

October 26, 2017

IAFL OBSERVER'S REPORT OF THE SEVENTH SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE 1980 AND 1996 HAGUE CONVENTIONS, OCTOBER 10-17, 2017

General Comments:

The Special Commission meets every four-five years and is composed of delegates from all Signatory States and observers from non-signatory States; academics and NGO's. Both delegates and observers participate in the discussions but only delegates may vote on resolutions. In practice, decisions are not made by vote but rather a sense of the body. Thus, opinions expressed by non-delegates can directly impact decisions.

The IAFL was the only worldwide organization of practicing attorneys that participated in the SC. The only other NGO of practicing attorneys at the SC was the relatively small U.S.-Mexican Bar Association. The delegates consisted of governmental officials and judges, many attending their first SC. Contrary to previous SC, there were a great deal of new delegates who were not very familiar with the function of the Special Commissions. Furthermore, while previous SCs had appointed groups of experts to examine certain issues and make recommendations, the lack of organizational memory impacted on the delegates reception of the reports.

The sessions were divided according to topics. Most of the topics dealt with the technical aspects of implementing the Conventions and improving the communications between member states. Few of the discussions addressed substantive issues, such as the recent trends to define habitual residence contrary to established case law.

Highlights of the primary topics of discussion are summarized as follows:

- Prof. Nigel Lowe of Cardiff University presented his latest findings regarding the implementation of the Abduction Convention. Of particular interest is his finding that the primary reason for the rejection of return petitions by courts is no longer the Art. 13b exception (26%) but instead rejection of the claim that the habitual residence of the abducted child was in the requesting state (27%). This is a significant change from past findings but unfortunately no discussion occurred as to the possible explanation for this development. It was also found that 70% of appeals were rejected. The overall number of cases have not been reduced in the

five years since the prior survey, but the increase in the population needs to be considered.

- The IAFL referred to its survey and noted the importance of retaining an attorney to commence proceedings at the earliest possible stage.
- Direct judicial communication was discussed. Although some jurisdictions have difficulty with the concept, it was seen as an important tool which should be implemented more widely. Article 15 of the Convention was discussed and discretion was encouraged in its use.
- European Court of Human Rights case law was discussed. At the last SC the case of Neulinger v. Sharuck was noted as being contrary to the Abduction Convention. The Permanent Bureau prepared a statement noting how the subsequent case of X v. Latvia had returned to the principles of the Abduction Convention. IAFL objected to the statement given that X v. Latvia in fact cites the Neulinger case in a positive way. After the ensuing discussion, the statement was withdrawn. It was later revised so as to refer to X only by quoting the language which restates the Court's commitment to implementing the Abduction Convention.
- The role of the Central Authorities was discussed, particularly the nature of the information which they provide and the forms which are used. The IAFL stressed the importance of providing information as to the law regarding parental rights in each jurisdiction, as well as keeping the information required in their forms to be brief and factual.
- Rights of custody and access were discussed. Courts were encouraged to provide for access with the left behind parent during return proceedings. International relocation was discussed. The use of relocation can be one way to reduce incidents of abduction.
- A report on the status of the 1996 Convention was presented. Since the last SC in 2011, 16 new Contracting States have adopted the Convention, bringing the total to 46. The Permanent Bureau will maintain a list of Contracting States that are willing to host new Contracting States to give them an understanding of how the Convention is implemented.
- The SC reviewed the benefits in the use of the 1996 Convention regarding the implementation of the Abduction Convention, particularly in matters of habitual residence, rules on jurisdiction and applicable law. The 1996 Convention provides a response to the issue of delay where the abducting parent hides the location of the child. It provides that the one year period for filing an application during which the courts are not to consider acclimation, begins when the left behind parent knew or *should have known* of the child's location. The Abduction Convention is silent on this matter and the courts have generally not upheld tolling.

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- The SC devoted significant discussion and clear reluctance to obligate the Contracting States to take measures of enforcement not specifically permitted by their domestic laws. It was noted that private agreements between parents must have court ratification if they are to be recognized. There was significant objection to applying the terms of the 1996 Convention to unaccompanied children.
- Much discussion took place regarding the nature of the forms to be used by Central Authorities when providing information to each other. It was emphasized that there should be no burden on CA to provide any information not explicitly required by the Convention.
- A model travel form was discussed in order to simplify travel of minors accompanied by only one parent. There was no agreement as to the necessity of such a form and in fact, some States objected to even posting such a form on the Permanent Bureau website. It was therefore not approved by the SC.
- PB services, primarily INCADAT and INCASTAT were discussed. The lack of funding had brought the PB to a point where INCADAT would have been closed, but funding from the German Government and the law firm of Myles Stockbridge has enabled it to continue. The new INCADAT website was unveiled for the first time at the meeting. It has improved features and is more user friendly. Central Authorities will now be able to designate a person as a correspondent with the ability to directly upload new cases along with their summary. The PB will then be able to review and publish these summaries. The inclusion of the 1996 Convention in the database may be considered in the next two or three years.
- The continued expansion of INCASTAT was recognized as valuable but is subject to the necessary funding. The Government of Canada had made a grant but future funding is required to maintain the project. An electronic Country Profile is considered in order to keep the information updated in the Child Abduction Section.
- The International Hague Network of Judges (IHNJ) was encouraged to continue expanding its activities, including international meetings. The SC approved the development of a documents to inform lawyers and judges about direct judicial communications in specific cases within the context of the IHNJ.
- The previous SC appointed a working group to make recommendations regarding the implementation of Article 13b of the Abduction Convention. There was no discussion regarding the status of this Guide to Good Practice in the making. The SC simply supported the continuing work of the group.
- The SC emphasized the importance of providing reports or information quickly and efficiently under Articles 32, 34 and 35 of the 1996 Convention. Those Articles deal with the cooperation among Central Authorities in cases where protective measures on behalf of children are contemplated. There was also a recognition of

the importance of using simple and rapid procedures for enforcement or recognition of protective orders made in another Contracting State.

- The SC supports the compilation of a report by the PB concerning the operation of Articles 8 and 9 of the 1996 Convention. Those Articles deal with the possible transfer of jurisdiction between Contracting States.
- There was discussion on the recognition and enforcement of family agreements, but no substantive recommendations were made.
- The SC proposed that there be support for the voluntary return of abducted children in cases of court ordered returns. The IAFL pointed out that this could lead to further abductions and that provisions must be made to insure the physical return under supervision. The recommendation was amended to state that voluntary returns be carried out according to court ordered terms.

The conclusions of the Special Commission are generally in the form of guidelines to good practice, and none are binding. The impression of the IAFL observers was that caution was displayed by the delegates when considering commitments by their States to any new undertakings. Very little discussions of substance took place during the sessions. Most of the discussions on substantive issues took place during the informal meetings between delegates and observers.

Recommendations:

It is of particular importance for the IAFL to be present at these Special Commissions. It was pleasing to see that many of the judges knew about our organization, but for a number of them this was their first contact with us. Our contributions to these meetings are also very important as only we bring the perspective of practicing attorneys who have experience in these areas of law.

I suggest that we take a more active role in the activities of the Permanent Bureau between the meetings of the SC. The next SC will be in five years but there will be many meetings during the interim. I raised the idea of a joint meeting of judges and lawyers which is something that has not occurred and is very much needed. Not everyone is enthusiastic about such a meeting, but I believe that we can succeed in bringing this about within the PB framework.