia. Sam's father refuses to hand over their child. He adds that Sam is also against the idea and that the courts in England would never have allowed such contact if they had actually listened to Sam's views.

Assuming the father's observation that Sam was not heard is true, recognition of the English measure **may** not be recognised in another Contracting State if the fact that Sam was not heard is **in violation of the latter State's fundamental principles of procedure** and the case was not urgent (Art 23(2)(b)). Assuming that the Order **is** recognisable, Sam's mother can seek enforcement pursuant to Articles 26 and 28.

Enforcement

Article 27

No review of merits (other than what is necessary to apply the rules on recognition & enforcement).

Article 28

Measures will be enforced as if made by the authorities in that State and to the extent provided by that State's laws.

Central Authorities

Article 30

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Specific Duties

Article 31

Central Authorities (directly or through public authorities or other bodies) shall:

1. Facilitate communication and offer assistance regarding (i) transfer of jurisdiction and (ii) co-operation provisions in theConvention.

2. Facilitate agreed solutions via mediation, conciliation etc.

3. Assist in locating child on a request by competent authority of another Contracting State where child is in need of protection.

Example 9

Sam is now 17. Unfortunately, John has since joined a dangerous cult. He tries to get Sam to join. Sam's father informs the Moroccan police but before they can do anything, John snatches Sam and disappears. Sam's father suspects John has taken Sam to Uruguay.

The Central Authority in Uruguay has a **duty to assist in locating Sam** as he is in need of protection and may be present there (Art 31(c)). Since no measures under the Convention have been taken in Morocco, they do not fall under a duty to inform the authorities in Uruguay under Art 36. As Sam is 17, the 1980 Child Abduction Convention will **not** apply but the 1996 Convention will apply (Art 2).

Obligatory co-operation and communication

Article 33:

Cross-border placement of children

- Contracting State (with jurisdiction under Articles 5 to 10) **must** consult with the Contracting State where placement of a child is being contemplated.

- They **must** provide a report on the child and the reasons for the proposed placement / provision of care.

State where placement is proposed **must** give consent, otherwise placement may be refused recognition under Article 23(2)(f).

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Anne-Marie Hutchinson OBE, QC (Hon.)
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Obligatory co-operation and communication

Article 36:

Contracting State in which measures have been taken or are under consideration shall inform the State (including a non-Contracting State) where:

- Child is exposed to a serious danger; and

- Child has changed residence or is present in the latter State

about the danger involved and the measures taken or under consideration unless Article 37 applies (e.g. child would be put in danger).

Examples of *serious danger*: Child exposed to drugs
Child requiring constant medical treatment

Dawson Cornwell | the family law firm

Anne-Marie Hutchinson OBE, QC (Hon.)
www.dawsoncornwell.com

Other Provisions

Convention provides for other instances where co-operation is envisaged (but is not made mandatory):

Article 32 (Requesting a report on the child's situation and that measures of protection are taken)

Article 34 (Requesting information when contemplating taking a measure of protection)

Article 35(1) (Requesting assistance in implementing measures abroad)

Article 35 (Requesting information, evidence or a finding in access cases)

Article 40 (Requesting certificate specifying details of parental responsibility powers)

FPR and Regulations (England)

Part 31 (with PD31A) of the Family Procedure Rules 2010 should be referred to in respect of proceedings for the recognition, non-recognition and registration of measures to which the 1996 Convention applies.

The Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 took effect on the day the Convention entered into force.

HCCH Asia Pacific Week 2017

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SESSION 5.

Jurisdiction (Revising Korean Private International Law)

Moderator

Frank Poon
next Representative of Asia Pacific Regional Office of the HCCH

Presenter

Kwang Hyun Suk
Professor at Seoul National University School of Law (Korea)

Panelist

Tae-ak Rho
Chief Judge of the Seoul Northern District Court (Korea)

Anselmo Reyes
Representative of Asia Pacific Regional Office of the HCCH

Yuko Nishitani
Professor at Kyoto University (Japan)

Moderator

Frank Poon

next Representative of Asia Pacific Regional Office of the HCCH

Mr Frank Poon joined the Hong Kong Government in 1978 after obtaining an honours degree in public administration from the University of Ottawa, Canada. He has since served in various posts in the Government. In 1991, he joined the Department of Justice (then Legal Department) as a Crown Counsel after qualifying as a solicitor in England and Hong Kong. He obtained an LL.M degree from the University of Hong Kong in 1995.

While in the Department of Justice, Mr Poon served in various posts in the Civil Division, International Law Division and Legal Policy Division. He was appointed as the Solicitor General of Hong Kong from August 2010 to September 2015. His major areas of interest include public law, private and public international law, air law and international trade law.

Among other duties, Mr Poon was responsible for implementing legislative reform of arbitration law in Hong Kong. His other responsibilities included promoting the rule of law in Hong Kong, advising the Government on constitutional law such as the Basic Law of the Hong Kong Special Administrative Region and human rights law. He also oversaw cooperation on legal matters between Hong Kong and the Mainland of China.

Mr Poon has participated in the negotiation of a number of international agreements as a representative of the Hong Kong Special Administrative Government. Since 1998, he participated in a number of meetings of the Hague Conference on Private International Law as a member of the Chinese delegation. He was also closely involved in Hong Kong's efforts to enter into legal cooperation arrangements with other jurisdictions in the Greater China region.

Mr Poon retired from Government service in September 2015. He began hearing appeals from asylum claimants from November 2016 as a member of the Torture Claims Appeal Board of Hong Kong. He will serve as the representative of the Asia Pacific Regional Office of the Hague Conference on Private International from August 2017.

Presenter

Kwang Hyun Suk

Professor at Seoul National University School of Law (Korea)

Education

- College of Law, Seoul National University (B. Jur., 1979)
- Albert-Ludwigs-Universitaet in Freiburg i. Br., Germany (LL.M., 1991)
- Graduate School of Law, Seoul National University (Doctor Jur., 2000)

Work Experience

- Member of Kim & Chang, law firm of Korea (1984 – 1999)
- Member of the Korean Delegations to various Hague Conference on Private International Law, UNCITRAL and UNIDROIT Projects (1997 -)
- Professor of Hanyang University, College of Law (1999 - 2007)
- Professor of School of Law, Seoul National University
- President of the Korea International Trade Law Association (2013.3. – 2015.5.)
- Vice-President of the Korea Private International Law Association (2011.3. –)

Published Books

- Articles (in Korean)

- Private International Law Issues relating to International Adoption with an Emphasis on the Special Adoption Act and the Hague Adoption Convention, Family Law Review Vol. 26 No. 3 (2012)
- Hague Convention on the Civil Aspects of International Child Abduction and Korea's Accession, in Seoul Law Journal, Vol. 54 No. 2 (2013) and others on private international law, international civil procedure law and international commercial law

- Books (in Korean)

- International Jurisdiction to Adjudicate (2001)
- Private International Law of Korea revised in 2001, 1st edition (2001), 2nd edition (2003)
- Private International Law and International Litigation, Volumes 1 & 2 (2001), Volume 3 (2004), Volume 4 (2007), Volume 5 (2012)
- Law of Contracts for the International Sale of Goods : Commentary on CISG (2010)
- International Civil Procedure Law (2012)
- Commentary on Private International Law of Korea (2013)

- Articles (in English)

- The New Conflict of Laws Act of the Republic of Korea, in Yearbook of Private International Law, Volume 5 (2003)
- Korea's Accession to the Hague Child Abduction Convention, Family Law Quarterly, Vol. 48, No. 2 (Summer 2014)
- Recognition and Enforcement of Foreign Judgments in the Republic of Korea, in Yearbook of Private International Law, Vol. 15 (2013/2014) (2014)
- Harmonization of Private International Law Rules in Northeast Asia, Japanese Journal of International Law and Diplomacy, Vol. 114, No. 1 (2015)

- Books

- South Korea Section, in International Secured Transactions edited by Dennis Campbell, Binder 2 (Oceana Publications, Inc., Dobbs Ferry, NY, 2004)

Panelist

Tae-ak Rho

Chief Judge of the Seoul Northern District Court (Korea)

Education

- 1977 - 1981: Han-yang University, College of Law (LL.B.)
- 1995 - 1996: Georgetown University Law Center (LL.M.)

Work Experience

(As a Judge)

- 2017 - Present Chief Judge, Seoul Northern District Court
- 2014- 2017 Presiding Judge, Seoul High Court
- 2012- 2014 Chief Presiding Judge of Criminal Division, Seoul Central District Court
- 2003 - 2006 Law Professor, the Judicial Research and Training Institute

(Other experiences)

- 2016 Adjunct Professor, Korea University (Maritime Law)
- 2016 - Vice President, the Korea Association of the Law of Civil Procedure
- 2014 - President, the International Trade Law Community of the Supreme Court of Korea
- 2013 - Vice President, the Korea Private International Law Association

Published Books

(English Version)

- Major Judicial Precedents in Private International Law and International Business Transaction IN 2013, Korean Yearbook of International Law Vol 1. 2014 (2015)
- An Analysis of Recent Supreme Court Decisions on International Jurisdiction - Focus on the interpretation of Article 2 of the Private international Act and the Substantial Connection Principle, Supreme Court Law Journal No. 1 Vol 3.(June 2013)

(Japanese Version)

- Recent Legislation and Practice of Korean Insolvency Law- Regarding introduction of the Seoul Rehabilitation Court and Electronic Insolvency Case Management, Osaka Law Review Vol 67 No. 1(No.307) (May 2017)
- Recent changes in the civil appellate procedure and where they are headed- focusing on trial practices of Seoul High Court, Waseda University Comparative Law Review Vol. 48 No.2 (2014.12.1.)
- Legal issue of licensing technology transfer under Korean International Private Law, Waseda University Global COE enterprises and Law Creation Competition Research Institute Volume 9 No. 1 No. 33 (2012)

And more including Korean version articles

Panelist

Anselmo Reyes

Representative of Asia Pacific Regional Office of the HCCH

Education

- AB (Harvard), BA, LLM, PhD (Cambridge)

Work Experience

- Professor of Legal Practice, University of Hong Kong -- 2012 to present
- International Judge, Singapore International Commercial Court -- 2015 to present
- Judge, Court of First Instance, Hong Kong -- 2003 to 2012
- Senior Counsel, Temple Chambers, Hong Kong -- 2001 to 2003
- Barrister, Temple Chambers, Hong Kong -- 1989 to 2001

Published Books

- 淺談新民事司法訴訟 (Reflections on Civil Procedure under Civil Justice Reform) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd., March 2012.
- 淺談香港仲裁法 (How to be an Arbitrator - A Personal View) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd, June 2013.

Panelist

Yuko Nishitani

Professor at Kyoto University (Japan)

Education

- 1998 Ph.D. in Law (Heidelberg University, Germany)
- 1994 - 1997 Research at Max Planck Institute and Heidelberg University, Germany
- 1992 - 1994 Master Studies at Kyoto University, Japan (LL.M. in Law)
- 1988 - 1992 Undergraduate Studies at Kyoto University, Japan (B.A. in Law)

Work Experience

- Since 2015 Professor at Kyoto University, Japan
- 2011 - 2015 Professor at Kyushu University, Japan
- 1997 - 2007 Associate Professor at Tohoku University, Japan
- Since 2007 Visiting Professor at several universities (Duke University (US), Brescia University (Italy) and Tel Aviv University (Israel))
- Since 2017 Member of Curatorium of the Hague Academy of International Law
- Since 2003 Member of several Legislative Committees of the Japanese Ministry of Justice
- Since 2011 Representative of Japan in several projects of the HCCH

Published Books

- 2017 (forthcoming) (editor) "Treatment of Foreign Law - Dynamics towards Convergence?" (Springer, Jus Comparatum series) (English)
- 2008 (editor with Jürgen Basedow and Harald Baum) "Japanese and European Private International Law in Comparative Perspective" (Mohr Siebeck) (English)
- 2007 (editor with Karl Riesenhuber) "Wandlungen oder Erosion der Privatautonomie? – Deutsch-japanische Perspektiven des Vertragsrechts –" (De Gruyter) (German)
- 2000 (monograph) "Mancini und die Parteiautonomie im Internationalen Privatrecht - Eine Untersuchung auf der Grundlage der neu zutage gekommenen kollisionsrechtlichen Vorlesungen Mancinis -" (C.Winter-Verlag) (German)

Awards

- 1998 Lucia- und Rolf-Serick-Preis 1998 (award for doctoral thesis at Heidelberg University)

SESSION 5.

Presentation

Proposed Amendments of the Private International Law Act of Korea : With a Focus on the Rules of International Jurisdiction

Kwang Hyun Suk

Professor at Seoul National University School of Law (Korea)

Proposed Amendments of the Private International Law Act of Korea: With a Focus on the Rules of International Jurisdiction

[HCCH Asia Pacific Week 2017: Seoul, Republic of Korea, July 4, 2017]

Professor Kwang Hyun SUK (石光現教授)
School of Law, Seoul National University

I. Introduction

It is my great honor and pleasure to participate in the "HCCH Asia Pacific Week 2017" conference organized to celebrate the 20th anniversary of Korea's membership of the HCCH co-hosted by HCCH, the Ministry of Justice, the Judicial Research and Training Institute, the Ministry of Foreign Affairs, the Private International Law Association of the Republic of Korea, and the Korean Bar Association. First of all, I would like to express my sincere thanks to the organizers of today's conference for giving me the opportunity to make a presentation on the Rules of International Jurisdiction to be inserted in the Private International Law Act of Korea.

The current Private International Law Act of Korea ("KPILA") includes three articles on international jurisdiction that were introduced in 2001. Art. 2 in Chapter 1 (General Provisions) lays down general rules on international jurisdiction (hereinafter "jurisdiction", which refers to "adjudicatory jurisdiction" or "jurisdiction to adjudicate"). Arts. 27 and 28 set forth special rules to protect consumers and employees. In June 2014, the Ministry of Justice of Korea ("KMOJ") established an expert committee ("Committee") in charge of preparing the draft amending the KPILA, the term of which has expired on December 31, 2015. The Committee consisted of ten experts including myself. The most important task of the Committee was to prepare an official draft of the amended KPILA. As of May 31, 2017 an official draft of the amended KPILA has not been published. Since January of 2017 the KMOJ had made efforts to complete the remaining works and actually has prepared an unofficial tentative draft ("Tentative Draft") of the amended KPILA. Although the Tentative Draft has not been officially released to the public, I am aware of the contents thereof since I am providing assistance to the KMOJ. In this article, I would like to briefly discuss the major contents of the Tentative Draft without going into details thereof since the Tentative Draft has not been published.

Unlike Japan, which added in 2012 detailed rules on international jurisdiction only on property law matters in the Civil Procedure Act of Japan ("JCPA") and Civil Enforcement Act of Japan

("JCEA"), respectively, Korea will insert the rules on international jurisdiction on not only property law matters, but also family law and succession law matters in the KPILA, in parallel with existing rules on applicable law. At present China does not have detailed rules on international jurisdiction in both the Chinese Private International Law Act and the Civil Procedure Act. Korea is different from both Japan and China in that Korea plans to insert detailed rules on international jurisdiction in the private international law act rather than civil procedure act, whereas both Japan and China have inserted detailed (in the case of Japan) or brief (in the case of China) rules on international jurisdiction in their respective civil procedure act.

II. Direction and the Regime of the Future Jurisdiction Rules

1. Current Regime: Transitory Codification in 2001

Art. 2 of the KPILA states that detailed rules on international jurisdiction should be developed by consulting, but without being bound by, the provisions on domestic territorial (or local) jurisdiction (or the venue provisions) of Korean law, such as Arts. 2 to 25, and Arts. 29 to 31 of the Civil Procedure Act of Korea ("KCPA"). However, it is necessary to take into account the special characteristics of international jurisdiction, as distinct from local jurisdiction. Insertion of these articles was a transitory measure which implied that detailed rules on international jurisdiction would follow in the succeeding years. The reason the Korean legislators were satisfied in 2001 with the transitory measure was that the "Judgment Project" aimed at developing a comprehensive worldwide convention dealing with international jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters was underway under the auspices of the Hague Conference on Private International Law[HCCH – 앞과 통일성 고려]. However, since the Judgment Project has failed, it is time for the Korean legislators to complete their plan to provide detailed rules on international jurisdiction in the KPILA.

2. Direction of Amendment

A. Concretization and Individualization of Art. 2

The purpose of the amendment of the KPILA is to insert detailed and refined rules on international jurisdiction in the KPILA. This means that the abstract principles declared in Art. 2 should be replaced with more concrete and individualized rules. In preparing these rules, the Committee had considered the rules on international jurisdiction of the 1999 Preliminary Draft of the Hague Conference and the rules set forth in the Brussels I Regulation, the Choice of Court Convention of 2005 (in the case of property law matters), the Brussels II bis Regulation, various

Hague Conventions including the Children's Conventions and the "Convention on the International Protection of Adults" of 2000, the EU Maintenance Regulations of 2008, the EU Succession Regulations of 2012 and the draft of the EU Matrimonial Property Regulations (in the case of family law matters).

B. Rules on Direct Jurisdiction of Korea

Since the international jurisdiction rules of the KPILA will be binding upon Korean courts only, the Committee decided in principle to insert rules on direct jurisdiction, provided, however, there are exceptions. For example, in order to set forth neutral and fair jurisdiction rules, the Committee agreed to insert rules of choice of court agreement both for Korean and foreign courts. Since the KCPA (Art. 217(1)) expressly provides that the rules on indirect jurisdiction are the same as those on direct jurisdiction, the proposed rules on direct jurisdiction of the KPILA will also have important meaning for indirect jurisdiction in the context of recognition and enforcement of foreign judgments.

3. Structure

Chapter 1 of the KPILA will be amended as follows:

Current Provisions		**Future Structure**	
Ch. 1	General provisions (§§1-10) Art. 1 (Purpose) Art. 2 (General Principles) Arts. 3-10 Articles on Governing Law	Ch. 1	**Section 1**. Art. 1 (Purpose)
			Section 2 International Jurisdiction Art. 2 (General Principles), new articles to be added here: general jurisdiction, jurisdictions based upon office or activity, presence of property, jurisdiction based upon relationship, counter-claim, jurisdiction agreement, appearance, exclusive jurisdiction, *lis pendens*, *forum non conveniens,* exception for family and succession matters, provisional measures, non-contentious matters
			Section 3 Governing Law. Existing Articles

In each of the chapters from 2 to 9 (except for Chapters 3 and 4), new Section 1 on international jurisdiction will be added, and the existing articles on governing law will be moved to new Section 2.

Current Provisions		**Future Structure**	
Ch. 2	Person (§§11-16)	Ch. 2	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law
Ch. 3	Juridical Act (§§17-18)	Ch. 3	No change
Ch. 4	Rights *in Rem* (§§19-23)	Ch. 4	No change
	Protection of Intellectual Property (§24)	Ch. 5	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Article on Governing Law

Ch. 5	Obligations (§§25-35)	Ch. 6	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law
Ch. 6	Family (§§36-48)	Ch. 7	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law
Ch. 7	Succession (§§49-50)	Ch. 8	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law
Ch. 8	Bills of Exchange, Promissory Notes and Checks (§§51-59)	Ch. 9	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law
Ch. 9	Maritime Matters (§§60-62)	Ch. 10	Section 1 New Articles on Int'l Jurisdiction
			Section 2 Existing Articles on Governing Law

III. General Provisions on International Jurisdiction (Chapter 1)

Here, I will discuss the rules on international jurisdiction to be inserted in Chapter 1 of the KPILA.

1. Existing Art. 2: General Principles

Current Status

(1) The courts shall have international jurisdiction if the parties or the case in dispute has a substantial connection with the Republic of Korea. In determining whether or not such substantial connection exists, the courts shall follow the reasonable principles in conformity with the ideas underlying the allocation of international jurisdiction to adjudicate.
(2) The courts shall determine whether or not they have international jurisdiction by reference to the provisions on jurisdiction of domestic laws, having full regard for the special characteristics of international jurisdiction in light of the provisions of paragraph (1).

Art. 2 states that detailed and refined rules on international jurisdiction should be determined by consulting, but without being bound by Arts. 2 to 25 and Arts. 29 to 31 of the KCPA in civil or commercial matters. At the same time, it is necessary to take into account the special characteristics of international jurisdiction, as distinct from domestic territorial (or local) jurisdiction. The idea underlying Art. 2 is to require Korean judges to establish more detailed and refined rules on international jurisdiction after considering the special characteristics of international jurisdiction, instead of mechanically assuming that the 'rules on international jurisdiction' are identical to the 'venue provisions' of the KCPA. Accordingly, the venue provisions of the KCPA could be used as a reference for Korean courts in developing detailed and refined international jurisdiction rules.

Tentative Draft

Art. 2 in the Tentative Draft reads as follows:

> (1) The courts shall have international jurisdiction if the parties or the case in dispute has a substantial connection with the Republic of Korea. In determining whether or not such substantial connection exists, the courts shall follow the reasonable principles in conformity with the ideas underlying the allocation of international jurisdiction *i.e.*, fairness to the parties, justice, promptness and economy of trial.
> (2) Where there is no provision on international jurisdiction in this Act, other acts or treaties, the courts shall determine whether or not they have international jurisdiction by reference to the provisions on jurisdiction of domestic laws, having full regard for the special characteristics of international jurisdiction in light of the provisions of paragraph (1).

Art. 2 will have several functions. First, it will declare the general principles regulating the international jurisdiction of Korean courts. Second, Art. 2(2) will have a positive function whereby Korean courts can have international jurisdiction by reference to the venue provisions of Korean law where there is no provision on international jurisdiction under Korean law or treaties. Third, Art. 2(1) will also have another positive function whereby Korean courts can have international jurisdiction solely based upon substantial connection where there is neither a provision on international jurisdiction under Korean law or treaties nor a venue provision in the KCPA. The third function should be employed in very exceptional cases only, since the amended KPILA will enumerate detailed grounds of international jurisdiction. In this sense, Art. 2 is an open-ended provision with the nature of a general clause. On the other hand, Art. 2 will not have a negative function, which will be left to a separate article dealing with the doctrine of *forum non conveniens*.

2. General Jurisdiction

Current Status

The KCPA provides that an action is subject to the jurisdiction of the court located at the place where the defendant has his domicile (in the case of a natural person) or its principal place of business (in the case of a legal person; Arts. 2, 3 and 5 of the KCPA). It is generally recognized that this rule (*actor sequitur forum rei*) applies to international jurisdiction.

Tentative Draft

An article setting forth the *actor sequitur forum rei* rule has been added in the Tentative Draft. However, habitual residence instead of domicile has been selected as the point of contact for general

jurisdiction for the following two reasons: First, in the context of choice of applicable law, the KPILA does not use domicile as a point of contact. Second, habitual residence rather than domicile is widely used as the basis of general jurisdiction in various Hague Conventions.

The scope of cases where the *actor sequitur forum rei* rule is valid is not entirely clear. In particular, it is not clear whether the rule will also hold true for non-contentious matters. The Committee agreed to insert a provision in Chapter 1 that articles in the Chapter will apply, *mutatis mutandis*, to non-contentious matters unless their application is against the nature.

3-1. Jurisdiction based upon the Presence of Office or Branch

How to limit the scope of this ground of international jurisdiction?

Current Status

An action against a person maintaining an office or a business office can be filed before the court located in that area only if the action concerns the business affairs of such office or business office (Art. 12 of the KCPA). It is generally recognized that this rule applies to international jurisdiction. Art 5(2) of the KCPA also provides that the general forum for a foreign corporation shall be the place in Korea where it has an office or a business office. According to this provision, it is not material to the exercise of jurisdiction by the court located in the general forum whether such office or place has any relation to the action. Despite a strong opposing view, Korean courts tend to hold that if a foreign corporation establishes an office or a business office in Korea, it will be subject to Korean international jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the Korean office or business office, which can be viewed as supporting the American concept of "doing business". However, it is not clear whether the Supreme Court still maintains the position expressed in the past, because in a recent case of 2010, the Supreme Court apparently did not follow the approach of a judgment of 2000 in a comparable dispute.

Tentative Draft

An article along the lines of the following has been added in the Tentative Draft (Cf. Brussels I *bis* (Art. 7(5)), the 1999 Preliminary Draft (Art. 9) and the JCPA (Art. 3-3(4)):

> An action against a person having an office or establishment in Korea and relates to the activities of that office may be filed in Korea.

3-2. Jurisdiction based upon the Activity of the Defendant

How to limit the scope of this ground of international jurisdiction?

Current Status

There is no provision on this head of international jurisdiction.

Tentative Draft

An article along the lines of the below has been be inserted in the Tentative Draft (Cf. The 1999 Preliminary Draft (Art. 9) and the JCPA (Art. 3-3(5)):

> An action against a defendant may be filed in Korea where the defendant has continuously and systematically carried on commercial or business activity in, or towards, Korea; provided that the dispute relates to that commercial or business activity.

Even in the absence of such article, under Art. 2 of the current KPILA, one could allow such international jurisdiction based upon "substantial connection" with Korea. However, in order to enhance legal certainty and clarity, the Committee agreed to insert such a provision. Art. 3-3(5) of the JCPA is a good model of such jurisdiction. One could justify such ground of international jurisdiction, because foreign companies can conduct business in Korea without establishing any office or establishment in Korea through internet and by other means. This could be described as so-called "transacting business" jurisdiction (*i.e.* special jurisdiction) as opposed to "doing business" jurisdiction (*i.e.* general jurisdiction). The Committee wanted to make clear that it is a ground of international jurisdiction based upon a so-called "targeted activity criterion". There were several concerns of the Committee. The first concern was that the text should be further clarified, so that mere operating of a website by a foreign company where Korean residents could access should not be regarded as carrying on business or commercial activity in Korea. The second concern was that the "targeted activity criterion" in the context of B2B should be more stringent than that applicable to consumer contracts. This is because the KPILA has already introduced international jurisdiction based upon a "targeted activity criterion" for consumer contracts (Art. 27). Otherwise, the international jurisdiction based upon a "targeted activity criterion" for consumer contracts would be redundant. In order to accommodate these concerns, the Committee decided to add the phrase "systematic and continuous activities" which had been used by the U.S. Supreme Court Judgments (*Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952) and *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984)) in the past as a ground of general jurisdiction until it was recently abandoned by the judgment in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

We should pay attention to the relationship between the activity-based jurisdiction to be newly introduced on the one hand, and the traditional contract jurisdiction and the tort jurisdiction, respectively, on the other. In particular, certain contract disputes and tort disputes arising from a foreign company's activities targeted towards Korea could be subsumed under the head of the activity-based jurisdiction in the future.

4. Jurisdiction based upon the Presence of Property of the Defendant

How to limit the scope of this ground of international jurisdiction?

Current Status

An action relating to property rights against a person who does not have a domicile in Korea may be brought before the court located in the area where the subject matter of the claim, the subject matter for security or any attachable property of the defendant, is located (Art 11. KCPA). This appears to confer local jurisdiction merely on the grounds of the location of any specified subject matter or property. Despite majority view criticizing such a position as allowing exorbitant jurisdiction, the Supreme Court admitted in 1988 that Art. 11 of the KCPA may be applied to international jurisdiction. Majority view takes the position that it should apply only when the defendant has had property in Korea for a certain period of time and whose value is sufficient to cover the plaintiff's claim. However, considering a recent case of 2014, the Supreme Court now appears to depart from its previous position.

Tentative Draft

The Committee had no objection against the rule that the presence of the defendant's property could constitute a ground of international jurisdiction for an action relating to property rights where the subject matter of the claim or the subject matter for security is located in Korea. On the other hand, there was much discussion in the Committee as to whether the presence of the defendant's property could constitute a ground of international jurisdiction for an action relating to property rights in general which has nothing to do with that property. The conclusion was that the presence of property could constitute a ground of international jurisdiction for an action relating to property if the property can be a subject of arrest or seizure. However, this rule does not apply when (i) the case in dispute has no connection at all, or only a slight connection, with Korea or (ii) the value of the property is substantially small. An arrest of a ship by a Korean court could constitute a ground of international jurisdiction over the case against the owner of the arrested ship, which will be set forth in the chapter dealing with maritime matters.

5-1. Jurisdiction based upon the Relationship between Claims

Current Status

The KCPA contains a provision allowing an action involving several claims to be filed before the court having local jurisdiction over one of the claims (§25(1)). Some legal commentators take the

view that the provision could be applicable to cross-border actions as well. However, the Brussels I and the 1999 Preliminary Draft do not contemplate such possibility at all.

Tentative Draft

An article along the lines of the below has been inserted in the Tentative Draft:

> Where two or more claims are made jointly in a single action and Korean courts have international jurisdiction over one of them, the action may be filed before Korean courts only if the claims have a close connection between them.

* A question arises as to the interaction between the so-called "mosaic rule" (applicable to torts or infringement of intellectual property rights) on the one hand, and international jurisdiction based upon relationship between claims on the other. Under the 'mosaic rule', a plaintiff may file an action either in the courts of the State where the damage originated or the domicile or habitual residence of the defendant, in respect of the whole of the damage suffered, or in the courts of the States where the damage actually occurred, but only in respect of the damage suffered in the States concerned.

* family matters: principal (or anchor) claim v. incidental claim

The Committee decided to apply to family matters the rules on international jurisdiction based upon the relationship between claims but with some qualifications. Accordingly, Korean courts having international jurisdiction over a principal (or anchor) claim such as divorce or adoption can have international jurisdiction over an incidental claim such as a claim for appointment of custodian or a claim for child support. However, Korean courts having international jurisdiction only for an incidental claim cannot have international jurisdiction over a principal claim.

5-2. Jurisdiction based upon the Relationship between Parties

Current Status

The KCPA contains a provision allowing an action by, or against, several persons to be filed before the court having jurisdiction over one of the defendants (§25(2)). Some legal commentators take the view that the provision could be applicable to cross-border actions as well. The Brussels I and the 1999 Preliminary Draft also allow such possibility but under stricter conditions.

Tentative Draft

An article along the lines of the following has been inserted in the Tentative Draft:

> A plaintiff filing an action against a defendant before a Korean court in which that defendant is habitually resident may also file an action before that court against other defendants not habitually resident in Korea only if the claims against the defendant habitually resident in

Korea and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments.

6. Counter-claims

An article along the lines of the below has been inserted in the Tentative Draft (Cf. Brussels I (Art. 8(3)), the 1999 Preliminary Draft (Art. 15)(these two are a little bit narrower) and the JCPA (Art. 146(3)):

A defendant may file a counter-claim before a Korean court, if the counter-claim has a close connection with the original claim or with the defense thereto, and the proceedings will not be significantly delayed thereby; provided, however, that the foregoing shall not apply where the counter-claim falls within the exclusive jurisdiction of a foreign court.

7. Jurisdiction Agreement (Choice of Court Agreement)

Current Status

In practice, the parties' agreement on international jurisdiction plays a very important role. The effectiveness of the parties' agreement on international jurisdiction in a cross-border action is generally accepted in Korea, although there is no express provision on point in the KCPA. However, the Supreme Court held on September 9, 1997 that in order for a jurisdiction clause conferring exclusive jurisdiction upon a foreign court to be valid, (i) the case does not fall under the exclusive jurisdiction of Korea, (ii) the agreed upon foreign court has valid international jurisdiction under its law, (iii) the case should have a reasonable relationship with the chosen foreign court, and (iv) the jurisdiction agreement is not egregiously unreasonable or unfair. Although the condition (iii) has been criticized by legal commentators, the Supreme Court maintains its position.

Tentative Draft

In relation to the requirement mentioned in (iii) above, the Committee agreed not to follow the position of the Supreme Court. In addition, considering the entry into force of the "Convention on Choice of Court Agreements" on October 1, 2005 at the Hague Conference, the Committee agreed to specify as below.

Under the Tentative Draft a Korean court shall dismiss proceedings where there is an exclusive choice of court agreement in favor of a foreign court, unless (i) the agreement is null and void under the law (including choice of law rules) of the State of the chosen court; (ii) a party lacked the capacity to conclude the agreement; iii) giving effect to the agreement would be manifestly contrary to the

public policy of Korea; or iv) the chosen court has decided not to hear the case or there is a situation in which the agreement cannot properly be performed.

In family matters, international jurisdiction based upon parties' choice of court is in principle excluded; unless there is an express provision allowing parties' choice of court agreement. For example, the parties are allowed to enter into a choice of court agreement in the case of maintenance matters (Chapter 7, Section 1). However, this exception is not applicable where the chosen court has no connection at all, or has only a slight connection, with the case or the maintenance creditor is a minor or an adult ward.

8. Jurisdiction based on Appearance

Current Status

Even if a person is not otherwise subject to the international jurisdiction of Korean courts, if he/she appears before the Korean court and responds to the merits without objecting to the jurisdiction, the Korean court will assume international jurisdiction since he/she can be deemed to have consented to the international jurisdiction of the Korean courts (Art. 30).

Tentative Draft

An article along the lines of the Brussels I *bis* (Art. 26(1)), the 1999 Preliminary Draft (Art. 5) and the JCPA (Art. 3-8) has been inserted in the Tentative Draft.

In family matters international jurisdiction based upon appearance is not permitted in principle. However, where the parties are allowed to enter into a choice of court agreement in family matters, the international jurisdiction based upon appearance should also be allowed, even if there is no express provision to that effect.

9. Exclusive Jurisdiction

Current Status

The KCPA does not contain any provisions on exclusive international jurisdiction of Korean courts. However, a majority of commentators take the position that Korean courts have exclusive international jurisdiction in the following cases: (i) in proceedings relating to the registration in public registers, if the register is kept in Korea; (ii) in proceedings relating to the validity of the constitution, nullity or dissolution of companies or the validity of the decisions of their organs, if the company has been established under Korean law; (iii) in proceedings relating to rights *in rem* in immovable property, if the property is situated in Korea (the same applies to proceedings based upon the right to

use immovable property if such rights is registered in public registers, iv) in proceedings relating to the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in Korea and (v) in proceedings concerned with the enforcement of judgments, if the judgment is to be enforced in Korea.

This is very similar to the list of exclusive jurisdictions under the Brussels I Regulations (§22).

Tentative Draft

An article dealing with exclusive jurisdiction has been added in Chapter 1 of the Tentative Draft. The list of exclusive jurisdictions of Korean courts is as follows:

(i) in proceedings relating to the registration in public registers, if the register is kept in Korea;

(ii) in proceedings relating to the validity of the constitution, nullity or dissolution of a legal person or an association or the validity of the decisions of its organs, if it has been established under Korean law;

(iii) in proceedings relating to rights *in rem* in immovable property, if the property is situated in Korea (the same applies to proceedings based upon the right to use immovable property if such rights is registered in public registers);

iv) in proceedings relating to the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in Korea;

v) in proceedings concerned with the enforcement of judgments, if the judgment in proceedings concerned with the enforcement of judgments, if the judgment has been or is to be enforced in Korea.is to be enforced in Korea.

As to the proceedings mentioned in (i) and (iv) above, there are two exceptions. First, rules on exclusive jurisdiction shall not apply when those matters arise as incidental questions. Second, rules on exclusive jurisdiction shall not apply when the transfer or registration being the subject matter of the proceedings should be performed by a contract between the parties. This is because in such case, the principal subject matters of the dispute are the interpretation of the contract, and the rights and obligations of the parties under the contract. The purpose of the second exception is to reflect the position of the Supreme Court of Korea.

As to the proceedings mentioned in (iii), there was much discussion as to whether Korean courts should have exclusive jurisdiction or not. Some members supported the position of the Brussels I and the 1999 Preliminary Draft, whereas other members were in favor of the position of the JCPA according to which Korea would not have exclusive jurisdiction. The KMOJ decided to take the former position. An action relating to immovable property may be filed in Korea if the immovable is located in Korea. An action relating to the ownership of immovables falls under this sub-paragraph.

With regard to (iv) above, there was a dispute whether proceedings where the Korean plaintiff requires the Japanese defendant to transfer and register the transfer of the patents registered in Japan pursuant to the contract between the parties is subject to the exclusive jurisdiction of Japan or not. While the Supreme Court admitted that the proceedings where the subject matter is the validity or existence of patents generally fall under the exclusive jurisdiction of the country of registration (in that case in Japan), the Supreme Court, on April 28, 2011, held that the proceedings in question did not fall under the exclusive jurisdiction of Japan, because the principal subject matters of the dispute were the interpretation of the contract, and the rights and obligations of the parties under the contract. The judgment was welcomed by legal commentators in Korea.

10. *Lis Pendens*

Current Status

There is no provision on this issue in the KPILA or KCPA. Although there is a split of opinion, majority of lower courts appear to take the priority rule coupled with a positive predicted recognition.

Tentative Draft

Rules on *lis pendens* along the lines of the below have been inserted in the Tentative Draft, which resembles Art. 21 of the 1999 Preliminary Draft.

When an action that is the same as the case pending before a foreign court is filed before a Korean court, the Korean court may, *ex officio* or upon application of a party, suspend the proceedings if the foreign court is expected to render a judgment capable of being recognized in Korea, unless the Korean court has jurisdiction pursuant to an exclusive jurisdiction agreement or it is manifest that the Korean court is more appropriate to resolve the dispute than the foreign court. A party can file an immediate appeal against the Korean court's decision to suspend the proceedings. Upon application of a party, the Korean court may proceed with the case if the plaintiff in the foreign court has failed to take the necessary steps or if the foreign court has not rendered such a decision within a reasonable time. The Korean court shall dismiss the case as soon as it is presented with a judgment rendered by the foreign court that satisfies the requirements for recognition under Korean law. For the purpose of this Article, the timing when the action has been filed before the foreign and Korean courts is decisive in determining which action has been filed first.

11. *Forum non Conveniens*: Special Circumstances Theory

Current Status

At present, there is a split of opinion among legal commentators as to whether or not the doctrine of *forum non conveniens*, under which the Korean court may refuse to exercise international jurisdiction even if Korean courts have international jurisdiction according to the standard established by the KPILA, is permitted. In the past, Korean judges could have some amount of flexibility by resorting to the so-called "special circumstances theory" modeled on the Japanese court precedents.

Tentative Draft

An express article permitting the *forum non conveniens* doctrine has been be added in the Tentative Draft. The purpose is to give Korean judges some amount of discretion in concrete cases in exercising international jurisdiction. Unlike the 1999 Preliminary Draft which expressly enumerates the factors which the courts seized should consider in determining whether to exercise the international jurisdiction, the KPILA will not list the factors.

> Article * (Declining of International Jurisdiction)
> (1) Even if Korean courts have international jurisdiction under this Act, in exceptional circumstances, a Korean court may, on application by the defendant made no later than at the time of the first defense on the merits, suspend its proceedings or dismiss the case if it is clearly inappropriate for the court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute, unless the jurisdiction of the court seized is founded on a choice of court agreement.
> (2) In the case of para. 1, before suspending the proceedings or dismissing the case, the court should give the plaintiff the opportunity to challenge the application of the defendant.
> (3) The parties may bring an immediate appeal against the decision of the court under para. 1.

Although there is no court precedent, under Korean law, recognition or enforcement of a foreign judgment may not be refused on the ground that the Korean court considers that the foreign court should have declined international jurisdiction according to the criterion under the KPILA. In such case, Korean courts cannot deny that the foreign court had international jurisdiction.

12. Exceptions in relation to Family Matters and Succession Matters

Current Status

There is no provision on this issue in the KPILA or KCPA.

Tentative Draft

Several new articles that have been inserted in Chapter 1 of the Tentative Draft (such as choice of court agreement and jurisdiction based upon appearance) will not be applied in the case of family matters and succession matters, unless otherwise set forth in this Act. A typical example is the maintenance matters set forth in Chapter 7, Section 1, where the parties are allowed to enter into a choice of court agreement within certain limit.

13. Provisional Measures

Current Status

There is no provision other than provisions on local jurisdiction in the KCPA and the KCEA (Korean Civil Enforcement Act).

Tentative Draft

An article along the lines of the below have been inserted in the Tentative Draft. (Cf. The 1999 Preliminary Draft (Art. 13) and the JCPA (Art. 11)):

> A petition for an order of provisional relief may be made before a Korean court where Korean courts have international jurisdiction over an action on the merits or where the asset to be provisionally attached or seized or the object of the dispute is located in Korea. In addition, a petition for an order of provisional relief may be made before a Korean court where there is an urgent need, in which case the effect shall be limited within Korea.

* Art. 12(1) of the Child Protection Convention: "Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10."

* Similar provision in Art. 11(1) of the Convention on the International Protection of Adults

14. Non-contentious Matters

Are detailed rules on international jurisdiction for non-contentious matters available?

Current Status

There is no provision other than provisions on local jurisdiction in the Family Litigation Act and the Act on Procedures of Non-contentious Matters.

Tentative Draft

The KMOJ decided to take the below approach.

As to family matters, succession matters and personal matters, KPILA will set forth rules on international jurisdiction for non-contentious matters as well as contentious matters. Articles in this category will provide that "Korean courts shall have international jurisdiction over certain matters".

As to the other matters, the KPILA will set forth rules on international jurisdiction for contentious matters. Articles in this category will provide that "An action on certain issues may be filed before Korean courts." As to non-contentious matters of this category, international jurisdiction shall be determined pursuant to the general principles set forth in Article 2 of the KPILA unless otherwise set forth in the KPILA.

In addition, an article on non-contentious matters in Chapter 1 will expressly provide that the rules on international jurisdiction in Chapter 1 shall apply, *mutatis mutandis*, to non-contentious matters unless it is against their nature.

In the future, Korean experts should make further efforts to develop more detailed rules on international jurisdiction for non-contentious matters.

IV. Special Provisions on Jurisdiction: Articles to be inserted in Chapters 2 through 10 (except for Chapters 3 and 4): Rules on Special Jurisdiction

Here I will discuss the rules on exclusive jurisdiction and special international jurisdiction in the order of the articles to be inserted in Chapters 2 through 10 (except for Chapter 3) of the KPILA. In principle, the rules on international jurisdiction in Chapter I and the rules on special jurisdiction of each chapter include exhaustive rules on international jurisdiction for the matters falling under each Chapter. However, there are exceptions in matters falling under Chapter 5 (Intellectual Property) and Chapter 10 (Maritime Matters).

1. Person (Chapter 2, Section 1)

Current Status

There is no provision other than the below venue provisions under the KCPA.

(i) An action by a company or other association against its member, or an action by a member against a member, each of which is based on his status as a member may be filed before Korean courts if Korean courts have general jurisdiction over the company or other association (Art. 15(1) of the KCPA). (ii) An action by an association or foundation against its officer based on his/her status as

an officer, or an action by a company against its founder or inspector may be filed before Korean courts if Korean courts have general jurisdiction over the association, the foundation or the company, respectively (Art. 15(2) of the KCPA). (iii) An action by a creditor of a company or other association against its present or former member, based on his/her status as a member may be filed before Korean courts if Korean courts have general jurisdiction over the company or other association (Art. 16 of the KCPA).

Tentative Draft

Declaration of Disappearance: Korean courts shall have international jurisdiction over matters relating to a declaration of disappearance of natural person in any of the following cases: (i) where the absentee is a Korean national, (ii) where the last habitual residence of the absentee was in Korea, or (iii) where the absentee has property in Korea or there is a legal relationship governed by Korean law or other justifiable ground (the international jurisdiction to be limited to the relevant property and the legal relationship).

Management of Property: Korean courts shall have international jurisdiction over matters relating to management of the absentee's property if the absentee was last habitually resident in Korea or has property in Korea.

Special Jurisdiction: Special jurisdiction mirroring the first category of the venue provisions of the KCPA (Arta. 15 and 16) mentioned above will be inserted in the KPILA (Cf. Art. 3-3(7) of the JCPA). On the other hand, there will be no provisions in the KPILA mirroring the second and the third categories of the venue provisions of the KCPA.

2. Real Property (Chapter 4, Section 1)

Current Status

There is no provision other than the venue provisions in the KPCA (Art. 20).

Tentative Draft

An action relating to an immovable property may be filed in Korea if the immovable is located in Korea. An action relating to the ownership of immovables falls under this sub-paragraph. The international jurisdiction is exclusive. This provision will be inserted in Chapter 1.

3. Intellectual Property Rights (Chapter 5, Section 1)

Current Status

There is no provision other than the venue provisions in the KPCA (Art. 24).

The most problematic disputes relating to intellectual property are those involving the registration or validity of patents or other similar rights requiring registration. It has been generally thought that Korean courts have exclusive international jurisdiction in proceedings relating to the registration or validity of patents or other similar rights, if the registration has taken place in Korea. However, in a recent case of 2011 mentioned above, the Supreme Court distinguished (i) proceedings in which the subject matter is the validity or existence of patents on the one hand, and (ii) proceedings in which subject matters are the interpretation and effects of the contractual obligations between the parties on the other, and clearly held that only the first category falls under the exclusive jurisdiction of the country of registration.

Tentative Draft

The position of the Supreme Court will be maintained under the Tentative Draft. Three articles along the lines of the below have been inserted in the Tentative Draft.

First, an action relating to validity and extinction of intellectual property rights that are created by registration may be filed before Korean courts only when they are registered in Korea. However, the foregoing shall not apply when those matters arise as incidental questions. In addition, the foregoing shall not apply when the transfer or registration being the subject matter of the proceedings should be performed by a contract between the parties. Second, an action relating to contractual matters such as assignment or license of intellectual property rights may be filed before Korean courts if such rights are protected, exploited or registered in Korea. Third, an action relating to the infringement of intellectual property rights may be filed before Korean courts if the infringement took place in Korea or the infringement has been directed towards Korea.

The relationship between the rule on the infringement of intellectual property rights in Chapter 5 and the rules on tort in general in Chapter 6 needs to be clarified.

* Interaction between mosaic system on the one hand, and international jurisdiction based upon relationship between claims on the other.

The Committee could not come to a final conclusion as to whether to introduce the so-called “mosaic rule”. If such a rule is adopted, a question arises as to whether international jurisdiction based upon relationship between claims could still be permitted in such cases. If permitted, the mosaic rule (*i.e.* quantitative limitation of international jurisdiction) would be meaningless.

4. Obligations (Chapter 6, Section 1)

A. Contract

Current Status

The KCPA provides that an action relating to property rights may be brought before the court located in the place of abode or the place of performance (Art. 8). In a case involving payment of contractual obligations, the Supreme Court held in 1972 that Art. 8 could be a basis of international jurisdiction. Although Art. 8 on its face is not limited to the performance of a contractual obligation, the majority view maintains that the provision should not apply to non-contractual obligations. It is not clear whether the Supreme Court still maintains the former position expressed in 1972, because in a recent case of 2006 the Supreme Court apparently did not follow the approach of the 1972 Judgment in a dispute based upon contractual obligations.

Tentative Draft

An article along the lines of the following has been added in the Tentative Draft under the strong influence of Art. 6 of the 1999 Preliminary Draft:

1. An action relating to contracts may be filed before Korean courts if:
   a. in matters relating to the supply of goods, the goods were supplied in Korea;
   b. in matters relating to the provision of services, the services were provided in Korea; or
   c. in matters relating both to the supply of goods and the provisions of services, performance of the principal obligation took place in Korea.
2. An action relating to contracts other that those listed above may be filed before Korean courts if the place where the obligation constituting the ground of the claim has actually been performed in Korea or the place where the obligation constituting the ground of the claim has been agreed to be performed in Korea.

This means that the place of performance of a contractual obligation can be a ground of international jurisdiction in a relatively limited situation. For example, in the absence of the parties' agreement on the place of performance of obligation, the place where the obligation should be performed under the law applicable to the contract cannot be a ground for international jurisdiction. The reason for such limitation was that the factual situations of contracts were so diverse that the international jurisdiction based upon the place of performance of a contractual obligation cannot always be justified. In addition, if we base international jurisdiction on the place of performance in question, two different States can have international jurisdiction over the disputes arising from one

contract depending upon who files an action as plaintiff. This is the reason why the KMOJ has combined the approach of the 1999 Preliminary Draft and modified traditional approach in Korea.

B. Protection of Socio-Economically Weaker Parties: Consumer Contracts

Current Status

In order to protect socio-economically weaker parties, the KPILA sets forth special rules on international jurisdiction in respect of passive consumer contracts and individual employment contracts (Arts. 27 and 28), which are modelled on the Brussels Convention (Arts. 13 through 15), the Brussels I Regulation (Arts. 15 through 17) and on the 1999 Hague Draft Convention (Arts. 7 and 8).

This is the so-called "protective jurisdiction".

In the case of a consumer contract falling under Art. 27(1), a consumer may also bring an action in the country of his habitual residence; on the other hand, an action against the consumer may be brought by the other party only in the country of the consumer's habitual residence. In addition, the choice of court agreement by the parties to a consumer contract is effective only if such agreement is entered into after the dispute has arisen; or if it allows the consumer to bring an action before another court in addition to those having international jurisdiction under Art. 27.

In order for a consumer contract to be eligible for protection under Art. 27, the contract should be entered into by a consumer for a purpose that can be deemed to be outside his profession or business activity, and it should be a so-called 'passive consumer contract", *i.e.*, falling into one of the categories mentioned below: (i) where, prior to the conclusion of the contract, the other party engaged in or directed to that country professional or business activities including soliciting business through publicity, and the consumer had taken in that country steps necessary for the conclusion of the contract; (ii) where the other party received the consumer's order in that country; or (iii) where the other party arranged the consumer's journey to a foreign country for the purpose of inducing the consumer to order.

Tentative Draft

The scope of consumers under Art. 27 of the KPILA modeled on the Rome Convention has been slightly expanded along the lines of the Brussels I and the Rome I.

* The relationship between the head of international jurisdiction on consumer contracts and the activity-based jurisdiction to be newly introduced

C. Protection of Socio-Economically Weaker Parties: Employment Contract

Current Status

Art. 28 sets forth special rules on employment contracts. Whereas the consumer's habitual residence is relevant in consumer contracts, the place where the employee habitually performs his work is relevant in individual employment contracts.

Tentative Draft

There will be no amendment except for the structural change in order to split the provisions on applicable law and the provisions on international jurisdiction.

D. Torts: no separate rules on Jurisdiction for special types of tort

Current Status

An action for tort may be filed before the court of the place where the tortious act occurred (Art. 18 of the KCPA). It is generally recognized that Art. 18 of the KCPA could apply in determining the question of international jurisdiction. Where the tortious act occurred in one place and the consequence of the injury occurred in another, each of them could be a ground for international jurisdiction. The majority view maintains that the places should be determined rationally from the viewpoint of international jurisdiction and that, in the case of product liability in particular, it should be taken into account whether the place of acting or the place of injury was one of the areas that the defendant was reasonably able to foresee. The Supreme Court endorsed such view in the product liability case of 1995. This judgment was apparently influenced by the idea of 'reasonable foreseeability' and 'purposeful availment' appearing in the decisions of the Supreme Court of the US (*World-Wide Volkswagen Corp v Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co v Superior Court*, 480 U.S. 102 (1987)).

Tentative Draft

An article along the lines of the Brussels I *bis* (Art. 7(2)), the 1999 Preliminary Draft (Art. 10) and the JCPA (Art. 3-3(8)) has been inserted in the Tentative Draft. The so-called 'mosaic rule', as in the *Shevill* case of 1995 (C-68/93) of the ECJ, is not contemplated. There will be no separate rules on special types of tort, such as product liability or defamation, etc.

5. Family (Chapter 7, Section 1)

Current Status

In its leading case of 1975, the Supreme Court held that (i) in principle, the domicile of the defendant should be located in Korea in order for Korean courts to have international jurisdiction, because the *forum rei* principle is also valid for family matters including divorce cases; and that (ii) however, by way of exception, the Korean courts may have international jurisdiction even if the domicile of the defendant is located outside of Korea, where the refusal to entertain the action could amount to a denial of justice. As for situations amounting to a denial of justice, the Supreme Court mentioned cases where the defendant fails to appear or a comparable situation exists, or the defendant fails to actively responds to the action. Obviously, such position has been strongly influenced by the Japanese court precedents.

However, it is not clear whether the Supreme Court still maintains such position after the amendment of the KPILA in 2001, because a subsequent judgment of the Supreme Court did not mention the foregoing jurisdiction rules. The position of the lower courts is split into two classes: (i) one to make efforts to establish the international jurisdiction rules on a case-by-case analysis under the KPILA, instead of following the international jurisdiction rules established by the Supreme Court in the case of 1975 and (ii) the other one adhering to international jurisdiction rules established by the Supreme Court in the case of 1975.

Tentative Draft

Articles dealing with international jurisdiction on matters relating to (i) marriage, establishment of parent-child relationship, (ii) adoptive parent-child relationship, parental right (parental responsibility), (iii) maintenance and (iv) adult guardianship have been be added in the Tentative Draft, respectively. In family matters international jurisdiction based upon parties' choice of court or appearance is in principle not allowed unless otherwise set forth in the KPILA.

A. Matters relating to Marriage

Korean courts have international jurisdiction over the matters relating to marriage in any one of the following cases: (i) the applicant and one or all of the minor children are habitually resident in Korea, (ii) either of the spouses is habitually resident in Korea and the spouses were last habitually resident in Korea, (iii) both spouses have Korean nationality or (iv) a Korean applicant with a habitual residence in Korea files an action solely for the purpose of dissolving the marriage relationship. Separate rules will be added for cases where both spouses are respondent. However, the Korean nationality of either of the spouses (in particular the applicant) cannot be a ground of international jurisdiction. In addition, Korean courts have international jurisdiction if the respondent is habitually

resident in Korea. This is because the article on general jurisdiction in Chapter 1 is also applicable to contentious matters relating to marriage.

However, the KPILA will not permit *forum actoris* such as that in the Brussels II *bis* (the habitual residence of the applicant coupled with his residence for one year) or *forum actoris* in the home country such as that in the Brussels II *bis* (the habitual residence of the applicant coupled with his residence for six months in the home country) on the ground that it is not fair to the respondent.

Considering that matrimonial property is closely related to the matters of property, the Committee considered inserting an article permitting a choice of court agreement between the parties concerned. However, the idea has been finally abandoned. This means that the foregoing rules on international jurisdiction applicable to marriage-related matters will also apply to matrimonial property matters.

B. Matters relating to Establishment of parent-child relationship

Korean courts have international jurisdiction over the matters relating to establishment of parent-child relationship and its dissolution if the child has his habitual residence in Korea or the child and one of the parents have Korean nationality.

C. Matters relating to Adoptive parent-child relationship

Korean courts have international jurisdiction over the matters relating to establishment of adoption if a prospective adoptee or the prospective adoptive parent has his or her habitual residence in Korea. Korean courts have international jurisdiction over matters relating to confirmation of adoptive parent-child relationship or its dissolution if the child has his habitual residence in Korea or the child and one of the adoptive parents have Korean nationality. Although Korea has signed the Adoption Convention in May 2013, Korea has not ratified the same.

D. Matters relating to Parental right (parental responsibility)

Korean courts have international jurisdiction over the matters relating to parental rights, custody, rights of visitation or guardianship of a minor child if the child is habitually resident in Korea, provided, however, that the foregoing shall not apply if the child is settled in its new environment after the expiration of the period of one year from the date when the child has been wrongfully removed or retained. The rationale behind this jurisdiction rule is that it enables the authorities to take necessary measures as promptly as possible and lower the burden of the child in need, and the place is near evidence and assistance to children and youths. That is also the position taken by the "Convention on the Civil Aspects of International Child Abduction" ("Abduction Convention") to which Korea is a party and the "Convention on Jurisdiction, Applicable Law, Recognition,

Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children" ("Child Protection Convention").

Korean courts also have international jurisdiction over the matters relating to guardianship for a minor child if the ward has his assets in Korea and there is a need to protect the ward.

It is noteworthy that different jurisdiction rules will apply to the guardianship for minor children on the one hand and the guardianship for adults on the other, the difference being that the nationality constitutes a ground of jurisdiction in the case of adults, whereas that is not the case with minor children. In this context, a question was raised whether such a distinction could be justified because in the context of applicable law, the KPILA refers the guardianship for minor children and the guardianship for adults to the same connecting principles. The majority of the members of the Committee accepted that such a distinction was inevitable.

E. Matters relating to Maintenance

At present, it is not clear whether the courts for the place where the creditor is habitually resident have international jurisdiction. The Committee agreed to insert an article which expressly grants international jurisdiction on the courts for the place where the creditor has his habitual residence. Apparently, it is to protect weaker parties on the level of private international law. In addition, Korean courts have international jurisdiction if the respondent is habitually resident in Korea. This is because the article on general jurisdiction in Chapter 1 is also applicable to contentious matters relating to maintenance. This ground of international jurisdiction will bring about an important change in that the jurisdictional obstacle for the so-called "Kopinos" could be overcome. Of course, there are other obstacles such as the lack of reciprocity between Korea and the Philippines. In addition, the parties may enter into a choice of court agreement on maintenance matter, provided, however, the foregoing shall not apply where the maintenance creditor is a minor or an adult ward or the place selected by the parties has no connection at all, or only a sight connection with the case. Such choice of court agreement shall satisfy the formal requirement applicable to a choice of court agreement in Chapter 1.

F. Adult Guardianship

Korean courts have international jurisdiction over the matters relating to guardianship for adults in any of the following cases: (i) where the ward is habitually resident in Korea; (ii) where the ward is a Korean; or (iii) where the ward has his assets in Korea and there is a need to protect the ward.

G. Jurisdiction based upon Nationality of the Parties

In certain family matters, Korea has international jurisdiction if both parties have Korean nationality. This is the case with marriage-related matters, whereas this is not the case with

establishment of adoptive parent-child relationship or maintenance. Accordingly, we should pay more attention so that the rules on jurisdiction based upon nationality would be consistent in diverse family matters.

H. Overall Assessment and Future Tasks

Compared with European Union, which has the "Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000)" (the "Brussels II *bis*"), the "Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations" (the "Maintenance Regulation"), the "Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" (the "Succession Regulation"), those rules to be inserted in the KPILA are very much brief. In addition, many countries of the EU are parties to some of the Hague Conventions, such as the Abduction Convention and the Child Protection Convention. Accordingly, one may doubt whether it is desirable for Korea to insert insufficient rules on international jurisdiction for family matters. However, I am confident that those rules to be inserted in the KPILA could improve the current situation and will constitute the basis upon which we could establish more detailed rules in the future.

6. Succession (Chapter 8, Section 1)

Current Status

An action relating to a succession, a bequest (or a testamentary gift) or other acts taking effect upon death may be filed before the court located in the area where the general forum of the deceased was located at the time when such succession commenced (Art. 22 of the KCPA). In addition, an action relating to a succession claim and the liability of an estate, which does not fall under Art. 22 of the KCPA, may be filed before such court, if the whole or part of the estate is located in the jurisdiction area of the court under Art. 22 of the KCPA. It is generally recognized in Korea that these rules apply to international jurisdiction.

Tentative Draft

Under the Tentative, Draft Korean courts shall have international jurisdiction to rule on the succession as a whole, if the deceased had his habitual residence in Korea at the time of death. The

same applies where the deceased had his last habitual residence at the time of death, if his habitual residence is unknown. In addition, Korean courts shall have international jurisdiction to rule on the succession as a whole, if the deceased has his estate in Korea, provided, however, that the foregoing is not applicable when the value of the estate is significantly small.

In addition, the Committee agreed to set forth international jurisdiction for matters relating to wills. Korean courts shall have international jurisdiction to rule on the will, if the deceased had his habitual residence in Korea at the time of the will or the property, which is the subject of will, is located in Korea. Under Korean law, matters relating to wills generally fall within the category of non-contentious matters. Finally, considering that succession is closely related to the property and the KPILA permits party autonomy within a certain limit in the context of applicable law, the Committee agreed to insert an article permitting a choice of court agreement between the parties concerned, except where the parties are a minor or an adult ward or the place chosen has no substantial connection with the dispute. The scope of the "parties concerned" is not entirely clear especially in the case of non-contentious matters (Cf. Recital 28 of the EU Succession Regulation). Such a choice of court agreement should satisfy the formal requirement applicable to a choice of court agreement in Chapter 1. I am not sure whether allowing a choice of court agreement in the context of succession matters is desirable.

According to the principle established by the Committee, the article on general jurisdiction in Chapter 1 should also be applicable to succession matters. However, it is not clear whether that is correct without any limitation.

In matters on succession or will, international jurisdiction based upon parties' choice of court or appearance is not allowed unless otherwise set forth in this Act. A typical example where choice of court is allowed is succession matters where the parties may enter into a choice of court agreement on succession matters; provided, however, the foregoing shall not apply where the place selected by the parties has no connection at all, or only a slight connection, with the case.

7. Promissory Notes, Bills of Exchange and Checks (Chapter 9, Section 1)

Current Status

There is no provision other than the venue provision in the KCPA (Art. 9).

Tentative Draft

An action relating to a bill of exchange, promissory note or check may be filed in Korea if the place of payment of the bill, promissory note or check is located in Korea. This provision mirrors Art. 9 of the KCPA.

8. Maritime Matters (Chapter 10, Section 1)

Current Status

There is no provision other than the venue provision of the KCPA (Arts. 10, 13 and 14).

Tentative Draft

An action relating to limitation of liability of the shipowner, charterer, manager, operator or other users (hereinafter referred to as the "shipowner and others") of the ship may be filed before Korean courts if any one of the following places is located in Korea: (i) the place of registration of the ship in respect of which the accident took place; (ii) habitual residence or principal place of business of the shipowner and others; (iii) the place of accident (including place of injury); (iv) the first place at which the ship arrived after an accident; (v) the place where assets of the shipowner and others have been arrested; or (vi) an action based upon limitation claim has been filed against the shipowner and others.

An action against a shipowner and others relating to a ship or navigation may be filed before Korean courts if the arrest of the ship has been effected in Korea (so-called "*forum arresti*"). The venue provision, whereby an action based on a claim secured by maritime lien or any other security interest in a ship (such as a ship mortgage) may be filed in the place where the ship is located, will not be transformed into a rule on international jurisdiction. In other words, Art. 3-3(6) of the JCPA will not be inserted in the KPILA. The reason is that mere presence without attachment or arrest is not sufficient to secure the creditor's exercise of his right against the ship.

An action relating to general average may be filed before Korean courts if any one of the following places is located in Korea: (i) the location of the ship; (ii) the place where the arrest of the ship has been effected; or (iii) the first place at which the ship arrived.

An action relating to a collision of ships or any other accident at sea may be filed before Korean courts if any one of the following places is located in Korea: (i) the place of registration, or the location, of the damaging ship; (ii) the place of collision; (iii) the first place at which the damaged ship arrived; or (iv) the place where the damaging ship has been arrested. The relationship between the rules on the collision of ship in Chapter 10 and the rules on tort in general in Chapter 6 needs to be clarified.

An action relating to salvage may be filed before Korean courts if any one of the following places is located in Korea: (i) the place where the salvage was performed; or (ii) the first place at which the salvaged ship arrived.

Although Korea is not a party to the "International Convention on Arrest of Ships" ("Arrest Convention"), the Committee accepted the proposal that *forum arresti* be a ground for international

jurisdiction for maritime matters, such as limitation of liability of the shipowner and others, general salvage, collision of ships and salvage. The place of arrest in this context encompasses the place of arrest or provisional arrest and the place where the ship could have been arrested, but bail or other security has been given in lieu of the arrest or provisional arrest.

9. Trust and Insurance Contracts

Current Status

There is no provision.

Tentative Draft

The Committee considered inserting in the KPILA rules on trust and insurance contracts. However, the conclusion was not to insert those rules in the Tentative Draft.

V. Concluding Remarks

Thus far, I have explained the major contents of the detailed rules on international jurisdiction to be inserted in the amended KPILA. For the first time in the history of Korean private international law the Committee and the KMOJ have tried to prepare the comprehensive rules on international jurisdiction. As I have mentioned at the beginning of my presentation, unfortunately the Committee could not succeed in preparing the draft of the amended KPILA even though the Committee could reach agreements on various tricky issues including the structure of the jurisdiction rules, the introduction of *forum non conveniens, lis pendens*, family matters (albeit unsatisfactory) and non-contentious matters. The areas which have caused major difficulties were family matters and non-contentious matters. Since January of 2017 the KMOJ has been making efforts and actually has prepared the Tentative Draft which has not been released to the public. I hope that the KMOJ will publish the final draft of the amended KPILA sooner or later. I admit that the proposed rules on international jurisdiction are not perfect. However, I am quite confident that those rules will definitely enhance the legal certainty on international jurisdiction in Korea while leaving certain amount of flexibility to Korean courts which they could exercise under the doctrine of Korean version of the doctrine of *forum non conveniens*. In addition, in a very exceptional case, the Korean courts will be able to justify its international jurisdiction based upon the positive function of Article 2, when the totality of the circumstances justifies that conclusion. Once enacted, the rules on international jurisdiction of the KPILA would certainly serve as the solid basis for the future development.

I would like to close my presentation with the following remarks:

Thus far the Hague Conference has exercised great influence on the development of private international law in Korea and is expected to continue to do so in the future. I believe that my presentation has clearly demonstrated such influence. I hope that the "HCCH Asia Pacific Week 2017" will be a great opportunity reminding the Republic of Korea and Koreans of the practical importance of the private international law and the Hague Conference if Korea really intends to strengthen its Cross-border Co-operation in Civil and Commercial Matters with other countries.

SESSION 5.

Discussion

Yuko Nishitani
Professor at Kyoto University (Japan)

July 4th, 11:00 – 12:30 / Panelist / Session 5 (Jurisdiction – Revising Korean Private International Law)

Comments by Yuko Nishitani

In light of the on-going discussion on the revision of Korean Private International Law (KPIL), comments are provided in a comparative perspective, particularly from a viewpoint of Japanese law. They will particularly address the following points:

- Idea of a comprehensive "Private International Law" Statute (synergy of jurisdiction, applicable law, and the recognition and enforcement of foreign judgments)
- Structure of Jurisdiction Rules in the KPIL (principles and *forum conveniens & forum non conveniens*)
- Jurisdiction based on the Activity of the Defendant
- Treatment of Choice of Court Agreement
- Scope of Exclusive Jurisdiction (rights in rem in immovable property; registered intellectual property)
- *Lis Pendens*

HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
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SESSION 6.

Apostille & e-APP

Moderator

Christophe Bernasconi
Secretary General of the HCCH

Presenter

Peter Zablud
Professor at Victoria University (Australia)

Gyooho Lee
Tenured Professor at Chung-Ang University (Korea)

Panelist

Yoonjung Choi
Judge of Goyang Branch of Uijeongbu District Court (Korea)

Changmin Chun
Research Fellow of Korea Capital Market Institute (Korea)

Mayela Celis
Principal Legal Officer of the HCCH

Anselmo Reyes
Representative of Asia Pacific Regional Office of the HCCH

Jeeyoung Ha
Second Secretary of Ministry of Foreign Affairs (Korea)

Welcome Remarks

Jae-wan Lee

Deputy Director-General for Overseas Koreans and Consular Affairs,
Ministry of Foreign Affairs (Korea)

Education

- Feb.1988 B.A. in Law, Korea University, Seoul, Korea
- Jul.1998 M.A. in Law, University of Virginia, VA, U.S.A.
- Feb.2003 Ph.D. in Law, Korea University, Seoul, Korea

Work Experience

- May1991 Passed High Diplomatic Service Examination and Joined the Ministry of Foreign Affairs (MOFA)
- Jul.2002 First Secretary, Korean Embassy in the Republic of Austria and Korean Permanent Mission to the International Organizations in Vienna
- Jul.2005 Counsellor, Korean Embassy in the Republic of Cote D'Ivoire
- Jul.2007 Director, Territorial and Oceanic Affairs Division, Ministry of Foreign Affairs and Trade (MOFAT)
- Feb.2009 Director, Humanitarian Assistance Division, MOFAT
- Aug.2010 Counsellor, Korean Permanent Mission to the United Nations Secretariat and International Organizations in Geneva, Geneva, Switzerland
- Aug.2013 Minister and Consul-General, Korean Embassy in the Republic of the Philippines
- Aug.2015 Deputy Director-General for Development Cooperation, Ministry of Foreign Affairs (MOFA)

Moderator

Christophe Bernasconi

Secretary General of the HCCH

Christophe Bernasconi is the fourth Secretary-General of the Hague Conference on Private International Law. He took office on 1 July 2013. He joined the Permanent Bureau (Secretariat) of the Hague Conference in September 1997.

As Secretary-General, Dr Bernasconi is responsible for the administration of the Hague Conference (with currently 146 connected States, and a total of 80 Members from around the world) and the operation of its Permanent Bureau (approx. 30 FTEs). He has long-standing expertise in the field of international civil procedural law (jurisdiction of courts, recognition and enforcement of foreign judgments, service of process and taking of evidence abroad, access to justice, etc.), international administrative cooperation (Apostille; he is the designer and principal administrator of the electronic Apostille Program, e-APP), international commercial and finance law (intermediated securities), as well as international child protection law (parental child abduction, protection of children generally). He has been responsible for various meetings of Special Commissions, Experts' and Working Groups, both in relation to normative work of the Hague Conference and post-Convention services. His current focus is on developing and implementing various management improvement initiatives at the Permanent Bureau, and on furthering the global visibility of the Hague Conference.

He holds a law degree from Fribourg University in Switzerland (magna cum laude; bilingual German/French), an LL.M. degree in comparative law from McGill University in Montreal (Canada), and a doctoral degree in Private International Law from Fribourg University (summa cum laude).

Before joining the Permanent Bureau, Dr Bernasconi lectured at the University of Fribourg, worked as Legal Expert at the Swiss Institute of Comparative Law in Lausanne, and as Scientific Collaborator at the Federal Office of Justice in Switzerland. He also advised practitioners on various Private International Law matters.

Dr Bernasconi was a Member of the Model Notary Act Revision Committee (USA), which produced the Model Notary Act 2010, published by the National Notary Association (NNA). He was also a Member of the International Bar Association Capital Markets Forum Subcommittee on Legal Certainty for Intermediated Securities, and was Co-Rapporteur of the International Law Association's former Committee on Transnational Enforcement of Environmental law. He is an Honorary Fellow of the Australian New Zealand College of Notaries (ANZCN). He is a member of the advisory board of the Hague Project Peace and Justice Foundation.

He was born in 1964 in Basel, Switzerland. He is married and has 3 children.

Presenter

Peter Zablud

Professor at Victoria University (Australia)

Education

- Bachelor of Laws University of Melbourne
- 3 Division Officer Training School (Australian Army)

Work Experience

- Director of Notarial Studies, Sir Zelman Cowen Centre, Victoria University (since 2001)
- Appointed as Notary by the Court of Faculties of the Archbishop of Canterbury (1990)
  (presently holding office by virtue of the Public Notaries Act 2001 of Victoria, Australia)
- Admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria and High Court of Australia (1970)
- Commissioned into the Royal Australian Infantry (1965)

Published Books

- Principles of Notarial Practice, 2nd Edition (The Notary Press 2016)
- Notarizing for International Use - A Guide for American Notaries, Attorneys and Public Officials (The Notary Press 2012)
- Principles of Notarial Practice (Psophidian Press 2005)
- A Notary's Forms and Precedents (Psophidian Press 2002)

Awards

- Member of the Order of Australia (Australia Day Honours List 2017)
- Reserve Force Decoration and National Medal (for service in the Australian Army Reserve)
- Distinguished Fellow of the Australian and New Zealand College of Notaries

Presenter

Gyooho LEE

Tenured Professor at Chung-Ang University (Korea)

Education

- Washington University School of Law, St. Louis, MO; USA
  Doctor of Juridical Science (Major: Civil Procedure) Spring 1998
- Georgetown University Law Center, Washington, DC
  Visiting Researcher August 1995
- University of Washington School of Law, Seattle, WA; USA
  Master of Law in Asian Law June 1994
- Yonsei University, Seoul, South Korea
  Master of Law (Major: Civil Procedure) February 1992

Work Experience

• Professor (tenured) School of Law Chung-Ang University Seoul, South Korea	September 2011 - Present
• Associate Professor School of Law Chung-Ang University Seoul, South Korea	March 2008 -- August 2011
• Vice Dean for International Affairs and Public Relation and Director of Law Library and of SJD Program School of Law Chung-Ang University Seoul, South Korea	March 2016-February 2018
• Vice Dean for Academic Affairs School of Law Chung-Ang University Seoul, South Korea	April 2012- January 2014
• Visiting Scholar, Washington University School of Law, St. Louis, MO; USA	2014
• President, The Association of Content Property for Next Generation	2015-2018
• President, The Association of International Cultural Property Law	2015-2017
• Vice President for international affairs, Korean Civil Procedure Association	2012-2016
• Vice President, Korea Association for Informedia Law	2013-2018

• Vice President, Korean Computer Game Law Association	2014-2018
• Member, PROYECTO MICINN DER 2013-44739-R (Spain)	2015-Present
• Editor, Korean Yearbook of International Law	2013-2017
• Member, AIPPI Standing Committee for Geographical Indications	2016-2018
• Member, Association of Critical Heritage Studies ICH Network Committee	2016-2018
• Arbitrator, Weihai Arbitration Commission (Weihai, China)	2016-2019
• Associate Member, International Academy of Comparative Law	Since 2015

Published Books

1. English Books

• Failures of American Civil Justice in International Perspective (coauthored with James R. Maxeiner & Armin Weber)(August 2011) (Cambridge University Press)

2. Korean Books

• Gyooho Lee, Patent Law: Cases and Explanations (Jinwon Sa) (4th ed. 2017)
• Gyooho Lee, Laws to Protect Geographical Marks including Geographical Indications, Korea Institute of Intellectual Property (2016)
• Gyooho Lee, Trademark Law (Jinwon Sa) (1st ed. 2015)
• Gyooho Lee, Copyright Law: Cases and Explanations (Jinwon Sa) (6th ed. 2017)

3. English Legal Articles

• Gyooho Lee, Recognition and Enforcement of Foreign Judgment under the Civil Procedure Act and the Civil Enforcement Act Revised in 2014, Korean Yearbook of International Law, Vol. 2, 309-322 (2014)
• Gyooho Lee, Keon-Hyung Ahn and Jacques de Werra, Euro-Korean Perspectives on the Use of Arbitration and ADR Mechanisms for Solving Intellectual Property Disputes, Arbitration International, Vol. 30, Issue 1 (2014)

4. English Book Chapters

• Gyooho Lee, Issues of International Private Law, in Byung-il Kim and Christopher Heath eds, Intellectual Property Law in Korea (2015)
• Gyooho Lee, Choice of Law, in Sanna Wolk & Kacper Szkalej eds., Employees' Intellectual Property Rights (Kluwer Law International, September 2015).
• Gyooho Lee, Republic of Korea of Part IIB National Legal Rules in Asia, in Sanna Wolk & Kacper Szkalej eds., Employees' Intellectual Property Rights (Kluwer Law International , September 2015).
• Gyooho Lee, Legal Issues on FOSS and Other Alternative Licenses in Korea, in Axel Metzger ed, Free and Open Source Software (FOSS) and Other Alternative License Models: A Comparative Analysis (Springer, 2016)

Awards

• Listee, Marquis Who's Who in the World in 2016 (December, 2015)
• Awardee of Chung-Ang University Academic Award (October, 2015)
• Listee, 2000 Outstanding Intellectuals of the 21st Century in 2016 (IBC, 10th ed.) (July, 2016)
• Official Commendation from International Intellectual Property Training Institute for Excellent Teaching of Intellectual Property Law (December, 2016)

Panelist

Yoonjung Choi

Judge of Goyang Branch of Uijeongbu District Court (Korea)

Education

- 2006 Seoul National University(law)
- 2017 Seoul National University(Commercial Law/Masters Degree)

Work Experience

- 2006 Judicial Research and Training Institute
- 2008 Seoul Western District Court
- 2010 Seoul Central District Court
- 2012 Chuncheon District Court(Wonju Branch)
- 2016 Uijeongbu District Court(Goyang Branch)

Published Books

- 'Legal Study of the Warrant in Principle and the Execution about Seizure and Search of Electronically Stored Information', Justice(Law Journal), Korean Legal Center, Seoul, April 2016
- 'Legal Issues of Implementing the System of Terminating Life-Sustaining Treatment', Supreme Court Law Journal(Vol. 6, No. 2), 2016
- 'A Study on the Controversy about Short-termism in the U.S.', thesis of master's degree, Seoul National University, Feb 2017

Panelist

Changmin Chun

Research Fellow of Korea Capital Market Institute (Korea)

Education

- 2011. 6. University of Hamburg, Faculty of Law (Dr. iur.)
- 2008. 2. McGill University, Faculty of Law (LL.M.)
- 2003. 5. University of Minnesota, Law School (LL.M.)
- 1996. 8. Gyeongsang National University, College of Law (LL.B.)

Work Experience

- 2014. 03 ~ Current: Korea Private International Law Association (Secretary General)
- 2012. 03 ~ Current: Korea International Trade Law Association (Director)
- 2011. 11 ~ Current: Korea Capital Market Institute (Head of Financial Law Team, Research Fellow)
- 1996. 11 ~ 2005. 2: Korea Securities Depository (Senior Manager)

Published Books

- Entrepreneurial Capital Markets in Korea: Current Status and Future Directions (KCMI Research Book 17-01, 2017)
- U.S. Regulation for Securities-based Crowdfunding and Implications (KCMI Research Report 15-08, 2016)
- Global Trends in Financial Regulation Reform and Korea's Future Directions (KCMI Research Book 15-02, 2015)
- Korean Derivatives Markets: Diagnosis and Road Ahead (KCMI Research Book 15-01, 2015)
- Korean Individual Investment and Savings Scheme: The Blueprint (KCMI Research Analysis, 15-01,2015)
- Cross-border Transactions of Intermediated Securities: A Comparative Analysis in Substantive Law and Private International Law (Heidelberg: Springer-Verlag, 2012)

Awards

2012. 3: Besondere Anerkennung from the DAI-Hochschulpreis 2011

Panelist

Mayela Celis

Principal Legal Officer of the HCCH

Education

- UNED (Universidad Nacional de Educación a Distancia), Madrid, Spain – Doctor of Laws (expected in 2019/2020)
- NYU (New York University) – Master of Laws (LL.M.) (2003-2004)
- Universidad Panamericana, Mexico, Bachelor of Laws (1996-2001)

Work Experience

- Hague Conference on Private International Law (2005-present). Principal Legal Officer as of January 2015
- Prior to joining the Permanent Bureau, Mayela worked in private practice, mainly focusing on litigation and corporate law in Mexico. She also worked at the Mexican Public Defender's Office in family law matters.

Published Books

- Carried out the main preparatory and drafting work of the updated and expanded 4th edition of the Practical Handbook on the • Operation of the Service Convention (2016).
- Mayela has authored a book on Letters of Request in Civil and Commercial Matters (published by the General Council of the Judicial Branch of Jalisco and the Universidad Panamericana in 2003) and has published a range of articles on Private International Law.

Awards

- Chamber of Commerce of Guadalajara award for Bachelor of Law's thesis

Panelist

Anselmo Reyes

Representative of Asia Pacific Regional Office of the HCCH

Education

- AB (Harvard), BA, LLM, PhD (Cambridge)

Work Experience

- Professor of Legal Practice, University of Hong Kong -- 2012 to present
- International Judge, Singapore International Commercial Court -- 2015 to present
- Judge, Court of First Instance, Hong Kong -- 2003 to 2012
- Senior Counsel, Temple Chambers, Hong Kong -- 2001 to 2003
- Barrister, Temple Chambers, Hong Kong -- 1989 to 2001

Published Books

- 淺談新民事司法訴訟 (Reflections on Civil Procedure under Civil Justice Reform) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd., March 2012.
- 淺談香港仲裁法 (How to be an Arbitrator - A Personal View) (Sunny Chan, trans.), Joint Publishing (HK) Co. Ltd, June 2013.

Panelist

Jeeyoung Ha

Second Secretary of Ministry of Foreign Affairs (Korea)

Education

- 2000 Yonsei University(National law)
- 2012 Sogang Lawschool
- 2017 Korea University(International law / PhD)

Work Experience

- 2006 Korea Highway Corporation
- 2008 Korea Housing Finance Corporation
- 2012 D.S. Legal Office (Law firm)

HCCH Asia Pacific Week 2017

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SESSION 6.

Presentation

The Apostille Convention – Authenticating Documents for international use

Peter Zablud

Professor at Victoria University (Australia)

THE APOSTILLE CONVENTION - AUTHENTICATING DOCUMENTS FOR INTERNATIONAL USE

**Preliminary Materials for a Presentation
to the HCCH Asia Pacific Week Symposium
Celebrating the 20th Anniversary of the
Republic of Korea's Membership of The Hague Conference**

by

Professor Peter Zablud, AM, RFD

Australian Lawyer and Notary

Director of Notarial Studies,
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Professor Peter Zablud, AM, RFD

Professor Peter Zablud is an Australian lawyer, who has been a notary since 1990.

He has written extensively about notarial practice and is the author of the authoritative textbook, *Principles of Notarial Practice* which has been sold in 21 countries and is now in its second edition.

Professor Zablud is the immediate past Chairman of the Board of Governors of The Australian and New Zealand College of Notaries and is a member of the Executive Board. He is a Distinguished Fellow of the College.

He is also a Fellow of the Society of Notaries of Victoria. He is a Past-President and is currently a Council member of the Society.

He is an individual member of the International Union of Notaries and is a member of the Board of the World Organization of Notaries.

Professor Zablud is the Director of Notarial Studies at Victoria University - Melbourne, where he designed and is responsible for the presentation of the notarial studies programme for prospective notaries. That programme is considered to be the outstanding course of education of its kind in the common law world.

As well as teaching at the University, Professor Zablud presents workshops and masterclasses for practising and prospective notaries throughout Australasia as well as in-house lectures and seminars about the notariat and the authentication of documents for cross-border purposes for government and private organisations.

THE APOSTILLE CONVENTION - AUTHENTICATING DOCUMENTS FOR INTERNATIONAL USE

Preliminary Materials for a Presentation

by

Professor Peter Zablud

Australian Lawyer and Notary

Director of Notarial Studies,
Victoria University, Melbourne, Australia

It is my privilege to give a Presentation about the *Apostille Convention* at the HCCH Asia Pacific Week Symposium in Seoul celebrating the 20th Anniversary of the Republic of Korea's membership of the Hague Conference.[1]

My compliments to the Hague Conference and its co-hosts, the Ministry of Justice and the Ministry of Foreign Affairs of the Republic of Korea, the Korean Judicial Research and Training Institute, the Korean Legislation Research Institute, the Korean Bar Association and the Korean Private International Law Association and to the event Sponsor, Korea Internet and Security Agency. Sincere thanks to them all for their involvement in and generous support of this important international Symposium.

My compliments also to the distinguished presenters and participants attending the Symposium.

The *Apostille Convention*

The *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* ("**the *Apostille Convention***") was adopted by the Hague Conference at its Ninth session on 26 October 1960 and was first signed on 5 October 1961. The Convention entered into force on 24 January 1965.[2]

The English language version of the *Apostille Convention* is Annex "A" in these materials.

A Jewel in The Hague Conference Crown

For more than half a century, the *Apostille Convention* has been a jewel in the Hague Conference Crown. It is one of the most successful and highly regarded of the Hague Conventions.

The *Apostille Convention*:

- has been acceded to by more Contracting States than any other Hague Convention — and the number continues to rise;
- provided international trade and commerce with a simple, workable and acceptable solution to the burdensome administrative problem of consular legalisation of public documents — and continues to do so; and
- has assisted millions of people around the world in conducting their cross-border personal and business affairs — and continues to do so.

Special Commission Meetings

The relevance and vitality of the Convention have been maintained and enhanced in no small part by the Conclusions and Recommendations (**C & R**) of the periodic meetings of the Special Commission to review the practical aspects of the *Apostille Convention* which are held in The Hague.[3]

Special Commission C & R result from consensus reached by participants. While not binding on Contracting States and their Competent Authorities, Special Commission C & R have persuasive authority and typically enjoy high levels of implementation.

The Concept of "Authenticity"

Since the invention of writing, records have been created, maintained and accumulated for both public and private purposes. For obvious reasons, over the ages, both the makers of records and those who rely upon them have been vitally concerned to ensure the trustworthiness of their documents.

If documents are to be trustworthy, it is of the essence that they be "authentic". To be "authentic" means that the document is what it purports to be (i.e. that it is genuine) and has not been tampered with or corrupted.[4]

The Special Status of Public Documents

In most countries, public documents of domestic origin enjoy a special status. Having been prepared by government or by trustworthy institutions or officials appointed or approved by government, public documents are generally considered to have the highest possible evidentiary value. As a rule, they are accepted as being *prima facie* authentic and are admitted in evidence by local courts without proof of the signatures or seals which they bear.

Consular Authentication of Foreign Public Documents

From about the late seventeenth century, a lack of familiarity with the officials and legal systems of other countries, combined with occasionally justified fears of forgery and knavery led to a requirement by officialdom in most trading nations to prove the authenticity of foreign notarial acts and other public documents as a pre-condition to the use of those documents within their territories. The method of proof adopted was the authentication of documents by the sending nation's consular officers.

Consular authentication is:

> The formality by which the diplomatic or consular agents of the country in which the document has to be produced, certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.[5]

The earliest legislative reference to a requirement for consular authentication appears in the French *Marine Ordinance of August 1681*, which included the following provision:

> No Instruments written in Foreign Countries where there are [French] Consuls shall be of any Value [in France], if they are not made Authentick by them.[6]

Until the early nineteenth century, it probably would not have been too difficult for a consul to personally satisfy himself as to the identity and status of the public official or notary whose signature and seal were to be authenticated. One can imagine that in many European posts and colonial port towns, consuls, notaries and public officials were acquainted socially. As the number of notaries and public officials swelled to meet the needs of burgeoning cities and international trade, maintaining contact would have become increasingly difficult. In large cities such as London, Paris and New York, it would have been impossible for consuls to know or even recognize all the city's notaries and senior public officials.

Therefore, from about the mid-nineteenth century, most countries began to prove the authenticity of foreign notarial acts and other public documents by using the services of their consuls abroad, not as a direct interface with notaries and public officials actually known to them, but as the final link in a process which became known as the 'chain of authentication'.

The Chain of Authentication

The chain of authentication involves a series of verifications by acceptable people or bodies endorsed on the subject document, where each successive person or body in the chain is either familiar with or is able to satisfactorily identify the immediately preceding verifier or signatory.

The process culminates in the signature and official stamp or seal of an official, usually a consular officer of the country where the document is to be produced, which either do not require formal proof or may be readily provable in the courts or institutions of that country.

Over time, the final link, namely the signature and stamp or seal of a consular officer or other recognised official became known as "**legalisation**" and still occasionally, in some countries as "consularisation".[7]

Despite the adoption of the *Apostille Convention* in 1961 which abolished "legalisation" as between the Contracting States, to which 113 countries are party as at 31 May 2017,[8] proving the authenticity of foreign public documents by a chain of authentication is still required by about 40% of the world's sovereign states. Those states include Canada, the Peoples Republic of China, Indonesia, Bangladesh, Pakistan, the members of the Arab League (other than Bahrain and Oman), almost all the South East Asian countries and 39 African countries.

Where the chain remains relevant, its length varies. For example:

- in Australia in relation to a notarial act, the chain only comprises two links namely, authentication by the Department of Foreign Affairs and Trade (DFAT) and then legalisation by a consular officer representing the destination country; but

- in the United States, in relation to a notarised document, the chain involves:
  - the authentication of the notary's signature and seal by the county clerk of the county in which the notary is registered;
  - the authentication of the county clerk's certificate by the Secretary of State's office of the state in which the county is located;
  - the authentication of the state Secretary of State's certificate by the Authentications Unit of the U.S. Department of State in Washington DC; and
  - the legalisation of the U.S. Department of State's authentication by a consular officer representing the destination country.

At each step of the way, the notarised document must be sent or delivered to the relevant office by or on behalf of the person requiring the legalisation and must be returned to or picked up by the lodging party. In Australia, the two steps typically take a week to complete. In the United States, it is not unknown for the entire process to take upwards of six or seven weeks. [9]

Contrary to continuing popular belief within the consular services and bureaucracies of a significant number of countries - to say nothing of the belief of many bankers, patent attorneys, lawyers and members of the public - **'legalisation' does not in any way certify the truth or accuracy of information contained in a document. Nor does it enhance the value of a document or its contents.**

Adoption of the *Apostille Convention*

In 1955, the Council of Europe requested the Hague Conference to give consideration to the drafting of a convention which would alleviate the problems associated with legalisation and at the same time, retain the effect of what was considered to be an indispensable legal formality in proving documents crossing national borders. The reference ultimately resulted in the adoption of the *Apostille Convention*

The purpose of the *Apostille Convention* was to replace legalisation of foreign public documents as between the Contracting States with a universally recognised, simple, dated, numbered and regulated certificate in a prescribed form which would be placed on a public document to be produced within the territory of a Contracting State, by a so-called "Competent Authority" in another Contracting State from which the document emanated.

The Convention established a regime whereby the only formality which is required in the Contracting States to certify the authenticity of the signature and capacity in which a person signing a public document has acted (and where appropriate, the identity of the seal or stamp on the document), is the addition of a prescribed certificate to be known as an 'apostille'.[10]

That requirement is subject to two riders. The first is that where, in specific cases, as between two or more Contracting States, legalisation of particular documents is not otherwise required, there is no need to have apostilles affixed to the documents concerned.[11] The second is that the Convention only overrides the provisions of a treaty, convention, or agreement between two or more contracting states relating to the certification of signatures, seals or stamps on public documents if those provisions are more rigorous than the formality of the affixing of an apostille.[12]

What are "Public Documents" for the Purposes of the *Apostille Convention*?

Having regard to generally accepted notions as to which documents were "public documents" in the post Second World War years, the framers of the *Apostille Convention* decided that the following documents should be deemed to be "public documents" for the purposes of the Convention, namely:

- documents emanating from an authority or an official connected with the courts or tribunals of the state, including those emanating from a public prosecutor, a clerk of court or a process server (*huissier de justice*);[13]
- administrative documents;[14]
- notarial acts;[15] and
- official certificates which are placed on documents signed by persons in their private capacity such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.[16]

Successive Special Commission meetings have eschewed a strict constructionist approach to the terms of Article 1 of the Convention and have determined that the list of public documents enumerated in Article 1 is not exhaustive and that it is a matter for individual Contracting States to determine whether or not a particular document is a public document and whether or not a person or authority executing a document is doing so in an official or private capacity.[17]

This does not mean that officials and bureaucrats, however senior, within the Competent Authorities or who may themselves be designated as Competent Authorities have been given a carte blanche on behalf of their Contracting States to unilaterally determine which documents may properly be categorised as public documents, as appears to have occurred in relation to certain medical certificates.

The primary source of domestic law in all civil law, common law and mixed law jurisdictions is legislative. In a number of jurisdictions the Sharia or other religious laws co-exist with legislation. Within the common law and mixed law jurisdictions a body of law exists which has been created by decisions of the courts.

Generally speaking, in most Contracting States, "public documents" are defined by statute, regulations or legislative instruments.

At common law, a series of English cases beginning with the House of Lords decision in *Sturla v Freccia* (1880) 5 A.C. 623, makes it clear that a public document (not otherwise categorised by legislation as such) must:

- concern a public matter
- be made by a public officer acting in the discharge of a strict duty to inquire into and be satisfied of the truth of the facts recorded; and
- have been brought into existence as a document of record to be retained indefinitely and not as a document intended to be of temporary effect or designed to serve only a temporary purpose.[18]

Accordingly, unless medical certificates or other similar certificates fall within the category of "administrative documents" under Article 1 of the Convention or are otherwise designed by legislation as "public" documents or in common law jurisdictions are deemed by case-law to be "public" documents they cannot have apostilles directly affixed to them, much as Competent Authority bureaucrats may wish to do so from time to time.

Form and Effect of an Apostille

The apostille affixed to a public document either directly or by means of an allonge, is in the form of the model found in the Annex to the Convention. It is signed, dated and stamped by the issuing Competent Authority officer. As required by the Convention, a unique number is allocated to each apostille. Particulars of all apostilles issued by

each Competent Authority are recorded and retained by the Competent Authority in a publicly accessible register, thereby enabling interested persons to verify the authenticity of specific apostilles.

As is the case with "legalisation" of a public document, **an apostille does not certify the content of the document to which it relates**. In the case of a notarial act, the apostille does not verify or add any legal significance to any underlying document to which the notarial act is appended or upon which it is endorsed.

Administrative Documents Dealing Directly with Commercial or Customs Operations

"Administrative documents dealing directly with commercial or customs operations" are specifically excluded from the ambit of the Convention.[19]

Determining the parameters of that exclusion is continuing to cause angst within many of the Competent Authorities as they attempt to balance the requirements of the Convention and the commercial needs of their own countries' exporters.

It is important to bear in mind that by its wording, the exclusion does not relate to all documents which may be from time to time directly concerned with "commercial or customs operations". It only relates to "*administrative documents*" and then not to the full range of documents which could possibly be so described.

"*Administrative documents*" are of course among the documents deemed to be public documents for the purposes of the Convention. Whenever considering whether a particular document falls into that category, it is always helpful to turn to the definitive French language text of the Convention for guidance.

As indicated in n14, the expression "*les documents administratifs*" where appearing in paragraphs 2 and 3 of Article 1 is poorly translated as "*administrative documents*" in the English language text. The latter expression is woolly and imprecise and is not a term of art.[20]

On the other hand, "*les documents administratifs*" is a well understood legal descriptor of various classes of documents issued by French government and government institutions. It does not include private "administrative" documents relating, in this case, to trade and customs matters. Nor does it include documents issued by non-

government organisations (such as Chambers of Commerce) which may be recognised by government, no matter how prestigious or important those organisations may be in the world of trade.

Even if a document is on its face, a "*document administratif*", it must also pass a specific test before it can be excluded from the operation of the Convention. It must have been brought into existence directly for the purposes of particular "commercial or customs operations" and not merely be a document which partially or on occasion may be used for international trade purposes.

As the Convention's rapporteur Professor Yvon Loussouarn observed in his Explanatory Report:

> … the adverb "directly" tends to restrict the exclusion solely to documents whose very content shows that they are intended for commercial or customs operations, thus excluding those which may occasionally be used for commercial operations such as certificates by the Patent offices (authenticated copies, documents certifying additions to patents, etc.).[21]

While significant legally and commercially, "*administrative documents*" represent a relatively small proportion of the myriad of commercial, administrative and regulatory documents now associated with international trade and commerce.

To the extent that documents such as Certificates of Origin and Certificates of Conformity which are used in international trade and commerce originate from private or non-government sources, they do not fall within the exclusion. As a general rule, they may readily be notarially authenticated. Apostilles may then be affixed to notarial certificates in the ordinary course.

To the extent that documents are indeed "*administrative documents*", technically they ought not have apostilles affixed to them. If however, as so often happens, persons or institutions in an importing country require a document to be "authenticated" before acceptance, then the authentication may be provided by a notary. In turn, an apostille may then be affixed to the notary's authentication which is a public document in its own right.

A good example is a Certificate of Pharmaceutical Product for a Solely Export Medicine which is issued by Australia's Therapeutic Goods Administration. That Certificate is unquestionably an "administrative document" dealing directly with commercial or

customs operations. As such, it is excluded from the ambit of the Convention. However, institutions in almost every South American country to which certificates of this nature are to be sent, normally require the Certificates to be authenticated before they may be used in the destination country. Invariably, notarial authentications to which apostilles are affixed are accepted without question.

Copies of Public Documents

Across the board, the documents known generically as 'civil status documents' or 'vital records' comprise one of the largest group of documents for which apostilles are required. Whether or not copies of those or other public documents may have apostilles affixed to them is a vexed question, the answer to which varies between countries. In the USA, the answer varies between the 56 U.S. states and territories.

It should go without saying that a simple photocopy of any public document, including a civil status document, should not be capable of having an apostille affixed to it. The possibilities of forgery are too great for the risk to be taken, whatever the source of the copy.

In many countries, original civil status records and other public documents are permanently kept by their official custodians. Only certified copies of the records are ever issued to members of the public. In those cases the "certified copies" are, for all practical purposes, treated as originals and apostilles may readily be affixed to them.

Copies of public documents certified by notaries form a separate class of their own. Certifying copies of documents of domestic or foreign origin is probably the most common service that notaries around the world are called upon to provide for international purposes.

It is accepted in virtually every country other than the United Kingdom and the United States, that their own notaries have the power to certify copies of public documents, including copies of civil status documents. In almost every jurisdiction, apostilles are routinely affixed to notarially certified copy documents, subject always to the proviso that an apostille relates to the notarial certification and not to the underlying document. Given the degree of trust reposed in notaries and in their acts, notarially certified copy documents are, for the most part, accepted everywhere as the functional equivalents of the original documents.

Language of the Apostille

The Convention specifically provides in Article 4 that the apostille may be drawn up in the official language of the authority (i.e. the country) which issues it. The Article goes on to say that the standard terms appearing in the apostille may be in a second language as well.

Particularly in circumstances where apostilles are drawn up in languages which are not readily accessible to most people, it is appropriate for an apostille to also have its standard terms and its inserted text written in a second language.

The two official languages of the Convention are French and English. Either language may appropriately be used as the second language for apostilles. The important thing to remember is that apostilles are designed to be used outside the countries in which they are affixed and that recipients must be able to comprehend them.

A number of bilingual and trilingual model apostilles have been developed by the Permanent Bureau and may readily be accessed on the HCCH website.

The Electronic Apostille Program (the e-APP)

The most important recent innovation in relation to the apostille has been the launch in 2006 of the Electronic Apostille Pilot Program (now the **Electronic Apostille Program**) (the "**e-APP**") by the Permanent Bureau in co-operation with the National Notary Association of the United States of America ("**the NNA**")

The 4th International Forum on E-Notarization, E-Apostilles and Digital Evidence, which was convened by the HCCH and the NNA, was held in New Orleans on 29 - 30 May 2008. It is well worth noting the following conclusions and recommendations of that International Forum, namely:

- the spirit and letter of the *Apostille Convention* are not an obstacle to the use of modern technology to further improve the practical operation of the Convention;

- not only Competent Authorities benefit from implementing the e-APP but indeed any user of apostilles benefits (whether as a requesting person or final recipient), because the overall operation of the Convention is greatly improved, security dramatically enhanced and fraud effectively combated;
- States should strive to achieve high standards in the issuance and management of digital credentials for Competent Authorities; and
- the model of an e-Register suggested under the e-APP is an invaluable tool to enhance the use and consultation of Apostille-Registers to check the origin of apostilles.[22]

The e-APP has two independent components, namely

- the electronic register ("e-Register"); and
- the electronic apostille ("e-Apostille")

which may be implemented together or individually.[23]

It is difficult to determine when, or even if, the electronic apostille will ever generally become the preferred means of delivering the Apostille. It is however noted that several jurisdictions are now introducing the electronic apostille as part of their general service delivery.

There is however no excuse for contracting States not to move towards the introduction of e-Registers. The technology is inexpensive and simple.[24] Inputting the data into an e-Register is neither difficult nor time consuming. The establishment of an e-Register fulfils a real need and plugs a serious hole in the administration of the apostille system.[25]

The implementation of an e-Register associated with a simple website established and controlled by a Contracting State's Competent Authority affords recipients of documents bearing apostilles a means to readily and speedily search the register and to confirm whether or not an apostille is genuine. In the past, as a practical matter, they have been unable to do so.

An implementation chart of the e-APP identifying Competent Authorities that have implemented one or both of the e-APP components may be found on the e-APP page of the HCCH website.

Additional Text "Outside the Box"

Within the limited confines of Competent Authorities, it is usually well understood that an apostille does not add any legal significance to or officially verify the content of the public document to which it relates, or in the case of a notarial certificate, the content of the notarially certified document.

On the other hand, within the various Contracting States themselves, in courts, tribunals, public offices and commercial institutions and enterprises as well as in the public mind generally, all too often apostilles are seen as official foreign government endorsement or verification of the contents of documents which are produced. This is particularly so when it comes to original and certified copies of degrees, diplomas and other academic documents.[26]

The misapprehension may readily and easily be dispelled by the simple expedient of adding appropriate additional text as to the limited effect of an apostille .."outside the box", (i.e. outside the area or frame containing the ten numbered prescribed items of the apostille) of each apostille which is affixed.

Recommendations as to the wording of additional text have been made by the Permanent Bureau and may be found in the *Apostille Handbook* (para. 256) and online at the Apostille section of the HCCH website.

The Need for Ongoing Education

It is evident from the responses to the Questionnaires circulated before Special Commission meetings that all Contracting States are conscious of the need to provide continuing education in addition to induction training for the staff of their Competent Authorities.

Quality induction training is essential to ensure that new staff members not only have the necessary skills to carry out their tasks efficiently, but that they also have an appropriate theoretical background to support their roles. In that regard, materials published by the Permanent Bureau including the *Apostille Handbook* are invaluable resources.

Competent Authorities must take the time and trouble to develop a comprehensive continuing education programme for staff members, perhaps to be presented over a three year cycle, to enable both front and back office staff to maintain, develop and update their performance, knowledge and skills.

Programmes need not be lengthy, complex or expensive. Where possible, important stakeholders such as the notariat, tertiary education authorities and officials associated with the generation of civil status documents should be involved in the preparation and presentation of induction training and continuing education.

As with all private and public sector organisations, it is always appropriate for specialist units such as Competent Authorities to undertake periodic assessments of their operations and the service levels they provide.

Key issues to be considered in any analysis would include:

- whether current procedures accord with the legitimate expectations and requirements of the public and the stakeholders;
- what inefficiencies and bad practices exist;
- how may procedures be standardised across a number of Competent Authorities (if there are more than one) within the Contracting State;
- what factors limit or restrict the organisation's ability to meet its desired performance levels; and
- what specialist advice or services can be called up to assist the organisation.

It should not be assumed that once a country has acceded to the *Apostille Convention* and has announced its accession and subsequently the entry into force of the Convention in its official government media, all its public servants, lawyers, bank officials, public institutions and authorities, let alone the public generally, will immediately be familiar with the apostille system or even be aware that it has replaced consular legalisation of public documents emanating from other Convention countries.

It should also not be assumed that all or any of those persons have even heard of 'legalisation' in any form or if they have, that they understand the difference between consular legalisation and the affixing of apostilles or appreciate that for the foreseeable future, the two systems will both operate side by side depending upon the origin or destination of documents.

15

The task of educating institutions and persons who advise the public in relation to apostilles and the need for the authentication of public documents emanating from their own country for production abroad and, just as importantly, vice-versa, is substantial, ongoing and time consuming. Assistance in disseminating information to the public as well as to their own members and staff, may be obtained from societies of notaries, bar associations, professional bodies for accountants and bankers' associations.

Meeting the Expectations of the Public

The need to educate Competent Authorities and their staff includes the need to educate them to meet the expectations of the public.

it is true that affixing apostilles to public documents is only a small part of government service delivery within the Contracting States; but it occurs literally millions of times each year and typically involves direct interface between bureaucrats and members of the public.

In a Report published in February 2015, accounting giant Deloitte outlined the forces shaping the citizen service sector and the manner in which governments deliver services and provide their citizens with access to information.[27]

The Report posits that the changing environment brought about by rising citizen expectations for service, government fiscal constraints and advances in information technology, is redefining the way customer services in the public sector are designed and delivered.[28] It then provides a summary of a "variety of leading global practices and lessons learned for governments aiming to enhance customer service" and identifies "eight key drivers and twenty-four trends that are shaping the future of public sector service delivery".[29]

Two earlier papers published in 2007 by the prestigious Washington think-tank, Center for the Study of Social Policy (CSSP), *Customer Satisfaction: What the Research Tells Us* and *Customer Satisfaction: Improving Quality and Access to services and Supports in Vulnerable Neighbourhoods*"[30] present a framework directed towards improving the quality of public sector services, especially in vulnerable communities. Both papers emphasise the need for service providers to include focus

on customer needs when establishing their priorities and to continually monitor and examine customer experiences, opinions and suggestions.

The Deloitte Report and the CSSP papers are valuable references for Competent Authorities to assist in improving their levels of service delivery and are highly commended.

Materials Published by the Permanent Bureau of the HCCH

The Apostille page of the HCCH website contains a wealth of material concerning the *Apostille Convention*.

The Permanent Bureau has published a series of three publications on the practical operation of the *Apostille Convention*.

- *The ABCs of Apostilles* which is a brochure that is primarily addressed to users of Apostilles with short answers to frequently asked questions, including when, where and how Apostilles are issued and what their effects are;
- *How to join and implement the Hague Apostille Convention* which is a brief guide that is designed to assist authorities in new and potential Contracting States in implementing the Convention; and.

- *The Apostille Handbook* which is a comprehensive reference tool that is designed to assist Competent Authorities in performing their functions under the Apostille Convention, as well as address issues that arise in the contemporary operation of the Convention.

All three publications may be downloaded in PDF format from the HCCH website and hard copies of the publications may be ordered using the order forms found on the website.

An extract from "*How to join and implement the Hague Apostille Convention*" comprising:

- a checklist of matters to consider before acceding to the Apostille Convention (being Annex 1 to the publication); and
- a flowchart on the accession procedure (being Annex II to the publication)

are together Annex "D" in these materials.

1 The Republic of Korea became a member state of the Hague Conference on 20 July 1997. Following accession to the *Apostille Convention* on 25 October 2006, the Convention entered into force in the Republic of Korea on 14 July 2007.

2 24 January 1965 was the sixtieth day after the deposit of the third instrument of ratification by a Contracting State with the Netherlands' Ministry of Foreign Affairs. (The process is set out in Articles 10 and 11 of the Convention).

On 25 September 1962, the Socialist Federal Republic of Yugoslavia, which incidentally, had abstained from voting for the *Apostille Convention* Text at the Ninth Session, was the first Contracting State to deposit an instrument of ratification. The second instrument was deposited by the United Kingdom on 21 August 1964. The third instrument was deposited by France on 25 November 1964, thus triggering the Convention's entry into force.

3 Pursuant to the *HCCH Statute* Art 8, Special Commission meetings are held between Sessions of the Hague Conference "to … study all questions of private international law which come within the purpose of [Conventions of] The Hague Conference".

To date, meetings of the *Apostille* Special Commission have been held in 2003, 2009, 2012 and 2016. The C & R, Questionnaires and Responses and other materials presented to meetings may be found in the dedicated "Apostille" page of the HCCH website <www.hcch.net>.

4 Care must be taken not to confuse "authenticity" with "reliability", or to assume merely because a document is authentic that *ipso facto* that 6the information in it is reliable.

5 *The Apostille Convention,* art 2.

6 *The Ordinance of Lewis (sic) XIV King of France and Navarre Given at Fontainebleau in the month of August 1681. Concerning the Marine. "Of Consuls of the French Nations in Foreign Countries"* Section X, Article XXIII. (Translated from French by Alexander Justice and appearing in his *General Treatise of the Dominion of the Sea and a Compleat Body of the Sea Laws,* (2nd ed. Between 1707 and 1724, [London], 274.).

7 With hindsight, it may have been preferable for the expression "consularisation" to have caught on. "Legalisation" is an inappropriate shorthand to describe the final part of the authentication process. It is an evocative word, the use of which elevates the process to which it relates from being an important but, nonetheless, mundane administrative task, to an activity of great solemnity and significance, at least in the minds of a good many of those involved in the process.

8 An (unofficial) list of the Contracting States and their territories, dependencies and autonomous regions is Annex "B" in these materials.

9 Occasionally, additional procedures are required in destination countries. For example, before Chile acceded to the *Apostille Convention*, on arrival in Chile, a legalised notarial act had to be presented at the "Legalisation" section of the Consular Department of the Ministry of Foreign Affairs in Santiago (which was only open from 9.00 a.m. to noon each weekday) to have the overseas Chilean consul's signature certified.

10 *Apostille Convention,* art 3.

An "Apostille" (pronounced "apostee") was originally an early 16th century French word, which meant a short recommendation or recommendatory note written by an influential person on the margin of a petition or at the foot of a letter. J Ch Taver, *The Royal Phraseological English-French, French-English Dictionary*, (3rd ed.London 1858).

The form of the apostille is set out in an annex to the Convention.

11 Ibid.

For example, Australia and New Zealand are both parties to the Convention. Before it became a party, New Zealand did not require Australian public documents to be legalised or otherwise authenticated before production within its territory. Therefore, even though the Convention now applies to New Zealand, apostilles need not be affixed to Australian public documents to be produced there and vice versa.

In addition to the *Apostille Convention*, there are presently a number of other conventions on foot in Europe involving differing numbers of contracting states, which exempt certain classes of documents from the requirements for legalisation within the territories of the various contracting states. Those conventions deal with matters such as the abolition of legalisation of documents executed by diplomatic agents or consular officers (London 7 June 1968) and international co-operation in administrative assistance to refugees (Basel 3 September 1985). As between the contracting states, apostilles need not be affixed to those documents subject to any relevant convention(s) which would otherwise be considered to be 'public documents' for the purposes of the *Apostille Convention*.

12 *Apostille Convention,* art 8.

This Article appears to be a 'belts and braces' provision which seeks to make it absolutely clear that the Convention is a simplification mechanism designed to replace more complex procedures. It is hard to imagine the provisions of a treaty between two countries which set up mechanisms for the legalisation of public documents where the formalities of legalisation were simpler (i.e. less rigorous) than the affixing of an apostille.

13 "Process server" is an extremely poor English translation of the term "*huissier de justice*". A combination of "bailiff", "sheriff", "marshal" and "specially qualified court officer" would be closer to the mark. The *huissier de justice* is a member of the legal profession in France and in a number of other European countries and in Quebec, whose duties range from the simple service of process to seizures and evictions and authenticating character finding which may be used as evidence in legal proceedings.

14 The *Apostille Convention* was executed in French and English versions. As set out in the Convention's execution clause, the French text prevails "in case of divergence between the two texts".

Superficially, the expression "*administrative documents* in Article 1 of the English version has the same meaning as "*les documents administratifs*" in the French version, However, in France "*les documents administratifs*" means far more than merely "*administrative documents*". "*Les documents administratifs*" refers to official documents, certificates and instruments issued by government (*l'administration*), such as birth certificates, death certificates and other documents prepared or derived from government records and not just documents of an administrative nature prepared by government or non-government institutions or entities.

15 A brief discussion of the meaning of notarial acts is Annex "C" in these materials.

16 *Apostille Convention*, art 1.

In his Explanatory Report on the Convention, the Convention's rapporteur, Professor Yvon Loussouarn did not offer a reason why in addition to "notarial acts", "notarial authentications of signatures" were deemed to be "public documents". It may be that the framers of the Convention had American notaries in mind when inserting the provision. Even if they did not, the provision enables apostilles to be affixed to "notarized" documents emanating from the United States in order to authenticate the signatures and seals of American notaries who do not, as a rule, prepare notarial acts in the sense that term is understood elsewhere in the world. If the provision did not exist, American "notarizations" might well have been excluded from the operation of the *Apostille Convention.*

17 See C&R 72 of SC 2009 and C & R 14 of SC2012.

18 See generally Adrian Keen, *The Modern Law of Evidence* (8th ed 2010) Oxford University Press at 342-346.

19 *Apostille Convention*, Article 1, paragraph 3(b).

20 There are now some 20 different translations of the Convention which may be found at or accessed via the Hague Conference website. Without seeking to be rude or churlish, it is fair to ask whether those translations were based on the French version of the Convention and to question the extent that in relation to the exclusion the translations truly and fairly translate the meaning and purport of "*les documents administratifs*".

21 Yvon Loussouarn, above n 17.

22 International Forum Conclusions & Recommendations, Section I.

23 Details of both components may be found on the e-APP page of the Hague Conference website.

24 The e-APP page provides all necessary technical information.

25 Contracting States are almost never requested to check their registers of apostilles. This is partly because the public is not aware of the provision of the Convention enabling the checking of registers and partly because the process involved in checking is genuinely difficult.

26 In that regard, see discussion about "Diploma Mills" and apostilles in *Preliminary Document No. 5 of December 2008* prepared for SC 2009 by the Permanent Bureau.

Also see remarks on the authentication of academic credentials in the ANZCN Position Paper, *Aspects of the Apostille Convention*, Information Document No. 5 of November 2012 prepared for SC 2012.

27 Deloitte, *Service Delivery Trend Outlook - The potential future of government customer service delivery*, A Report prepared for The Government Summit Thought Leadership Series (February 2015). Found at <http:/wwwz.deloitte.com.ca>.

28 Ibid 4 and 5.

29 Ibid 5.

30 CSSP February, <www.cssp.org/publications>

ANNEX "A"

ENGLISH LANGUAGE VERSION OF THE *APOSTILLE CONVENTION*

HCCH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

12. CONVENTION ABOLISHING THE REQUIREMENT OF LEGALISATION FOR FOREIGN PUBLIC DOCUMENTS[1]

(Concluded 5 October 1961)

The States signatory to the present Convention,
Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.
For the purposes of the present Convention, the following are deemed to be public documents:

a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("*huissier de justice*");
b) administrative documents;
c) notarial acts;
d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

a) to documents executed by diplomatic or consular agents;
b) to administrative documents dealing directly with commercial or customs operations.

Article 2

Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.
However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Apostille Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Neuvième session (1960)*, Tome II, *Légalisation* (193 pp.).

two or more Contracting States have abolished or simplified it, or exempt the document itself from legalisation.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "*allonge*"; it shall be in the form of the model annexed to the present Convention.
It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer.
When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.
The signature, seal and stamp on the certificate are exempt from all certification.

Article 6

Each Contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.
It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:
a) the number and date of the certificate,
b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.
At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more Contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4.

Article 9

Each Contracting State shall take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth Session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *d)* of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, the Convention shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

a) the notifications referred to in the second paragraph of Article 6;
b) the signatures and ratifications referred to in Article 10;
c) the date on which the present Convention enters into force in accordance with the first paragraph of Article 11;
d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;
e) the extensions referred to in Article 13 and the date on which they take effect;
f) the denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth Session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

Annex to the Convention

Model of certificate

The certificate will be in the form of a square with sides at least 9 centimetres long

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: .....

This public document

2. has been signed by .....

3. acting in the capacity of .....

4. bears the seal/stamp of .....

.....

Certified

5. at ..... 6. the .....

7. by .....

.....

8. N° .....

9. Seal/stamp: 10. Signature:

....

ANNEX "B"

AN (UNOFFICIAL) LIST OF THE CONTRACTING STATES AND THEIR TERRITORIES, DEPENDENCIES AND AUTONOMOUS REGIONS AS AT 31 MAY 2017

PROFESSOR PETER ZABLUD
Australian Lawyer and Notary

Contracting States and their Dependencies, Territories and Autonomous Regions which are subject to the *Hague Apostille Convention*

As at 31 May 2017

Albania

American Samoa
(USA Territory)

Andorra

Angola
(Portuguese Territory)

Anguilla
(UK Territory)

Antigua and Barbuda

Argentina

Armenia

Aruba
(Constituent country of the Kingdom of The Netherlands)

Australia

Austria

Azerbaijan

Azores
(Autonomous region of Portugal)

Bahamas

Bahrain

Barbados

Belarus

Belgium

Belize

Bermuda
(UK Territory)

Bonaire
(A special municipality of The Netherlands)

Bosnia & Herzegovina

Botswana

Brazil

British Antarctica
(UK Territory)

British Virgin Islands
(UK Territory)

Brunei Darussalam

Bulgaria

Burundi

Cape Verde

Cayman Islands
(UK Territory)

Chile

Christmas Island
(Australian Territory)

Cocos Island
(Australian Territory)

Colombia

Cook Islands

Costa Rica

Croatia

Curacao
(Constituent country of the Kingdom of The Netherlands)

Cyprus

Czech Republic

Denmark

Dominica

Dominican Republic

Ecuador

El Salvador

Estonia

Falkland Islands
(UK Territory)

Fiji

Finland

France

French Guyana
(French Overseas Department)

French Polynesia
(French Territory)

Georgia

Germany

Gibraltar
(UK Territory)

Greece

Grenada

Guadeloupe
(French Overseas Department)

Guam
(USA Territory)

Guernsey
(UK Territory)

Honduras

Hong Kong

Hungary

Iceland

India

Ireland

Isle of Man
(UK Territory)

Israel

Italy

Japan

Jersey
(UK Territory)

Kazakhstan

Kosovo

Kyrgyzstan

Latvia

Lesotho
(Formerly Basutoland)

Liberia

Liechtenstein

Lithuania

Luxembourg

Macau

Macedonia
(*Former Yugoslav Republic*)

Madeira
(Autonomous region of Portugal)

Malawi

Malta

Marshall Islands

Martinique
(French Overseas Department)

Mauritius

Mayotte
(French Overseas Department)

Mexico

Moldova

Monaco

Mongolia

Montenegro

Montserrat
(UK Territory)

Morocco

Namibia

Netherlands

New Caledonia
(French Territory)

New Zealand

Niue

Norfolk Island
(Australian Territory)

Northern Mariana Islands
(Cth associated with USA to which Convention applies)

Norway

Oman

Panama

Paraguay

Peru

Poland

Portugal

Puerto Rico
(Cth associated with USA to which Convention applies)

Republic of Korea
(South Korea)

Reunion
(French Overseas Department)

Romania

Russian Federation

St. Barthelemy
(French overseas collectivity to which Convention applies)

St. Helena
(UK Territory)

St. Kitts and Nevis
(Formerly Saint Christopher and Nevis)

St. Lucia

St. Martin
(French overseas collectivity to which Convention applies)

St. Pierre and Miquelon
(French Territory)

St. Vincent & The Grenadines
(Formerly St. Vincent)

Saba
(A special municipality of The Netherlands)

Samoa

San Marino

Sao Tome e Principe

Serbia

Seychelles

Sint Eustatius
(A special municipality of The Netherlands)

Sint Maarten
(Constituent country of the Kingdom of The Netherlands)

Slovakia

Slovenia

South Africa

South Georgia & South Sandwich Islands
(UK Territory)

Spain

Suriname

Swaziland

Sweden

Switzerland

Tajikistan

Tonga

Trinidad and Tobago

Turkey

Turks and Caicos Islands
(UK Territory)

Ukraine

United Kingdom

United States of America

Uruguay

Uzbekistan

Vanuatu

Venezuela

Virgin Islands of the United States
(USA Territory)

Wallis and Futuna
(French Territory)

Notes:

1. **Guatemala** acceded to the Convention on 19 January 2017. In the ordinary course, the Convention will enter into force for Guatemala on 18 September 2017.

2. **Denmark** has declared that the Convention does not yet apply for Greenland and the Faroe Islands, which are self-governing Danish overseas administrative divisions.

3. **New Zealand** has declared that the Convention does not apply for Tokelau, which is a self administered New Zealand Territory.

ANNEX "C"

A BRIEF DISCUSSION OF THE MEANING OF "NOTARIAL ACTS"

NOTARIAL ACTS IN AUTHENTIC AND PRIVATE FORMS

The notarial act generally

For present purposes, in all civil law jurisdictions and in all common law jurisdictions, other than the United States

- an **act** is an instrument that records a fact or something that has been said, done or agreed; and
- a **notarial act** is an act authenticated by a notary's signature and official seal, certifying
  - the execution in the notary's presence of a deed or instrument under hand; or
  - verifying one or more facts or things which the notary knows or has been able to satisfactorily prove.[1]

In the United States of America, it is necessary to distinguish a notarial act as defined above from a notarial act as typically defined in American legislation. In almost every United States jurisdiction, a notarial act is a function which a notary is authorised to perform, as opposed to a document or instrument which records that which the notary certifies has been done.[2]

Therefore, for example, in most countries the administration of an oath by a notary is an activity on the notary's part, but the recording of the administration of the oath in the jurat of an affidavit as certified by the notary's signature and seal, is a notarial act, albeit one of the simplest kind. On the other hand, within the United States, in the main, the administration of the oath is the notarial act and the jurat is merely a written statement confirming that the notarial act has occurred.

Categories of notarial acts

Outside the United States, all notarial acts necessarily fall into one of two categories, namely:

- **authentic** or **public form** acts; or
- other acts known in most common law countries as **private form** acts

Acts in "authentic form"

Also known as an act in "public form" and occasionally, as an act in "solemn form", the notarial act in authentic form had its genesis in Italy in medieval times. It comprises a single narrative instrument, written by the notary in the first person, which sets out or perfects a legal obligation or records some fact or thing. Because it has been prepared by a notary, it is conclusive and has full probative value in civil law jurisdictions where notarial acts automatically have full recognition.

In civil law countries, an act in authentic form has special evidentiary status and is usually automatically evidence of the facts and statements it records unless it is deprived of authenticity by a rarely undertaken, long and complex judicial procedure. A notarial act in authentic form does not, however, have probative force in relation to the facts which the parties have declared to the notary without evidencing them. That part of the instrument can be rebutted by ordinary means of proof.

NOTARIAL ACTS IN AUTHENTIC AND PRIVATE FORMS

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In addition to its probative force, an authentic form notarial act also has executory force; that is to say, an obligation or acknowledgement appearing in a notarially authenticated instrument is enforceable in the same way as if it were a judgement of the court, even though no proceedings have been brought before a court.

Because they are legal practitioners and legal advisors, most common law notaries are able to prepare and complete authentic form acts for production abroad.

Save for American civil law notaries who comprise a special group very much in the minority, U.S. notaries do not have the power or authority to prepare or complete notarial acts in authentic form. This is so, even if the documents have actually been prepared abroad and sent to the United States for notarization.[3]

The elements of a notarial act in authentic form

A notarial act in authentic form

- begins with **a protocol** (preamble) which sets out introductory matters such as:
  - the notary's name and status;
  - the date and place of the notarial act;
  - the fact of the appearance of one or more persons (typically referred to as 'the appearer(s)') before the notary, often together with one or more witnesses; [4]
  - any capacity in which an appearer appears or is acting; and
  - the means by which the notary has verified any facts or statements set out in the act relating to the appearer(s)
- continues with the **corpus** (operative part) which
  - records any declarations made to the notary by the appearer(s) by way of explanation or recital;
  - sets out, also by way of declaration by the appearer(s), the terms of the power of attorney, contract, arrangement, obligation or other legal act which is embodied in the instrument; and
  - refers to any annexures or documents produced to or by the appearer(s); and
- ends with an **eschatocol** (concluding statement) by the notary which states:
  - that the document was read over to and acknowledged by the appearer(s), and signed and, where applicable, sealed by the appearer(s) in the notary's presence and in the presence of any witnesses who are present; and
  - where appropriate or required, that all the requirements of the applicable local law relating to the formalities of execution of the document and its binding nature have been met.

'The document is then signed by the appearer(s) in the notary's presence and in the presence of any witnesses who also sign the document in each other's presence and in the presence of the appearer(s). The notary then signs and seals the executed document, although not necessarily in the presence of the appearer(s) or the witness(es), thereby making the document the notary's act.[5]

Acts in private form

A notarial act in private form is a certificate signed and sealed by a notary which evidences the notary's intervention and which is endorsed upon or appended to another document not usually prepared by the notary *qua* notary. Typically it relates to or deals with one or more aspects of the document such as its genuine nature or validity, its legal status and legal consequences or more often, the execution of the document and the verification of the identity, capacity and authority of the person(s) executing it.

Although their origins may be less auspicious and their preparation less formal and ritualistic than their 'authentic' kin, notarial acts in private form have an important function in modern commercial life and must be prepared by a notary with proper care as to their content and with due concern as to the consequences which flow from any negligent misstatement which might appear.

Regrettably, in some civil law quarters, there are notaries who think that acts in authentic form are the only true notarial acts and that the private form acts of the common law notaries are less worthy and of lower status as are, by extension, the common law notaries themselves.[6]

Those notaries would do well to remember that the majority of the acts which they actually prepare are acts in private form (known in France as acts "en brevet"), which are for production in jurisdictions outside their own. As with authentic acts, private form acts must be correctly and carefully prepared and completed.[7]

Acknowledgements

The quintessential notarial act in the United States is the taking of an 'acknowledgement' which is formal and official evidence of the proper execution of an instrument as a necessary precursor to admitting the instrument to public record.[8]

An **acknowledgement** is

> A notarial act in which a notary public certifies that a signatory, whose identity is personally known to the notary public, or proven on the basis of satisfactory evidence has admitted, in the notary public's presence, to having voluntarily signed a document for its stated purposes".[9]

Acknowledgement also means

> A declaration by a person that the person has executed an instrument for the purposes stated therein and if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of a person or entity represented and identified therein.[10]

An acknowledgement must be distinguished from an attestation, which is the act of witnessing the execution of a document and then signing the document as a witness. In taking an acknowledgement, American notaries do not act as witnesses to the execution of documents. If formal witnessing is required, that task typically falls to an independent person other than a notary.[11]

1 "Any certificate, attestation, note, entry, endorsement or instrument made or signed and sealed by a notary public in the execution of the duties of his office is a notarial act." (NP Ready, *Brooke's Notary* (Sweet & Maxwell 13 ed 2009), 75.

The former secretary of The Notaries' Society of England and Wales, AG (Tony) Dunford, has defined a notarial act as being 'a record of some activity which is intended and or required to have some evidential status, or some legal or administrative force or effect or some commercial effect'. (AG Dunford, *The General Notary*, (1999) 4).

2 Unlike a number of states which were once administered by civil law colonial powers, both Louisiana and Puerto Rico still follow their French and Spanish antecedents and make the distinction between notarial acts on the one hand and the powers and duties of notaries on the other. See generally, *Louisiana Revised Statutes Title 35, Notaries Public and Commissioners* and *Laws of Puerto Rico Title 4, Puerto Rico Notarial Act.*

3 Any American notary who wrongfully prepares or completes a notarial act in authentic form puts any transaction to which the document relates in immediate jeopardy. On one view, matters and things set out in the purported notarial act are a nullity *ab initio*, because American notaries, other than U.S. civil law notaries, do not have the training or status required to prepare or complete a notarial act in authentic form.

4 Civil law jurisdictions often require one or more witnesses to be present in addition to the notary when certain documents, typically documents relating to real estate and inheritance matters, are executed.

5 Requirements as to form are regulated to a greater or lesser degree in most civil law jurisdictions. For example, in Quebec, the *Notaries Act 2000*, among other things, sets out rules for notarial acts including rules relating to errors and omissions (s.37), forms and abbreviations (s.45), added words, letters or signs and words crossed out (s.46), inserts and additions (ss.47, 48 & 49), signing (s.50), reading over (s.51) and place(s) of execution (ss. 54 & 55).

Also see, for example, Part III, Title 1 of Malta's *Notarial Profession and Notarial Archives Act - Of formalities of Notarial Acts*, Article 51 of the *Notarial Law* of Italy and Chapter 9 of the Spanish Civil Code, *Reglamento Notarial.*

6 Dunford has observed that the essentials of public and private form notarial acts are, in reality, the same, but the difference between them lies in the purpose to which a particular act is to be put in the jurisdiction in which it is to be used (Dunford, above n 1 45).

7 Numerically, those notarial acts exceed acts in authentic form by a considerable number. Civil law notaries are just as prone to error when preparing acts in private form as are their common law brethren.

8 The acknowledgement has formed the basis of many notarial acts in countries such as Vietnam, the Philippines, Korea and Thailand, where American influence is keenly felt.

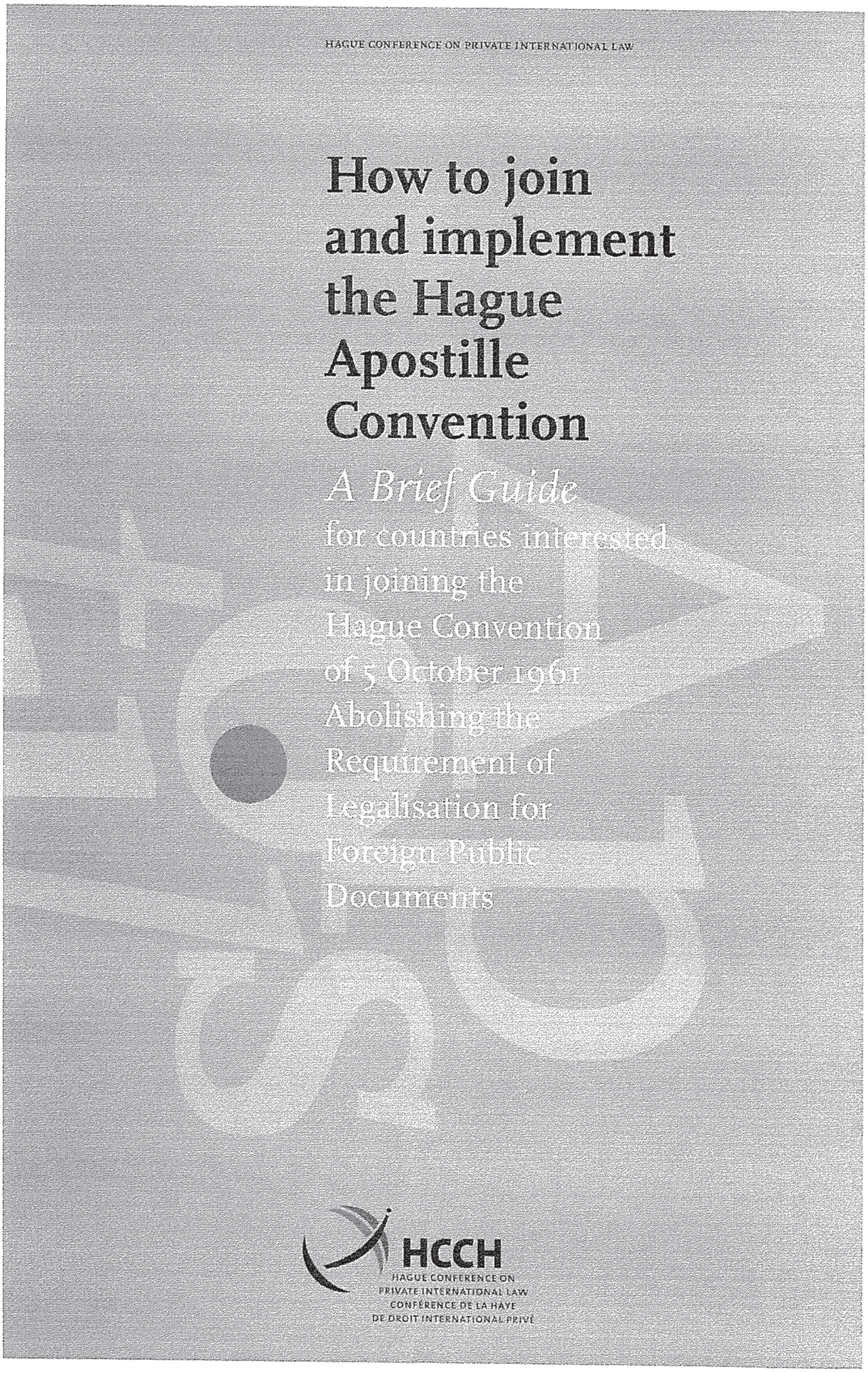
9 *Connecticut Annotated Statutes §3-94a. Notaries Public, Definitions.*

10 *Illinois Annotated Statutes, Ch.5. §312/6-101. Definitions.*

11 In some U.S. jurisdictions, it is possible to 'prove' a deed as an alternative to obtaining a signatory's acknowledgement. The procedure is sometimes called 'probating' a deed and involves one or more of the attesting witnesses making an affidavit that the person whose signature was witnessed acknowledged the instrument in the presence of the affiant(s) and any other attesting witness(es). See for example *Colorado Rev.Stat.Ann.Notaries Public §38-30-136* and *Iowa Code.Ann Iowa Law on Notarial Acts §558-31* and *558-32.*

ANNEX "D"

AN EXTRACT FROM
"*HOW TO JOIN AND IMPLEMENT THE HAGUE APOSTILLE CONVENTION*"


HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
How to join and implement the Hague Apostille Convention
A Brief Guide
for countries interested in joining the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Annex I

Checklist of matters to consider before acceding to the Apostille Convention

21

Checklist of matters to consider before acceding to the Apostille Convention

- ☐ Take steps to implement the Apostille Convention into internal law (as per internal constitutional and other legal requirements) and / or to remove any obstacles existing in internal law

- ☐ Publicise the accession and upcoming entry into force of the Convention among
  - ☐ the acceding State's embassies and consulates abroad
  - ☐ foreign embassies and consulates in the acceding State
  - ☐ officials and authorities in the acceding State that execute and authenticate public documents
  - ☐ the general public and professional groups involved in the circulation of public documents

- ☐ Determine what are *public documents* under internal law

- ☐ Determine which authority(ies) will be competent to issue Apostilles

- ☐ Ensure that sufficient resources have been allocated to each Competent Authority

- ☐ Prepare desk instructions and circulate them among officials and authorities that execute public documents

- ☐ Establish a database containing sample signatures and seals of officials and authorities that execute public documents

- ☐ Determine whether Apostilles will be issued
  - ☐ in paper form, and / or
  - ☐ in electronic form (*e-Apostilles*)

- ☐ Develop a common (bilingual or trilingual) Apostille Certificate

- ☐ Develop common practices for attaching Apostilles

- ☐ Establish a register of Apostilles, preferably one in electronic form that is publicly accessible online (*e-Register*)

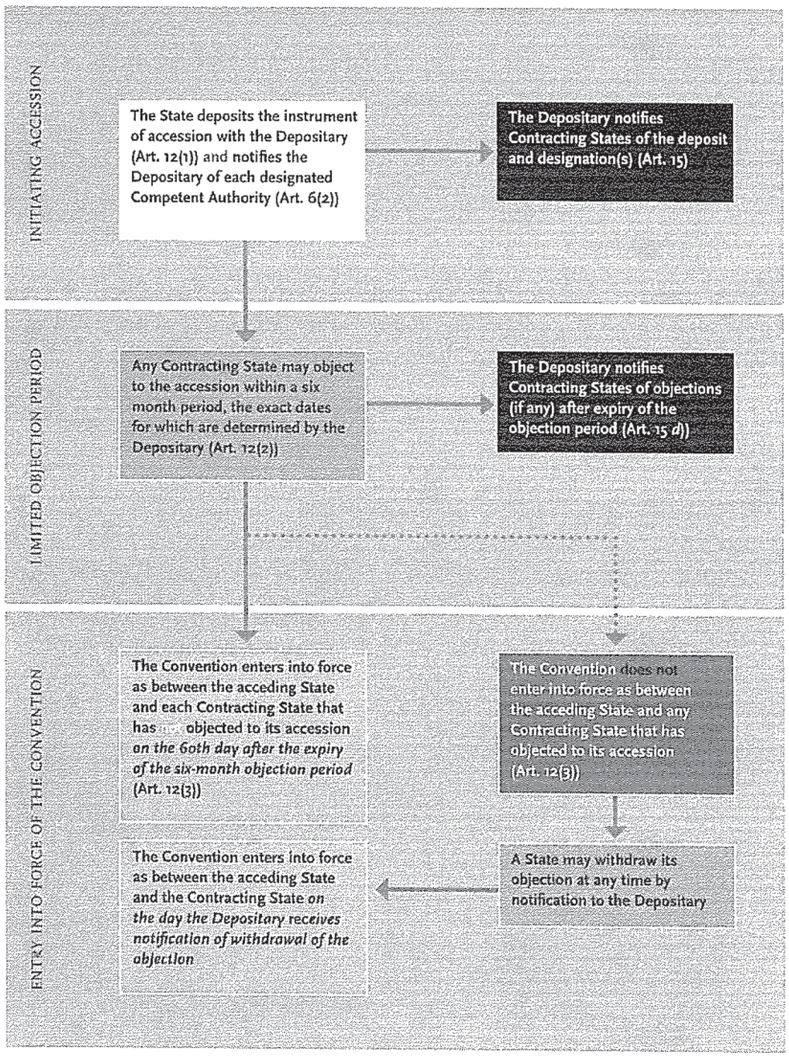
www.hcch.net > Apostille Section

22

Annex II

Flowchart on the accession procedure

Flowchart on the accession procedure



www.hcch.net > Apostille Section

SESSION 6.

Presentation

e-Apostille for a Better International Cooperation

Gyooho Lee

Tenured Professor at Chung-Ang University (Korea)

HCCH, Asia Pacific Week 2017

e-Apostille for a Better International Cooperation

Republic of KOREA

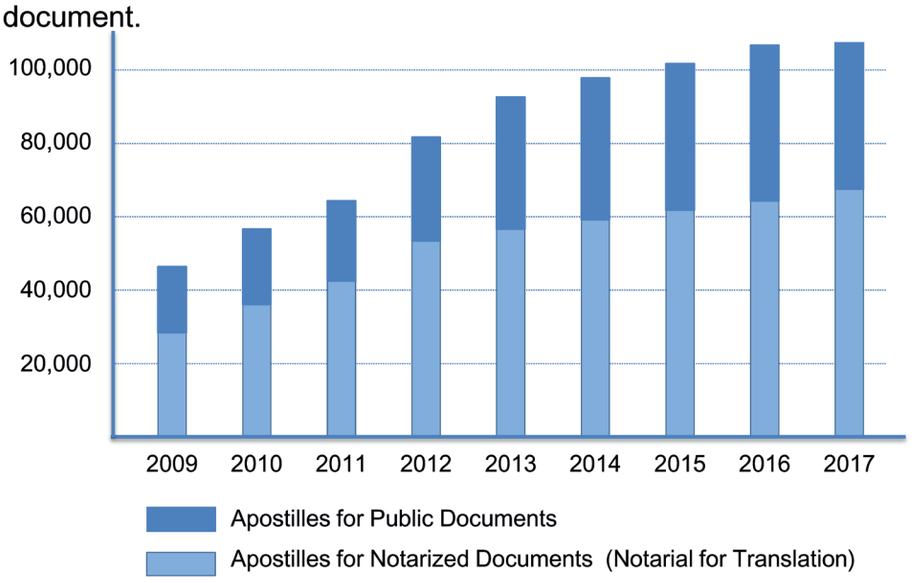
Prof. Gyooho Lee

Current Status of Apostille

Apostilles from Republic of KOREA

- The issuance of apostilles have increased 241% over the last 9 years.

- 64% of apostilles are issued for notarized documents.
  - Almost public documents are written in Korean.
  - Normally, foreign governmental officers request the translation of the public document.

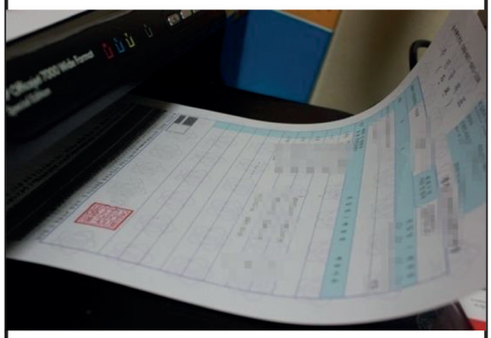


Online Apostille (1/3)

- Korean e-Government Service
  - Most of public documents can be issued online.

- In 2016, more than **65,000,000 public documents** had been issued **at HOME.**

Issuing the document at home

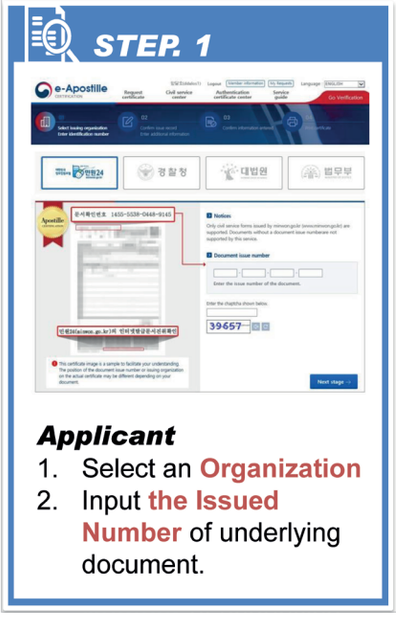


Automated public document issuance machine

Online Apostille (2/3)

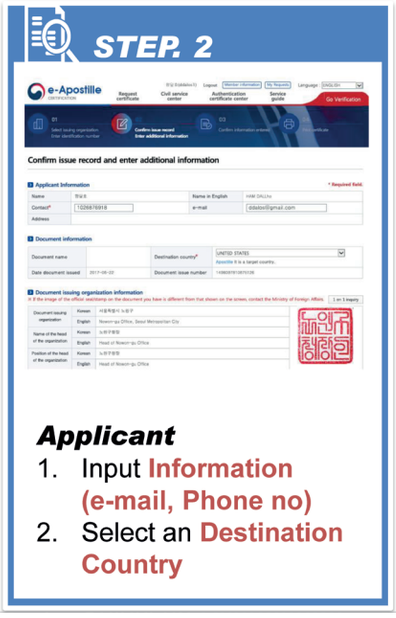
- The Korean government launched "Online apostille service", on Nov. 30. 2016.
  - http://www.apostille.go.kr

- This apostille system is connected by other organization's system and able to check validation of underlying public document in real time.



Applicant

1. Select an **Organization**
2. Input **the Issued Number** of underlying document.



Applicant

1. Input **Information (e-mail, Phone no)**
2. Select an **Destination Country**

Applicant

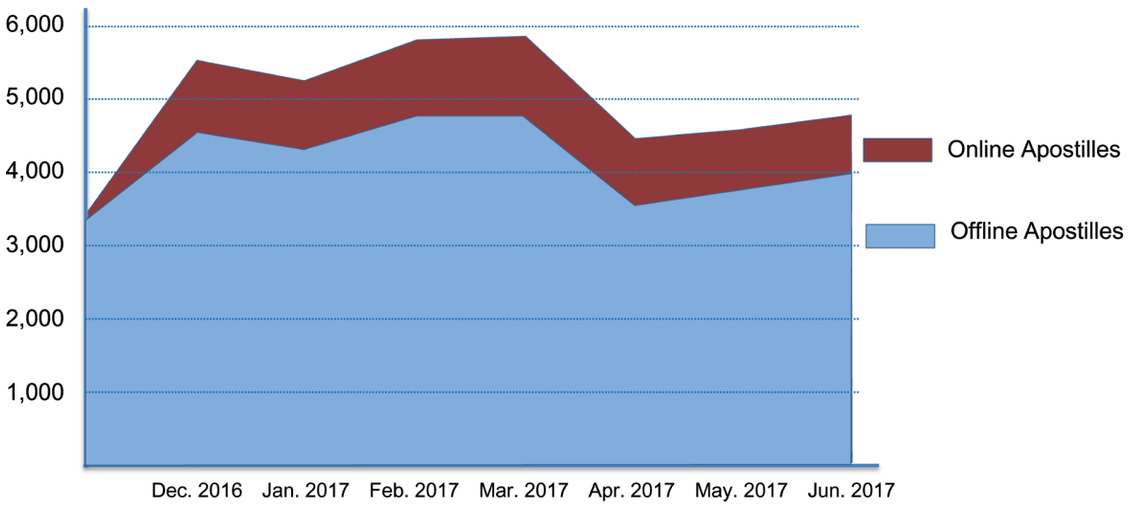
1. Print out apostille

Online Apostille (3/3)

- Over 4,000 apostilles for public document are issued every month.
  - 18% apostilles are issued within fully automated process, on the Internet.

- Koreans can get the apostille and underlying public document abroad.

- Governmental officers in foreign country can verify the authenticity of the apostille on the Internet.



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Destination Country - last 6 months (as of June 2017)

- Apostilles from online are also reliable abroad
  - The main reason is due to e-Register service.

Top 10 countries offline apostille

1	France	4,550
2	Germany	3,178
3	Spain	2,528
4	Russia	1,437
5	U.S.A	1,312
6	Czech	1,242
7	India	897
8	Mexico	826
9	Italy	793
10	Kazakhstan	715

Top 20 countries online apostille

1	France	1,047	11	U.K.	91
2	U.S.A	975	12	Japan	82
3	Germany	846	13	Italy	71
4	Mexico	250	14	Swiss	70
5	Austria	238	15	New Zealand	70
6	Netherlands	161	16	Kazakhstan	69
7	Czech	159	17	Belgium	67
8	Russia	128	18	India	49
9	Spain	110	19	Dominica	44
10	Australia	104	20	Hong Kong	39

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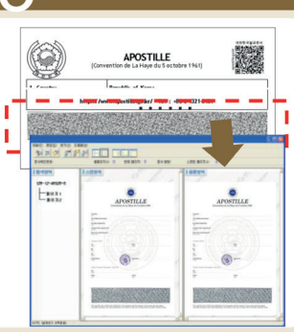
Voice of Overseas Koreans

- Overseas Koreans can save time and money to obtain the apostille for family certificate, etc.
  - It takes 30 minutes to get the apostille for family certificate, marriage certificate, criminal records and other public documents. (including sign up process).
- Foreign governmental officers can easily figure out how to verify the apostille certificate.

1 Advanced Lv. e-Register

2 QR-Code

3 2D Barcode



Challenges & Main IDEA

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Experiences & Challenges of Government of KOREA

- Failure of offer e-Apostille(Digital File Type) service.
  - Digital Signature Act: Re-signing problem
  - Framework Act on Electronic Documents and Transactions : Scanned document is not an original document.

- Necessity for a standard specification for supporting paper & digital types of apostilles at the same time.
  - How to implement an advanced level of e-Register for paper apostilles.
  - How to delivery information of paper apostilles to other country.
  - How to secure its system from cracking (Security)
  - How to comply with domestic law on personal information protection

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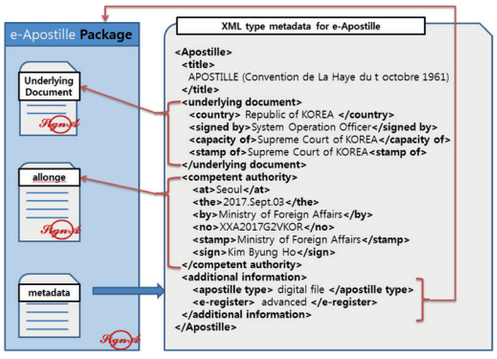
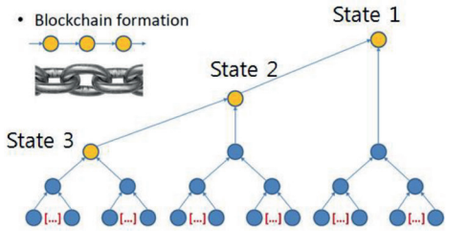
Main concepts of another way for e-Apostille

Package Type e-Apostille



e-Register supported by blockchain



Proposal at 10th e-APP Forum

Package of Apostille

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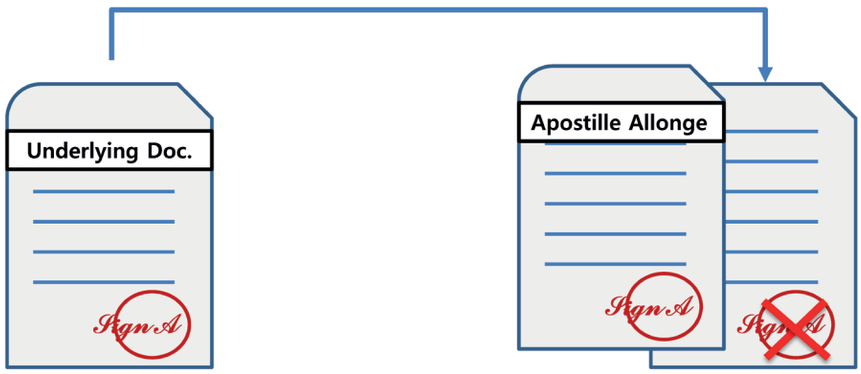
Problem of re-signing for e-apostille (1/2)



Natural born electronic or **scanned** underlying document with e-Signature of issuing authority of a State

e-Apostille needs an e-Signature of its competent authority

But it breaks the e-signature of the issuing authority

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Problem of re-signing for e-apostille (2/2)

Apostille allonge with valid e-signature of its competent authority in contracting state is valid

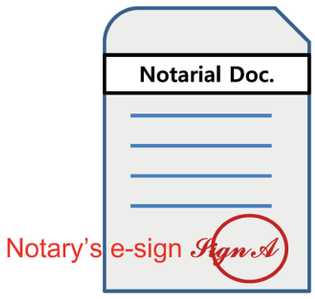
BUT underlying Document does not have a valid e-signature of its issuing authority.

This is NOT a lawful document in our domestic law.

Is this combination of apostille allonge and its underlying document **lawful** ?

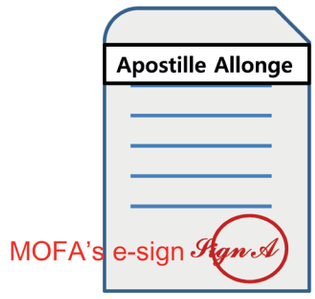
A contracting State must have domestic law deeming the combination of Apostille allonge and underlying document as lawful.

Practical case in Korea



Ministry of Justice provides electronic notarial document with notary's e-signature guaranteed by government.

And its records are fully managed by online service of Ministry of Justice.



Ministry of Foreign Affairs can not attach electronic apostille allonge to e-notarial document.

Because it will invalidate the e-signature of the notary.

And MOFA is not permitted to make a legal document through scanning process.

An e-apostille package is composed of separate files

Apostille Handbook Para. 270

Competent Authorities may employ a variety of methods to "attach" an e-Apostille by logically associating it with the underlying public document. In the case of e-apostilles issued using PDF technology, the e-Apostille may be attached by incorporating the e-Apostille and electronic public document into a single PDF document. **Alternatively, the e-Apostille may be attached to the electronic public document file as a separate file (although in practice it is the electronic public document that is attached to the e-Apostille).**

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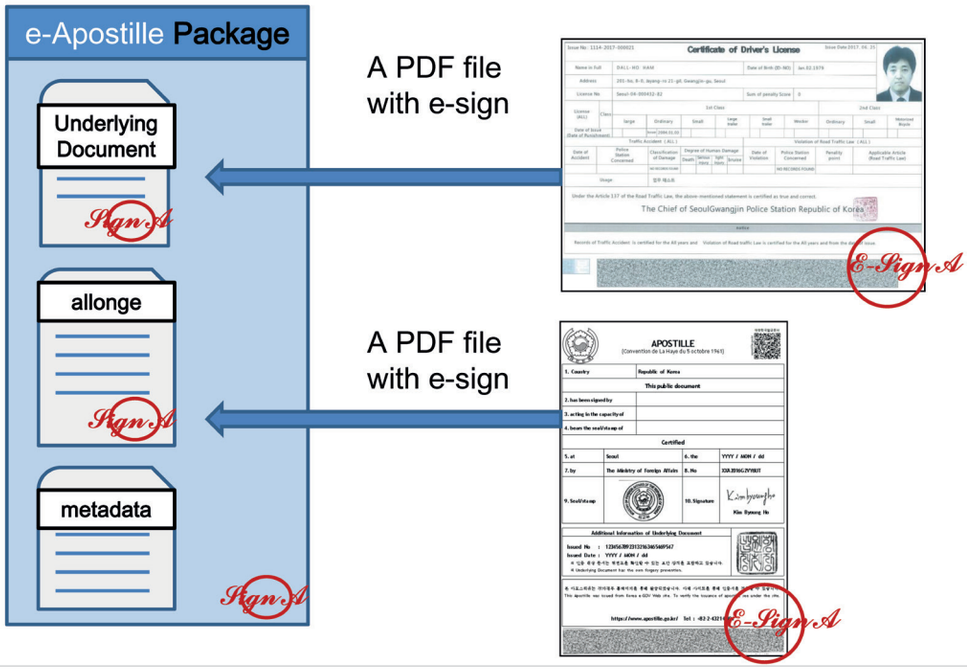
Basic structure of e-apostille package (1/2)

- An e-apostille package is composed of an apostille allonge and its underlying document file.



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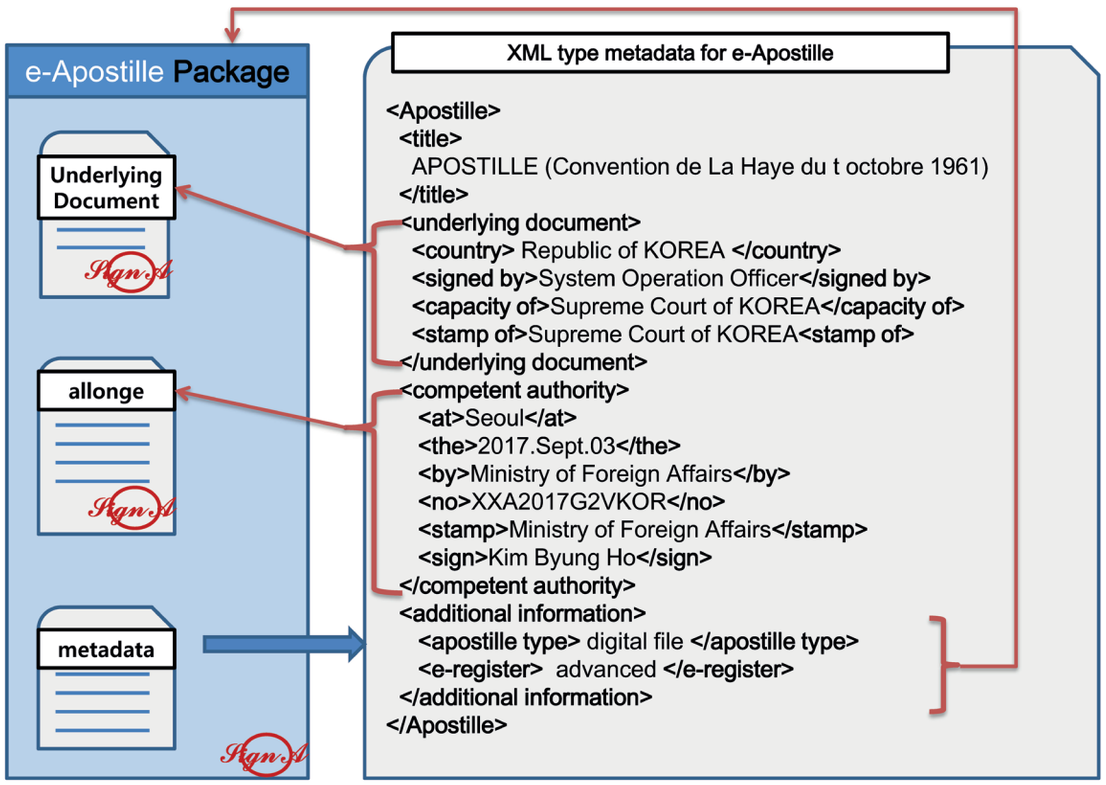
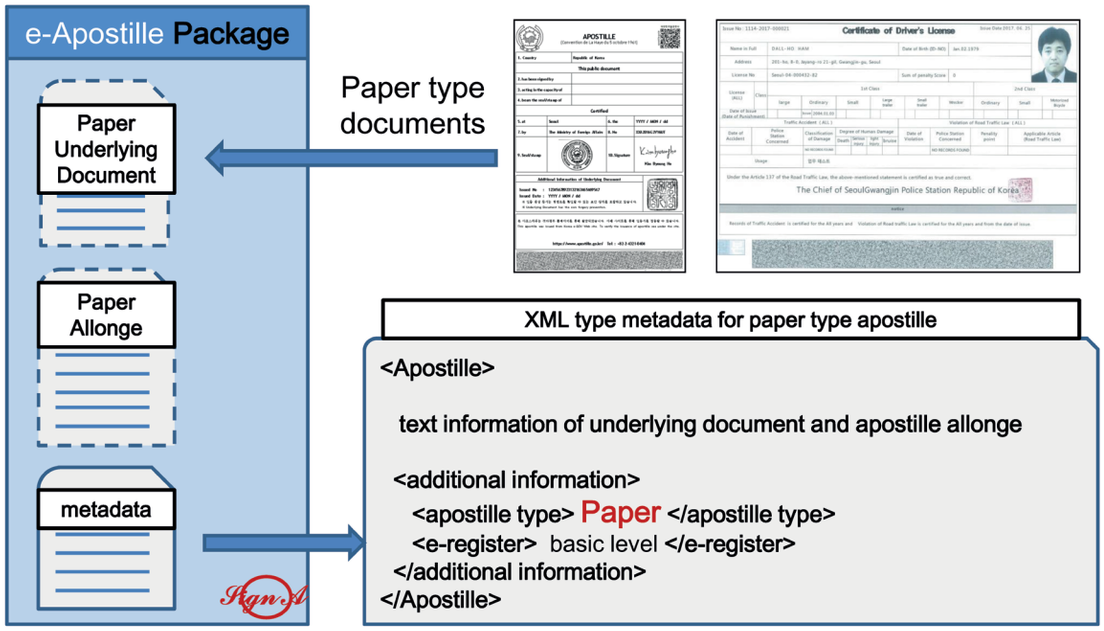
Basic structure of e-apostille package (2/2)



Supporting paper apostille

- e-Apostille package's metadata has information on underlying document and apostille allonge.

- Metadata(machine readable data) can be delivered on the Internet.



Trusted Chain

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Blockchain technology for e-apostille

- InterPARES Trust suggested blockchain technology for e-apostille, on 1st Nov. 2016 at 10th e-APP Forum.
- Blockchain technology can solve the research questions as follows:

Research questions

InterPARES Trust

- Can the data be trusted?
- Can the records from which the data are derived be trusted or even traceable?
- Are digital records complete? Are they authentic?
- How were they generated and by whom (human, computer, program, protocol)?
- How are digital records stored and under what jurisdiction?
- Who has access to digital records? How secure are they?

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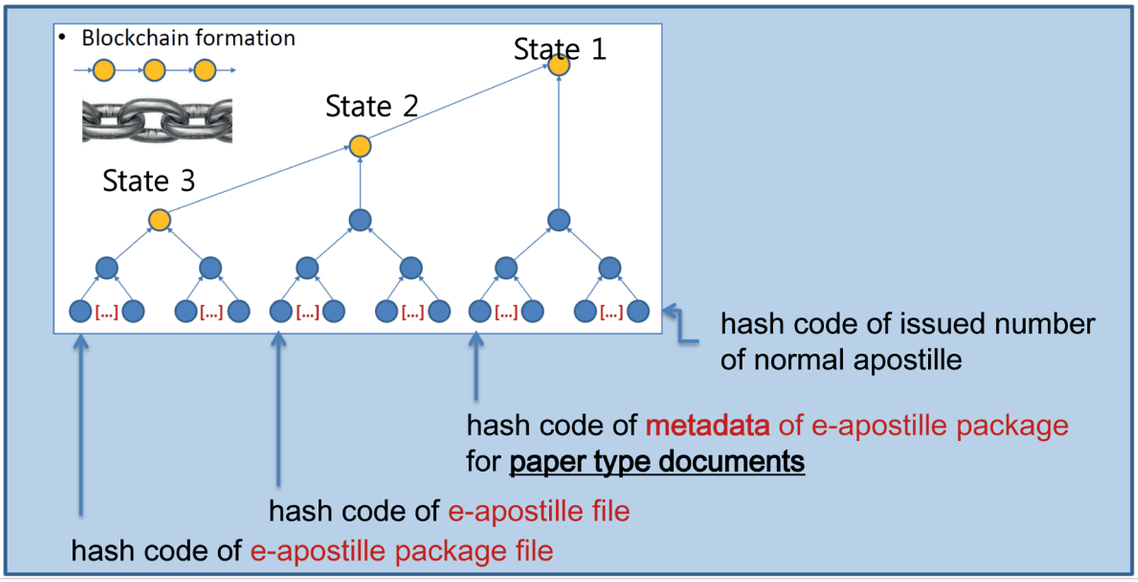
Blockchain technology with e-apostille package

- Blockchain technology is applicable to e-apostille package technology
  - Blockchain technology is applicable to paper-typed documents.
- Blockchain technology can guarantee security of apostille system of each contracting State and can be applied for non-repudiation policy on issuance of apostille.



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- Foreign governmental officers can verify the e-apostille with blockchain hash code.
- Under the Korean Act on Personal Information Protection, to transfer personal information of an individual to foreign country without his/her permission is strictly prohibited, for example, unless there is international agreement between Korea and the foreign country.
- Hash code does not contain personal information.

Hash code of	e-Register Category	Information displayed
Issued number	Basic	"Yes" / "No"
Metadata	Additional	"Yes" / "No" + information on Apostille and / or underlying document (possibly visual check)
e-apostille package e-apostille file	Advanced	"Yes" / "No" + information on Apostille and / or underlying document (possibly visual check) + digital verification of Apostille and / or underlying document

Closing Remarks

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Closing Remarks

- Necessity for application of new sustainable technology, such as blockchain one, to enhance world-wide application of e-Apostille.
- However, it is necessary for each country to employ the technology which complies with its law on digital signature, on electronic documents, and on notary public under its domestic legal framework prior to application of the new technology.

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- **Thank you for your attention**
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HCCH Asia Pacific Week 2017

3rd(Mon) - 6th(Thu) July 2017
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