

IAFL OBSERVERS REPORT OF THE HCCH SPECIAL COMMISSION ON 1965 SERVICE CONVENTION, 1970 EVIDENCE CONVENTION & 1980 ACCESS TO JUSTICE CONVENTION, JULY 2-5, 2024

Introduction

The HCCH convened a Special Commission on the 1965 Service Convention, 1970 Evidence Convention & 1980 Access to Justice Convention on July 2-5, 2024. It was the first such convention in over twelve years.

The purpose of a Special Commission ("SC") is to monitor the operation of the Hague Conventions and to agree upon conclusions and recommendations as to how the operation of the Conventions may be improved in the future. Per Article 8 of the Statute of the Hague Conference on Private International Law:

Article 8

(1) The Sessions and, in the interval between Sessions, the Council, may set up Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.

(2) The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.

There is extensive preparation for each SC. The HCCH published the preparatory documents (described as Preliminary Documents or 'Prel. Doc.'). There are then published a series of draft conclusions and recommendations for discussion at the SC. The Preliminary Documents are only published to the delegates and observers. They remain for viewing in the HCCH secure portal.

Attendees

The SC is attended by delegates from Signatory States to the Conventions, and by observers from other groups. A full list of attendees can be found [here](#).

The IAFL Delegation

The IAFL was represented at the SC by IAFL Vice President Jorge M. Cestero (live) and IAFL European Chapter President Sandra Verburgt. The report is a collaboration of the above named observers. IAFL Fellow Nadia de Araujo was a delegate for Brazil.

For Noting

The IAFL was one of 13 observer international non-governmental organizations at the Special Commission, held at the Peace Palace in The Hague on the dates set forth above. SC celebrated its meeting as the first official meeting of the HCCH with

Spanish as an additional official language. The SC and the HCCH like acronyms. The following portions below are reported within the context of international family law. In large part, the conclusions of the SC are summarized herein.

General Comments

ITEMS APPLICABLE TO ALL SUBJECT CONVENTIONS (IMPLEMENTATION/OPERATION/GENERAL):

- 1) The importance of effective cross-border judicial and administrative cooperation was stressed.
- 2) The SC noted the value of monitoring the Conventions' practical operation through its meetings. The SC acknowledged the benefits in enabling Contracting Parties to exchange their respective experiences in operating the Conventions to promote uniform interpretation and to foster mutual confidence in the application of these Conventions. More frequent SC meetings were recommended (the last one was 10+ years ago).
- 3) Communication and the use of IT was a greatly discussed issue. Salient points included:
 - A. The SC reiterated the importance of effective communication among Contracting Parties. To that end, the SC encouraged relevant authorities to communicate with each other using IT methods, taking into account data security and privacy considerations. The SC agreed that Contracting Parties should include specific transmission and communication requirements in their respective Country C.
 - C. Profiles to ensure that these issues are taken into account by other Contracting Parties. Email addresses must be communicated and kept up to date with the Permanent Bureau (PB).
 - D. The SC encouraged Contracting Parties, where possible, to implement electronic case registers or management systems to track or record requests.
 - E. Jorge Cestero (JC) found it interesting that the EU delegate seemed to suggest that mail or post delivery was, in the eyes of the EU, more secure than electronic transmissions. Sandra Verburgt (SV) comments: Maybe Europeans care more about their personal data. Perhaps this is because electronic transmission may be vulnerable to hacking and, once systems are hacked, access can be gained to the personal data of several individuals - even those not directly involved

in the specific electronic exchange. Postal delivery- even if lost - does not provide access to data for anyone other than the intended recipient. This does not necessarily mean that SV finds that we should not use electronic means of communications. JC found this to be inconsistent with the American experience, as in the US, email is thought of as more secure than post.

F. The term "civil or commercial matters" should be interpreted in a broad, liberal and autonomous manner, without reference exclusively to either the law of the requesting State (or State of origin), or to the law of the requested State (or State of execution), or to both laws cumulatively. The term should be interpreted consistently across both the Service and Evidence Conventions.

G. The SC welcomed the updated Service and Evidence Handbooks, prepared by the PB and considered by the Working Groups. The SC acknowledged the importance and usefulness of these Handbooks. The SC approved, in-principle, the fifth edition of the Handbooks, while noting that further amendments will be made, including incorporating the discussions at the SC meeting and relevant C&R, in cooperation with the Working Groups.

EVIDENCE CONVENTION DISCUSSION:

1) Generally:

A. The SC recalled the importance of the Evidence Convention as a bridge between common law and civil law procedures relating to the taking of evidence in civil and commercial litigation.

B. Contracting parties should review and revisit any reservations they have made, as this would improve the working of the convention.

C. The SC noted that there are still differing views among Contracting Parties as to the mandatory or non-mandatory character of the Evidence Convention. All Contracting Parties, whatever their views as to its mandatory application, priority should be given to the procedures offered by the Convention when evidence located abroad is being sought.

D. The practical operation of the Evidence Convention would be further improved by more timely execution of Letters of Request. The SC also encouraged better communication between Central Authorities at all stages of the execution of a Letter of Request. Any informal communication may be carried out by any appropriate means, including e-mail, while taking into account

data security and privacy considerations.

2) Central Authorities:

A. The SC encouraged Contracting Parties to: **(1)** promptly acknowledge the receipt of Letters of Request; **(2)** promptly respond to enquiries about the status of execution; and **(3)** communicate an indication of steps to be taken for execution.

B. The SC encourages the use of tools that allow the status of requests to be checked online, noting the importance of taking into account data security and privacy considerations.

3) Requests:

A. The SC noted that many Contracting Parties are able to transmit and receive Letters of Request electronically. The SC encouraged Contracting Parties to transmit and receive Letters of Request in electronic form where it is possible to do so.

B. The SC encouraged the practice of many Contracting Parties accepting Letters of Request that have been sent by private courier. [See C&R No 49 of the 2009 SC]

C. The SC welcomed the practice whereby, in response to a Letter of Request, evidence is, where appropriate, returned by electronic means, taking into account data security and privacy considerations.

D. Electronically or otherwise, PLEASE USE THE PROVIDED REQUEST FORM!

E. Requests for evidence should be presented as soon as practically possible so as to provide sufficient time for their execution in the requested State. A discussion of delays in the requested state ensued between several delegates. The discussion was that if it takes more than six (6) months to process the request and obtain the evidence, use of the Convention would be rendered useless.

F. The SC noted the importance of providing an **accurate and complete set of translations** for the expeditious execution of Letters of Request and encouraged Contracting Parties to comply with the translation requirements as set out in Article 4 of the Convention, in order to avoid delays in the execution of Letters of Request.

3) **Arbitration:** As this is a growing area of international family law, it is

important to stress that in some instances, and in accordance with the internal law of relevant Contracting Parties, the Convention has been made available for use in arbitration proceedings. The SC stressed that a request for the taking of evidence under the Convention would have to be presented by the relevant judicial authority of the Contracting Party where the arbitration proceedings take place.

4) Types of evidence:

A. The term "evidence" covers information stored in digital form (electronic evidence), which may include e-mail messages, digital images, and entries in electronic registers. The SC recommended that requests for electronically stored information should be treated in the same manner as requests for hard copy documents. The SC noted that the term "evidence" should be given a uniform meaning in each Chapter of the Convention and interpreted in an autonomous manner. The SC further recommended that **the term "evidence" should be interpreted liberally.**

B. The SC stated that there is **no legal obstacle to the usage of IT** under the Convention. However, the use of some techniques may be subject to different legal requirements in different Contracting Parties (e.g., obtaining the consent of all parties involved in the execution). The Convention should be interpreted to permit, to the greatest possible extent, the use of IT. The SC noted that the use of video-link and similar technologies to assist the taking of evidence abroad is consistent with the current framework of the Convention. The Convention permits a video-link to be used to assist in the taking of evidence by a diplomatic official, consular agent or Commissioner, provided that the practice is not forbidden by the Contracting Party in which the evidence is to be taken, and provided that the relevant permission has been granted.

5) Grounds for refusal of request:

A. There is an exhaustive list of the nature of grounds for refusal set out in Article 12(1).

B. Article 23 is intended to ensure that a request for the production of documents must be sufficiently substantiated, so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding (no fishing expeditions).

ACCESS TO JUSTICE CONVENTION DISCUSSION:

1) The existence and implementation of similar instruments related to access

to justice at regional or bilateral level should not deter States in their consideration of ratifying or acceding to the Convention which is an important component of an efficient system of international legal cooperation. This discussion, led by the delegation from Brazil, was probably aimed at the USA delegates, amongst others. Ha ha.

2) Legal persons (entities) are not considered persons under the Convention.

3) When examining an application for legal aid, the competent authorities of the requested State are invited to take into account the economic situation of the applicant in their State of residence. In this context, the competent authorities of the requesting State may for example transmit any document useful for assessing the economic situation in the State of residence or confirm if the applicant meets the criteria for legal aid in their State of residence.

SERVICE CONVENTION DISCUSSION:

1) Implementation/Nature of Service Convention.

A. One of the fundamental purposes of the Service Convention is to ensure that judicial and extrajudicial documents are brought to the notice of the addressee in sufficient time.

B. The SC confirmed the view that the Service Convention is of a **non- mandatory but exclusive character**, without prejudice to international law on the interpretation of treaties. The SC further noted with great satisfaction that the non- mandatory but exclusive character of the Service Convention has not caused any difficulties in the past 10 years.

C. The SC noted that various States recognize many kinds of extrajudicial documents. The SC invited Contracting Parties to encourage Central Authorities and, where applicable, forwarding authorities to communicate when problems of interpretation arise. The absence of a discussion on service of process in the private sector was noticed by JC.

D. Subject to electronic security concerns, the SC reiterated that the operation of the Convention is to be considered in light of a business environment which relies on IT, and that the **electronic transmission of judicial communications is a growing part of that environment and its use should be encouraged.**

E. Subject to the domestic law of the requested State, requests for service transmitted under the main channel of transmission (the Central Authority) may be executed (signed) by electronic means under Article 5. The SC also noted developments in the use of IT under the alternative channels of Article 10.

F. **Use of the Model Form is mandatory** and the SC encouraged relevant authorities in Contracting Parties to use it with the "Summary" and "Warning". The SC also encouraged the use of the "Summary" and "Warning" of the Model Form where one of the alternative channels of transmission is used.

G. The SC encouraged Contracting Parties to use **electronic versions of the Model Form** and noted that **digital or electronic signatures on requests can generally be accepted**, especially if they are transmitted from a competent forwarding Authority and where applicable can be easily verified.

H. Regarding the **translation requirement** for service under Article 5(1), the SC noted the importance of respecting the various requirements provided in the domestic laws of Contracting Parties.

2) Prompt Execution of Requests.

A. The SC recommended:

1. A request for execution of service should be **executed without undue delay**, and Contracting Parties are encouraged to take measures to further improve the effective operation of the Convention.

2. If a forwarding authority has not received any acknowledgement of receipt of the request for service from the requested State within 30 calendar days following the sending of the request, it is encouraged to contact the Central Authority in the requested State to enquire about the status of the request. Such enquiry should be answered within a reasonable time.

3. Where the request for service cannot be executed as a result of inadequate information or document(s) forwarded, the Central Authority of the requested State is encouraged to contact, as promptly as possible, the forwarding authority in order to secure the missing information or document(s).

4. Whenever the Central Authority of the requested State is considering, under Article 4, whether the request complies with the provisions of the Convention, it is encouraged to take that decision within 30 calendar days of

receipt of the request.

5. If at any time during the execution of the request for service, an obstacle arises which may significantly delay or even prevent execution of the request, the Central Authority of the requested State is encouraged to communicate with the forwarding authority as promptly as possible.

6. If the forwarding authority has not received a Certificate confirming service or non-service from the relevant authority of the requested State within a reasonable time after sending the request, it is encouraged to contact the Central Authority of the requested State to enquire about the status of the execution of the request and the enquiry should be answered within a reasonable time.

7. The Central Authority of the requested State is encouraged to take all reasonable and appropriate steps to execute the request until such time as the forwarding authority advises that service is no longer required. 11 h. The forwarding authority is also encouraged to specify in the request a time after which service is no longer required or inform the relevant authority of the requested State at any time that service is no longer required.

B. The general discussion among the delegates was that 6 months or less for service should be deemed reasonable. The SC encouraged Contracting Parties to provide an average time of execution in their Country Profiles, where possible.

3) The SC recalled the exhaustive nature of the **grounds for refusal** set out in Article 13(1) of the Service Convention and stressed the importance of providing notice of the refusal when the execution of the request is refused.

4) Alternative channels of transmission/service. Article 8 of the Convention provides for the direct service of documents by consuls and diplomatic officials, while Article 9(1) provides for the transmission of documents from one Contracting Party to the authorities of another Contracting Party designated by the latter for this purpose. Article 9(2) only applies in exceptional circumstances. 104 The SC reaffirmed its clear understanding that the term "send" in Article 10(a) is to be understood as meaning "service" **through postal channels**. The SC noted that Article 10(a) **includes transmission and service by e-mail**, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination. The SC reiterated that service by e-mail under Article 10(a) **must** meet the requirements established under Article 1 of the Convention, in particular that the addressee's physical address in the State of destination is known. The SC noted that

e-mail domains are not sufficient for locating the person to be served under Article 10(a).

5) A long and fascinating conversation about **contractual waivers of the Convention** was held. The SC took note of a case reported by one Contracting Party (USA, California case) in which the court found that the parties' agreement to use alternative means of notification constituted a waiver of formal service of process under the applicable law. The SC recalled the Convention's non-mandatory, but exclusive, character, according to which the Convention will only apply if the domestic law of the forum determines that there is occasion to transmit a document for service abroad; if so, one of the available channels under the Convention must be used. The SC also stressed the potentially negative impact of such contractual agreements, namely, in relation to the protection of defendants under Articles 15 and 16 of the Convention, and the recognition and enforcement of judgments in the Contracting Party. The SC further questioned the effect of privately negotiated agreements in light of Contracting Parties' declarations and reservations. NOTE: In the discussions, waivers in arbitration agreements were specifically mentioned. The IAFL delegates, and PB member Ignacio Goicochea discussed **the possible rise of such waivers in premarital and marital agreements.**

6) The SC recalled that the Convention does not address the issue of recognition and enforcement of judgments.

SPECIAL COMMISSION DOCUMENTS

Other Special Commission Documents for reference that can be found on the HCCH website:

[The SC News Item](#)

[The Conclusions and Recommendations of the SC](#)