THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: A GLOBAL PLAYER IN A SHRINKING WORLD

by Members of the Permanent Bureau[1]

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1 The Permanent Bureau (PB) is the *Secretariat* of the Hague Conference on Private International Law and is seated in The Hague (The Netherlands). The Permanent Bureau consists of the Secretary General, Hans van Loon (of Dutch nationality), the Deputy Secretary General, William Duncan (Irish/British) and three First Secretaries, Christophe Bernasconi (Swiss), Philippe Lortie (Canadian) and Andrea Schulz (German) (for further information on the PB, see *infra* footnote 16 and accompanying text).

This article has been prepared by Christophe Bernasconi and is made up of contributions by Members of the PB in their personal capacities. We wish to thank Kim Talus, a Finnish post graduate student completing an internship at the PB, for his assistance in preparing an initial draft of this article, and Marion Ely, a legal intern, for reviewing the final draft. The PB may be contacted at secretariat@hcch.net. For more information on The Hague Conference, including updated information on the status of all Hague Conventions, see <http://www.hcch.net>.

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Abstract

This article describes the whole organisation of the Hague Conference on Private International Law, since its origins until today. The article is focused in the main treaties sponsored and administered by the HCCH and makes relation to Colombia's situation within each one of them to conclude that Colombia would worth joining formally the organisation.

Key words
Private international law; Hague Conference on Private International Law, child rights, adoption, abduction.

I. Introduction

A. Why is there Private International Law?

A Columbian wife and her Swiss husband settle in Canada and buy property – a car registered in Venezuela causes an accident in Costa Rica involving victims who are habitually resident in the United States and Mexico – evidence located in France needs to be taken for a judicial proceeding in Australia – in breach of rights of custody attributed to the mother living in Spain, a child is retained by the father in Argentina at the end of a holiday period – a birth certificate issued in Honduras needs to be produced for official use in Germany – a Columbian investor, who has securities issued on five different continents credited to a securities account maintained for it by a Dutch broker-dealer, grants a security interest in the securities

account to a bank in Hong Kong. The list of possible examples is endless. With an increasing number of individuals or families moving from one country to another for a variety of purposes, and more and more international commerce being carried out by way of dealings between parties based in different States, the importance of Private International Law cannot be overestimated. Which courts should have jurisdiction to hear a cross-border dispute? Which law should apply to legal questions raised by factual situations that are linked to a variety of States? What about the recognition and enforcement of a judgment in other States? And how can the authorities of States effectively co-operate to be of mutual assistance in these matters? These are, in a nutshell, the crucial questions of Private International Law.

Private International Law (PIL) is not substantive law. For example, it does not provide the substantive answer to the question whether or not a manufacturer is liable for an injury caused to another person by one of its product, nor does it determine whether or not a parent has custody over a child, or what conditions must be fulfilled to get a perfect interest in securities taken as collateral. The answers to these questions are provided by the substantive law designated by the relevant PIL or 'conflict rules'. PIL thus merely acts as a pointer or "traffic signal", designating the legal order that governs a private law problem arising from a factual situation which is connected with more than one country. But if each State were to establish its own set of traffic signals, they might easily point into different directions, leading to conflicting results. This is where the mission of the Hague Conference on Private International Law is pivotal and where the extraordinary vision of its founding figure, TOBIAS M.C. ASSER[2], must be saluted.

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2 TOBIAS MICHAEL CAREL ASSER (28 April 1838 – 29 July 1913) was born in Amsterdam into a family with a tradition in the field of law, both his father and his grandfather having been well-established lawyers and his uncle having served as the Dutch Minister of Justice. He studied law in Amsterdam, taking a doctor's degree in 1860. In that same year, the Dutch government appointed him a member of an

B. WHY IS THERE A HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW[3]?

At a time when cross-border issues were peripheral at best, TOBIAS M.C. ASSER believed that the differences in the States' legal order (the "conflict of laws") could best be solved by international conferences which would agree on common solutions ("pointers") in an international treaty to be implemented by each participating State. It is against this background that ASSER, in 1893, persuaded the Dutch government to call the first conference of European powers to work out a codification of PIL[4]. The Hague Conference on Private International Law was born. Subsequent conferences, again all presided over by ASSER, were held in 1893, 1894, 1900,

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international commission which was to negotiate the abolition of tolls on the Rhine River. He was one of the founders of the *Institut de droit international* (1873). ASSER accepted a position as legal adviser to the Netherlands Ministry of Foreign Affairs in 1875; became a member of the Council of State, the highest administrative body in the government, in 1893; served as president of the State Commission for International Law beginning in 1898; acted as his country's delegate to the Hague Peace Conferences of 1899 and 1907, there urging that the principle of compulsory arbitration be introduced in the economic area; held a post as minister without portfolio from 1904 until his death. Noted as a negotiator, ASSER was involved during this period from 1875 to 1913 in virtually every treaty concluded by the Dutch government. One of his triumphs was the securing of a seat for Spain and for The Netherlands beside France, England, Germany, Austria, Italy, Russia, and Turkey on the Suez Canal Commission, the body that drew up the Suez Canal Convention of 1888 guaranteeing the canal's neutrality. Noted also as an arbiter of international disputes, he sat as a member of the Permanent Court of Arbitration that heard the first case to come before that court - the Pious Fund dispute between the United States and Mexico (1902). In 1911, ASSER was the laureate of the Nobel Peace Price.

3 In French (which, together with English, is the official language of the Hague Conference), the name of the organisation is Conférence de La Haye de droit international privé. Hereinafter, the organisation is referred to as HCCH. In Spanish, the name is *Conferencia de La Haya de derecho internacional privado*. Subject to available resources, significant efforts are undertaken by the Permanent Bureau to make relevant documentation of the organisation available in Spanish, too.

4 ASSER's initiative to codify the rules of private international law through negotiations among States built on earlier attempts initiated by *Pasquale de Mancini* from Italy, but which did not have the expected success.

and 1904. These conferences led to the first Hague Conventions on civil procedure and family law, including matters relating to marriage, divorce, legal separation, and guardianship of minors[5]. ASSER also proposed that other nations follow The Netherlands' example by appointing permanent commissions to prepare the work of the Conferences. "By doing this", he said in 1900,

> "the foundations will be laid for an international organization which, without interfering with the complete autonomy of the nations in the domain of legislation, would contribute greatly to the codification of international civil law within the not too distant future"[6].

The organisation's future was interrupted by the outbreak of the two world wars[7]; but in 1951, the HCCH resumed its work and was established as a permanent intergovernmental organisation (without changing its name and by setting up a Secretariat, *i.e.* the Permanent Bureau)[8]. Today, the HCCH has 64 Member States[9]

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5 *Hague Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage*; *Hague Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions as regards to divorce and separation*; *Hague Convention of 12 June 1902 relating to the settlement of guardianship of minors; Hague Convention of 17 July 1905 relating to civil procedure*; *Hague Convention of 17 July 1905 relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates*; *Hague Convention of 17 July 1905 relating to deprivation of civil rights and similar measures of protection.* As all of these early Conventions have been supplemented by modern instruments, the vast majority of States that were party to these Conventions have explicitly denounced them.

6 Quote from the Presentation Speech by JØRGEN GUNNARSSON LØVLAND, Chairman of the Nobel Committee, on 10 December 1911.

7 In between the World Wars, two Hague Conferences were held (in 1925 and 1928 respectively), but as the general climate for international harmonization of laws was not very favourable, these Conferences did not lead to any concrete results.

8 This Seventh Session gave the Hague Conference its Statute, the text of which is available at <http://www.hcch.net>, under the headings "Conventions" and "1".

9 The following 64 States are currently Members of the Conference (15 April 2004): Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina,

from all continents and representing various legal cultures and systems; there are currently 118 States party to at least one of the 35 Hague Conventions[10] adopted since 1951[11, 12]. Against this background, it is clear that Asser's prediction has come true and that the HCCH has indeed firmly established itself as one of the main global actors in the field of harmonisation of laws. It is at the HCCH where, based on workable consensus, bridges are built among different legal systems, thus allowing legal orders to interconnect while avoiding interferences with their substantive rules: *harmonisation that respects diversity*.

In the following sections of this article, we shall first briefly outline the organizational structure of the HCCH (II.), before presenting the main features of some of the most significant and most successful Hague Conventions in the fields of judicial co-operation, family law and finance law (III.). Finally, we will portray two Conventions that are currently under preparation by the HCCH (IV.).

Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malaysia, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela. For a full and updated list of all the HCCH-Member States, see <http://www.hcch.net>, under the heading "Member States". It is remarkable to note that the number of Member States has increased significantly in the recent past (27 Member States in 1980; 47 in 2001; 64 in mid-2004), thus reflecting the continuing and indeed growing importance of the HCCH's global mission.

10 For the full list of all the Conventions adopted under the auspices of the HCCH, see <http://www.hcch.net>, under the heading "Conventions".

11 For the full and updated status of all Hague Conventions, see <http://www.hcch.net>, under the headings "Status", and "Signatures and Ratifications".

12 *Columbia* is not yet a Member of the HCCH, but a party to the *Apostille* Convention (see below under III.A.1.), the *Child Abduction* Convention (see below under III.B.1.) and the *Intercountry Adoption* Convention (see below under III.B.2.).

II. THE ORGANIZATIONAL STRUCTURE OF THE HCCH

The organs of the Hague Conference are: Diplomatic Sessions, which –in principle– are held every four years and at which the final text of a new Convention is adopted and decisions relating to the organisation's future work programme are taken[13]; the Special Commission on General Affairs and Policy of the Conference, which meets on a yearly basis and oversees the work carried out by the organisation, discusses matters of general interest and strategic issues[14]; the Council of Diplomatic Representatives approving the budget[15]; Special Commissions (which are basically experts meetings) discussing, negotiating and drafting new Conventions and examining the practical operation of existing Conventions[16]; the Permanent Bureau (Secretariat)[17], which carries out the basic research on new topics included on the agenda of the Conference,

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13 The most recent Diplomatic Session was held in December 2002 and adopted the final text of the *Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary* (see below under III.C). The meeting in December 2002 ended the 19th Diplomatic Session of the HCCH.

14 The most recent of these meetings was held from 6-8 April 2004; for more information, see <http://www.hcch.net>, under the heading "Work in Progress". One of the main issues discussed during this meeting was the possibility for the European Community and other Regional Economic Integration Organisations to become a Member of the HCCH.

15 The regular budget of the organisation is approximately •2,100,000; a supplementary budget with voluntary contributions accounts for approximately •500,000.

16 The number of Special Commission meetings needed to complete a Convention varies depending on the nature of the project and the issues raised. On the monitoring of existing Conventions, see also the comments in footnote 17, *infra*.

17 For the current composition of the Permanent Bureau, see footnote 1. Overall, the Permanent Bureau is currently composed of approximately 14 FTEs (Full Time Equivalents) accounted for in the regular budget. In addition to the permanent legal and administrative staff, the Permanent Bureau is further composed of several legal officers (some of whom are paid through the voluntary supplementary budget) and interns, who wish to develop their skills in the field of PIL and to participate in the work of the HCCH. In the recent past, the Permanent Bureau has also had visiting experts on secondments from Member States.

assists Member States and observers in the negotiations of Conventions and their subsequent monitoring, and answers requests for information submitted by government officials, practicing lawyers, private individuals and other governmental or non-governmental organisations[18].

III. SYNOPSIS OF THE MOST IMPORTANT EXISTING HAGUE CONVENTIONS

Following ASSER's early vision, the principal means used by the HCCH to develop and harmonise PIL is through the negotiations of international treaties, The Hague Conventions, to which both Member States and non-Member States may subsequently become a party[19].

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18 Over the past years, the workload of the Permanent Bureau has increased significantly, in particular with respect to the answering of requests for information (the number of which has increased substantially as more and more States become parties to Hague Conventions) and the monitoring of existing Conventions. The collecting and analyzing of case law and current practice developing under existing Conventions, the maintaining of databases such as INCADAT (a database containing case law related to the Child Abduction Convention, see *infra* III.B.1.), and preparing of Guides to Good Practice and other Handbooks takes more than half of the Permanent Bureau's resources. The monitoring of the practical operation of existing Conventions is a key function of the HCCH. Special Commission meetings on the practical operation of Conventions bring together government representatives, judges and practitioners. These meetings are an invaluable forum for the exchange of information and adoption of specific recommendations and conclusions; they help to promote uniform interpretation of the Conventions, foster mutual confidence and enhance the mutual benefits for States parties to exchange their respective experiences in operating the Conventions. Thus, Contracting States are both beneficiaries and partners in this continuing enterprise.

19 There have been discussions in the past of the use of non-binding instruments in certain areas. On rare occasions, the HCCH has actually used and adopted a non-binding instrument, the most important one being the Declaration relating to the scope of the *Hague Convention of 15 June 1955 on the law applicable to international sales of goods*, which was adopted by the Fourteenth Session in 1980. This declaration considered that the interests of consumers were not taken into account when the Convention was negotiated and declared that the Convention of

The Hague Conventions may be divided into three categories: (1) Conventions relating to judicial and administrative co-operation, (2) the Children's Conventions and (3) other Conventions, dealing in particular with commercial and finance law. Generally speaking, the Conventions on judicial and administrative co-operation are easier to absorb by States than other Conventions, which often require them to revise their domestic rules of private international law or require other implementing legislation[20].

A. CONVENTIONS RELATING TO JUDICIAL AND ADMINISTRATIVE COOPERATION

A first key group of Hague Conventions relates to the promotion of judicial and administrative co-operation. This group includes essentially four Conventions: the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention), the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention), the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Taking of Evidence Convention), and the *Hague Convention of 25 October 1980 on International Access to Justice* (Access to Justice

1955 did not prevent States parties from applying special rules on the law applicable to consumer sales.

20 In general, the Conventions on conflict of laws (*i.e.*, dealing with the question of applicable law) have found wider acceptance in civil law countries than in common law countries, which traditionally favour a jurisdictional approach to conflict of laws problems. This, however, is somewhat of a sweeping statement. Several common law countries have joined Conventions dealing with the applicable law, such as the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, and the *Hague Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions*. Also, the most recent Convention adopted under the auspice of the HCCH, the Hague Securities Convention (see *infra* under III.C.), which is not yet in force, is expected to attract a vast number of common law States.

Convention). The practical operation of the Apostille, Service and Taking of Evidence Conventions has recently been examined during a Special Commission meeting held in October/November 2003. The meeting made special notice of the continuing practical importance of these three Conventions. It also emphasized that these Conventions operate in an environment subject to important technical developments. Although this evolution could not be foreseen at the time of the adoption of these Conventions, it was noted that the spirit and letter of the Conventions do not constitute an obstacle to the use of modern technology[21].

1. The Apostille Convention

With currently 79 States parties, the Apostille Convention is one of the greatest successes of the HCCH[22]. The main purpose of this Convention is to *facilitate the circulation of public documents*

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21 The meeting unanimously adopted *82 Recommendations and Conclusions* which are available at <http://www.hcch.net>, under the headings "Work in Progress", "Special Commissions on the practical operation of existing Conventions", and "Legalisation, Service & Evidence".

22 As of 15 April 2004, the following 79 States were Parties to the Apostille Convention: Andorra, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, China - Special Administrative Regions of Hong Kong and Macao only, *Colombia*, Croatia, Cyprus, Czech Republic, Dominican Republic, El Salvador, Estonia, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Grenada, Hungary, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Marshall Islands, Mauritius, Mexico, Monaco, Namibia, Netherlands, New Zealand, Niue, Norway, Panama, Portugal, Romania, Russian Federation, Saint-Lucia, Samoa, San Marino, Serbia and Montenegro, Seychelles, Slovakia, Slovenia, South Africa, Spain, Saint Kitts & Nevis, Saint Vincent and the Grenadines, Suriname, Swaziland, Sweden, Switzerland, Tonga, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United States of America, Venezuela. Two additional States are due to join the list of States parties shortly: Albania (on 9 May 2004) and Honduras (30 September 2004). For a full and updated list of States parties to the Apostille Convention, see <http://www.hcch.net>, under the headings "Conventions" and "12".

issued by a State party to the Convention and to be produced in another State party to the Convention[23]. To achieve this goal, the Convention first abolishes the cumbersome and frequently costly formalities of legalisation, and secondly, establishes a device based on only one formality, *i.e.*, the issuance of a certificate in a prescribed form entitled "Apostille". The Apostille is delivered by the competent authority[24] of the State where the document originates. The requirement of compliance to the model annexed to the Convention allows a fast review of the Apostilles' regularity. The Apostille is placed on the document itself or on an "allonge" and the competent authority is required to keep a register in which it records the Apostilles that it has issued. This register may be inspected by any person wishing to ascertain whether the entries in the Apostille correspond with those in the register. This allows the detection of false signature or false information that might be placed upon the Apostille. It is also important to stress that the only effect of an Apostille is to certify the authenticity of the signature, the capacity

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23 The Convention applies only to *public documents*. These are documents emanating from an authority or official connected with a court or tribunal of the State (including documents issued by an administrative or constitutional court or tribunal, a public prosecutor, a clerk or a process-server); administrative documents; notarial acts; 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. The main examples of public documents for which Apostilles are issued in practice include birth, marriage and death certificates; extracts from commercial registers and other registers; patents; court rulings; notarial acts (including attestations of signatures); academic diplomas issued by public institutions (in the case of diplomas issued by private institutions, the Apostille may only be issued to certify the signature and capacity of the notary when the diploma is authenticated by a notary, or to certify the signature and capacity of the signatory of a true copy); etc. On the other hand, the Convention does applies neither to documents executed by diplomatic or consular agents nor to administrative documents dealing directly with commercial or customs operations (*e.g.*, certificates of origin or import or export licenses), such documents being in any event exempt from legalisation in most cases.

24 For a list of the competent authorities designated by the States parties, see <http://www.hcch.net>, under the headings "Conventions", "12", and the respective State.

in which the person signing the document has acted, and where appropriate, the identity or stamp which the document bears. In other words, an Apostille does not relate to the content of the public document to which it is attached.

The Apostille Convention is of great practical importance for the States parties. According to the information gathered during a Special Commission, about 1,500 Apostilles are issued *per day* in *Colombia* mainly for birth certificates, diplomas, judicial and police documents[25]. Far over 1 million Apostilles are issued per year in the world. The Convention has demonstrated its great usefulness even for States not requiring legalisation in their domestic law: the citizens of these States enjoy the benefits of the Convention whenever they intend to produce a domestic public document in another State which, for its part, requires authentication of the document concerned.

Considering the usefulness of the Hague Apostille Convention, the recent Special Commission meeting mentioned above (*supra*, A.) recommended that a practical Handbook be prepared by the Permanent Bureau. Furthermore, it was decided that work towards the development of techniques for the generation of electronic Apostilles should be undertaken.

2. The Service Convention

The Service Convention sets out the means by which judicial or extrajudicial documents are to be transmitted abroad in order to be served. The Convention only applies as between States

25 See the responses supplied by Colombia (and many other States) to a questionnaire on the Apostille Convention prepared by the Permanent Bureau prior to the Special Commission on the practical operation of the Apostille, Service and Evidence Conventions and which was held in October/November 2003; the questionnaire and the replies are available at <http://www.hcch.net>, under the headings "Work in Progress", "Special Commissions on the practical operation of existing Conventions", and "Legalisation, Service & Evidence".

parties[26] and has three fundamental objectives: (1) to simplify the method of transmission of documents to be served from the State of origin to the State of destination; (2) to establish a system which ensures, in so far as possible, that a recipient is given actual notice of the document served in sufficient time to enable him or her to arrange for a defence; and (3) to assist in proving that service was validly effected in the State of destination, by means of the certificates contained in a standard form.

It should be noted that the Convention deals only with the transmission of documents from one State to another; it does not deal with substantive rules relating to the actual service, although, certain States parties have adapted their internal rules in this regard in order to further the achievement of the Convention's objectives referred to above.

a. THE PRINCIPAL METHOD OF TRANSMISSION

The Convention provides for a principal method of transmission, whereby the authority or official competent under the law of the requesting State transmits the document to a Central Authority of the requested State (see diagram in Appendix 1 to this article). The request for service so forwarded must be in the form annexed to the Convention, and must be accompanied by the documents to be served. The documents must be translated into the language of the State of destination if this State so requires. The use of a standard

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26 As of 15 April 2004, the following 50 States were Parties to the Service Convention: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belarus, Belgium, Botswana, Bulgaria, Canada, China (principal territory), China - Special Administrative Regions of Hong Kong and Macao, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Republic of Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malawi, Mexico, Netherlands, Norway, Pakistan, Poland, Portugal, Rumania, Russian Federation, San Marino, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, USA, Venezuela. For a full and updated list of States parties to the Service Convention, see <http://www.hcch.net>, under the headings "Conventions" and "14".

form allows the prompt and uniform processing of requests[27]. The Central Authority in the requested State will perform the request for service either by informal delivery of the document to an addressee accepting delivery voluntarily, or in accordance with the methods prescribed by that State's internal law, or using a particular method requested by the applicant, subject to certain conditions (art. 5). In all cases, a certificate of service in the form annexed to the Convention is returned to the applicant. The effect of the certificate is to raise a presumption of valid service.

b. Alternative methods of transmission

The Convention also provides for several alternative methods of transmission (see the diagram in Appendix 2 to this article), such as transmission through consular or diplomatic channels (direct or indirect), postal channels, or through judicial officers, officials or other competent persons of the State of destination. The latter permits, in particular, the transmission of documents to be served from one process-server *(huissier de justice)* to another. The Convention entitles a State to object to the use of some of these alternative methods of transmission.

c. Protection of the plaintiff's and defendant's interests

Regardless of the method of transmission used, the Convention contains two key provisions intended to protect the defendant both at the stage of the proceedings and when a judgment has been given in default. Articles 15 and 16 provide for a sanction requiring a

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27 The standard (pre-printed) terms in the model form shall in all cases be written either in French or in English; they may also be written in the official language (or in one of the official languages) of the State in which the documents originate (art. 7(1)). The *corresponding blanks* shall be completed either in the language of the State addressed or in French or in English (art. 7(2)).

court to suspend judgment (art. 15) or allow relief from the expiry of the period for appeal (art. 16), subject to certain requirements being met. The Convention thereby seeks to reconcile the respective interests and fundamental rights of the plaintiff and defendant.

d. HANDBOOK ON THE PRACTICAL OPERATION OF THE CONVENTION

The implementation and operation of the Service Convention is also facilitated by the existence of a Practical Handbook. A new edition of the Handbook is scheduled for the near future. A provisional version is already available for consultation on the Hague Conference's website[28].

3. The taking of evidence convention

The Taking of Evidence Convention establishes methods for the taking of evidence abroad in civil or commercial matters. The Convention, which applies only between States parties[29], provides

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28 See <http://www.hcch.net>, under the headings "Conventions" and "14", where more information relating to the Service Convention is available.

29 As of 15 April 2004, the following 40 States were Parties to the Evidence Convention: Argentina, Australia, Barbados, Belarus, Bulgaria, China (principal territory), China (Special Administrative Regions of Hong Kong and Macao only), Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Italy, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Kingdom, United States of America, Ukraine, Venezuela. For a full and updated list of States parties to the Evidence Convention, see <http://www.hcch.net>, under the headings "Conventions" and "20". It has to be noted that under art. 39, a State which was not represented when the Convention was adopted (Eleventh Session of the HCCH) but which is a Member of the HCCH or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice, may accede to the Evidence Convention; such an accession, however, has effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession (art. 39(4).

for the taking of evidence by means of letters of request, and for the taking of evidence by diplomatic or consular agents and by commissioners[30]. This Convention's importance lies in that it provides effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence.

a. LETTERS OF REQUEST

A judicial authority in one State party (requesting State) may by means of a letter of request to the competent authority of another State party (requested State) request it to obtain evidence. For such purpose, the judicial authority of the requesting State transmits the request for assistance to a Central Authority in the requested State. The latter then forwards the letter of request to the competent authority in its country for execution. The law of the requested State applies to execution of the letter of request. In order to expedite and facilitate execution, the Convention provides in particular for an option to allow the participation of members of the judicial personnel of the requesting authority, the parties and/or their representatives, in executing the letter of request; the requesting authority may also request the use of a special method or procedure for execution of the letter of request, provided that this is not incompatible with the law of the requested State or impossible of performance. Certain States have even amended their domestic law in order to permit techniques for the execution of requests that are customarily used in other States (*e.g.*, the drafting of verbatim transcripts of testimony, the possibility of cross-examination, etc.).

A requested authority unable to perform the letter of request itself may appoint a suitable person to do so (this applies in particular when the request is directed at common law countries;

30 Art. 33 provide an option for any State to exclude wholly or in part the application of the provisions of Chapter II relating to diplomatic and consular agents and commissioners.

the court addressed may then be unable to perform the letter of request itself because according to its procedure, it is up to the parties to collect the evidence). The person to be questioned or requested to discover documents may assert a privilege or duty to refuse to give evidence under either the law of the requesting State or the law of the requested State. A letter of request shall be executed expeditiously and may be refused only in specific cases. Last, while execution of the letter of request may not give rise to any reimbursement of taxes or costs, the requested State may require the requesting State to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the requesting State.

b. DIPLOMATIC OR CONSULAR AGENTS, COMMISSIONERS

The Convention also allows an option for diplomatic or consular agents and commissioners to take evidence, subject to certain requirements. A State party to the Convention is entitled to make the taking of evidence by such persons subject to prior permission. The representative or commissioner may take evidence, insofar as the proposed act is compatible with the law of the State of execution and with the permission granted. Subject to the same requirements, he or she may also have power to administer an oath or take an affirmation. The consular or diplomatic agent or commissioner may not exercise any compulsion against the person concerned by the request. The Convention provides, however, that States may, by declaration, authorize foreign persons permitted to take evidence to apply to the competent authority for appropriate assistance to obtain the evidence by compulsion. Unlike letters of request, the taking of evidence is as a rule performed in accordance with the forms required by the law of the Court before which the action is initiated. However, if the recommended forms are not permitted by the law of the requested State, they may not be used. Cross-examination, during which the witness is questioned by counsels for both parties, is also permitted. Last, the person required to give

evidence may, in the same way as pursuant to a letter of request, assert a privilege or duty to refuse to give evidence.

c. PRE-TRIAL DISCOVERY (ART. 23)

Pre-trial discovery is a procedure known to common law countries, which covers requests for evidence submitted after the filing of a claim but before the final hearing on the merits. The Convention permits States parties to ensure that such a request for discovery of documents is sufficiently substantiated so as to avoid requests whereby a party is merely seeking to find out what documents might be in the possession of the other party to the proceedings.

d. HANDBOOK ON THE PRACTICAL OPERATION OF THE CONVENTION

The implementation and operation of the Taking of Evidence Convention will be facilitated further by the publication of a new edition of a Practical Handbook that the Permanent Bureau expects to issue at the beginning of 2005[31].

4. THE ACCESS TO JUSTICE CONVENTION

The Access to Justice Convention is intended to facilitate, for any national or resident of a State party to the Convention, access to justice in any other State party[32] in which judicial proceedings are

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31 More information relating to the Evidence Convention is available at <http://www.hcch.net>, under the headings "Conventions" and "20".

32 As of 15 April 2004, the following 22 States were Parties to the Access to Justice Convention (States in which the Convention has entered into force): Belarus, Bosnia and Herzegovina, Bulgaria, Cyprus, Croatia, Czech Republic, Estonia, Former Yugoslav Republic of Macedonia, Finland, France, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland. For a full and updated list of States parties to the Access to

to be or have been commenced. The Convention's purpose, accordingly, is *not to harmonize domestic laws, but rather to ensure that the mere status as an alien or the absence of residence or domicile in a State are not grounds for discrimination in access to that State's justice.*

The Access to Justice Convention, seen as a supplement to the Service and Taking of Evidence Conventions, provides in relations between States parties for non-discrimination with respect to legal aid including the provision of legal advice, security for costs, copies of entries and decisions, and physical detention and safe-conduct. The three Conventions combined accordingly cover all the main international aspects relating to co-operation in civil and commercial proceedings, as covered by the *Convention of 1 March 1954 on Civil Procedure* that they were intended to replace.

a. LEGAL AID

The Convention establishes in particular: (1) the entitlement of nationals of any other Contracting State, and of persons having, or formally having had, their habitual residence in such other State regardless of nationality, to legal aid in each of the Contracting States, on the same conditions as if they were themselves nationals of and habitually resident in that State (art. 1); (2) the entitlement of all such persons to legal advice, provided that they are present in the Contracting State where advice is sought (art. 2); (3) the entitlement of all such persons, when pursuing their proceedings in any other Contracting States, to free service of documents, Letters

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Justice Convention, see <http://www.hcch.net>, under the headings "Conventions" and "29". It has to be noted that under art. 32, a State which was not a Member of the HCCH when the Convention was adopted (Fourteenth Session) or which was not invited to participate in its preparation, may accede to the Convention; such an accession, however, has effect only as regards the relations between the acceding State and such Contracting States which have not raised an objection to the accession within twelve months (art. 32(3)).

of Request and social enquiry reports, and to legal aid to secure the recognition and enforcement of the decision obtained (art. 13); (4) an expeditious and economical method for transmission between Contracting States of applications for legal aid, in particular by means of a forwarding authority which is required to assist the applicant and a receiving Central Authority which shall determine or obtain a determination upon the application. The use of a standard form allows a speedy and uniform processing of applications.

b. SECURITY FOR COSTS AND ENFORCEABILITY OF ORDERS FOR COSTS

The Convention also provides for: (1) an extension of the benefit of exemption of security required of plaintiffs or parties by reason only of their foreign nationality or of their not being domiciled or resident in the Contracting State in which proceedings are commenced, to all individuals or legal entities having their habitual residence in another Contracting State; and in return for this benefit; (2) a speedy and economical procedure, similar to that mentioned above (under (a)(4)), for orders for costs issued in one Contracting State against any party exempted from providing a security under the Convention to be rendered enforceable free of charge in any other Contracting State.

c. COPIES OF ENTRIES AND DECISIONS

The Convention grants nationals of a Contracting State and persons having their habitual residence in a Contracting State a right to obtain copies of or extracts from entries in public registers and court decisions in any other Contracting State, on the same terms and conditions as its nationals.

d. PHYSICAL DETENTION AND SAFE-CONDUCT

Again in order to avoid discrimination against any person having the nationality of or habitually resident in another Contracting State, the Convention:

1) prohibits the application against such a person of arrest and detention in civil or commercial matters, either as a means of enforcement or simply as a precautionary measure, in circumstances where they cannot be applied against nationals;

2) provides that such a person, when summoned by name by a court or tribunal or by a party with the leave of a court of tribunal, to appear as a witness or expert in proceedings before the courts or tribunals of another Contracting State, may not, for a limited period, be prosecuted, detained or subjected to any other restriction in his or her personal liberty on the territory of that State in respect of any act or conviction occurring before his or her arrival in that State.

It is to be noted that the Access to Justice Convention allows States parties to reserve the right to exclude the application of certain provisions of the Convention, subject to conditions (art. 28).

B. THE CHILDREN'S CONVENTIONS

The Hague Conference has, for more than a century, concerned itself with the protection under civil law of children at risk in cross-frontier situations. During the last part of the 20th Century, the opening up of national borders, ease of travel and the breaking down of cultural barriers have, with all their advantages, increased those risks considerably. The cross-border trafficking and exploitation of children and their international displacement from war civil disturbance or natural disaster have become major problems. There are also the children caught in the turmoil of broken relationships within trasnational families, with disputes

over custody and relocation, with the hazards of international parental abduction, the problems of maintaining contact between the child and both parents, and the uphill struggle of securing cross-frontier child support. There has also been an upsurge in the cross-border placement of children through intercountry adoption or shorter term arrangements, with the risks inherent in a situation where some countries find it difficult to ensure family care for all of their children while in others the demand for children from childless couples grows.

Three Hague Children's Conventions have been developed over the last twenty-five years, a fundamental purpose being to provide the practical machinery to enable States which share a common interest in protecting children to co-operate together to do so: The *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention), the *Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (Adoption Convention), and 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* (Child Protection Convention), all of which deal with children in cross-border situations.

Following the first *Judges' Seminar on International Protection of the Child* organised by the Permanent Bureau in 1998[33], the Permanent Bureau has started to issue, on a twice-yearly basis, the *Judges' Newsletter on International Child Protection*. This publication, which is available in English, French and, more recently, in Spanish on the HCCH's website[34], is designed to inform

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33 For more information on these International Judicial Seminars, whose organisation has become another important activity of the Permanent Bureau in relation to the Children's Conventions, see <http://www.hcch.net>, under the headings "Conventions", "28" and "Judicial Seminars on the International Protection of Children".

34 At <http://www.hcch.net>, under the headings "Conventions", "28" and "The Judges' Newsletter".

a wide circle of Judges, Central Authorities, practitioners, libraries and others around the world about current activities and topics relating to international child protection and to promote international co-operation and exchange of information in matters of international child protection.

1. The child abduction convention

With currently 74 States parties[35], the Child Abduction Convention is among the most significant successes of the HCCH and undoubtedly one of the best known Hague Conventions. The Child Abduction Convention seeks to protect children from the harmful effects of international parental child abduction or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.

Following a removal or retention of a child from one Contracting State to another, the left-behind person may apply for return of the

35 As of 15 April 2004, the following 74 States were parties to the Child Abduction Convention: Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia & Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), China (Macao Special Administrative Region only), *Colombia*, Costa Rica, Croatia, Cyprus, Czech Republic, Ecuador, El Salvador, Fiji, Guatemala, Honduras, Denmark, Estonia, Finland, The former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Zimbabwe. For a full and updated list of States parties to the Child Abduction Convention, see <http://www.hcch.net>, under the headings "Conventions" and "28". It has to be noted that under art. 38, a State which was not a Member of the HCCH when the Convention was adopted (Fourteenth Session) may accede to the Convention; such an accession, however, has effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession (art. 38(4).

child[36]. The requirements which must be met by the applicant under the Convention are strict but simple. He or she must establish that (1) the child was habitually residing in the country (which must be a Contracting State) of the applicant immediately before the removal or retention (art. 3(a); (2) the removal or retention of the child constituted a breach of custody rights by the law of that country (art. 3(a); and (3) the applicant was *actually* exercising those custody rights at the time of, or would have exercised those rights but for, the removal or retention (art. 3(b).

There is a treaty obligation for a court to return an abducted child below the age of sixteen if application is made within one year from the date of the removal[37]. After one year, the court is still required to order the child returned *unless* the person resisting return can demonstrate that the child is settled in the new environment (art. 12). A court may, on an *exceptional* basis, refuse to order a child returned if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (art. 13(1)(b)[38]. A court may also decline to return the child if the parent gave permission for the child to be removed, or to be retained (art. 13(1)(a), or if the child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child's views (art. 13(2). Finally, the return of the child may be refused if the return would violate the fundamental principles of the protection

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36 Art. 8 of the Convention provides that "[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child."

37 The Convention applies only to children under the age of sixteen. Even if a child was under sixteen at the time of the removal, the Convention ceases to apply when the child reaches the age of sixteen.

38 On this delicate issue in particular, see Special focus: article 13(1)(b) - The grave risk exception and the 1980 Convention, in: *The Judges' Newsletter,* Volume V / Spring 2003, pp. 17-47 (available at <http://www.hcch.net>, under the headings "Conventions", "28" and "The Judges' Newsletter").

of human rights and freedoms of the country where the child is being held (art. 20).

In response to the challenge of maintaining uniform interpretation on the Convention with a growing number of Contracting States from very different legal systems the Permanent Bureau has established a database, the International Child Abduction Database (INCADAT), containing a large number of leading decisions rendered by national courts. INCADAT can be used free of charge and has proven to be a valuable tool for judges, Central Authorities, legal practitioners, researchers and others interested in the subject.

A fifth meeting to review the practical operation of the Convention is due to take place towards the end of 2005[39]. Because of the large number of Spanish speaking countries now Parties to the Convention, every effort is made to ensure that relevant documentation concerning the Convention is also made available in Spanish, in addition to English and French.

Finally, the Permanent Bureau has issued a *Guide to Good Practice* under the Convention. Part I of the Guide deals with Central Authority Practice, Part II with Implementing Measures[40].

2. THE INTERCOUNTRY ADOPTION CONVENTION

With currently 57 States parties[41], this Convention is also one of the most successful and significant Conventions of the HCCH. The

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39 Previous meetings were held in 1989, 1993, 1997, and 2001. The Reports, Conclusions and Recommendations of these meetings are available at <http://www.hcch.net>, under the headings "Conventions" and "28", together with other relevant documentation.

40 Parts I and II of the Guide, in English, French and Spanish, are available at <http://www.hcch.net>, under the headings "Conventions", "28" and "Guide to Good Practice".

41 As of 15 April 2004, the following 57 States were parties to the Adoption Convention: Albania, Andorra, Australia, Austria, Belarus, Brazil, Bolivia, Bulgaria, Burkina Faso, Burundi, Canada, Chile, *Colombia*, Costa Rica, Cyprus, Czech

Convention applies to adoptions in which children move from one State party (State of origin or sending State) to another State party (receiving State). It is built on two founding principles. First, it recognizes that growing up in a family is of primary importance and is essential for the happiness and healthy development of a child. Secondly, it considers that, if a child cannot be raised by his or her family of origin, a permanent family placement in his or her country of origin should be considered, and only if this is not possible should an intercountry adoption be considered[42].

The Convention establishes a co-operative framework between State authorities and a division of responsibilities between authorities in the State of origin and the receiving State. Under the Convention, an adoption may take place only if the country of origin has established that the child is eligible for intercountry adoption, that due consideration has been given to the child's adoption in its country of origin and an intercountry adoption is in the child's best interests, and that after appropriate counselling the necessary consents to the adoption have been given freely. The receiving State, on the other hand, has to determine that the prospective adoptive parents are eligible and suited to adopt[43], and that the

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Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Guatemala, Georgia, Germany, Guinea, Iceland, India, Israel, Italy, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Moldova, Monaco, Mongolia, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Romania, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Kingdom, Uruguay, Venezuela. Two States are due to join the list of States parties shortly: Portugal (1 July 2004) and Madagascar (1 July 2004). For an updated list, see <http://www.hcch.net>, under the headings "Conventions" and "33". It has to be noted that under art. 44, a State which was not a Member of the HCCH when the Convention was adopted (Seventeenth Session) or which did not participate in that Session, may accede to the Adoption Convention; such an accession, however, has effect only as regards the relations between the acceding State and such Contracting States which have not raised an objection to the accession within six months (art. 44(3).

42 See the Preamble of the Adoption Convention.

43 Persons wishing to adopt a child resident in another State party must initially apply to a designated authority in their own country. The Convention provides that, with

child they wish to adopt will be authorized to enter and reside permanently in that State. The procedural requirements set by the Convention include the preparation and exchange of reports on the child and the prospective parents. A 'matching process' ensures the identification of the adoptive parents from among the approved applicants who can best meet the needs of the child based on the reports on the child and on the prospective adoptive parents. Only after a positive matching process can the actual adoption take place. The Convention ensures that the adoption will be recognized in all States parties to the treaty.

Every State party to the Convention must establish a Central Authority to carry out certain functions which include co-operating with Central Authorities of other States parties, overseeing the implementation of the Convention in its country, and providing information on the laws of its country.

Adoption agencies and individual providers of international adoption services may be authorized to perform designated functions with regard to individual adoption cases, provided they have become Hague Convention accredited or approved.

A second meeting of the Special Commission to review the practical operation of the Convention is due to take place in spring 2005[44].

The Permanent Bureau is currently preparing a Guide to Good Practice under this Convention. Because of the large number of Spanish speaking countries now Parties to the Convention, every effort is made to ensure that relevant documentation concerning

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limited exceptions, there can be no contact between the prospective adoptive parents and any parent or other person/institution which cares for the child until certain requirements have been met.

44 A first meeting was held in 2000; a Special Commission meeting on the implementation of the Convention took place in 1994. The Reports, Conclusions and Recommendations of these meetings are available at <http://www.hcch.net>, under the headings "Conventions" and "33", together with other relevant documentation.

the Convention is also made available in Spanish, in addition to English and French.

3. The child protection convention

The third of the modern Hague Children's Conventions, 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*[45], is much broader in scope than the first two, covering as it does a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children's property.

The Convention has uniform rules determining which country's authorities are competent to take the necessary measures of protection. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has his or her habitual residence, but also allow any country where the child is present to take necessary emergency or provisional measures of protection. The Convention determines which country's laws are to be applied, and it provides for the recognition and enforcement of measures taken in one Contracting State in all other Contracting States. In addition, the

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45 As of 15 April 2004, the following 8 States were parties to the Child Protection Convention: Australia, Czech Republic, Ecuador, Estonia, Latvia, Monaco, Morocco and Slovakia. Lithuania is due to join the list of States parties very soon. The following States have signed but not yet ratified the Convention: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden, Switzerland, United Kingdom,. For an updated list, see <http://www.hcch.net>, under the headings "Conventions" and "34". It has to be noted that under art. 58, a State which was not a Member of the HCCH when the Convention was adopted (Eighteenth Session) may accede to the Convention; such an accession, however, has effect only as regards the relations between the acceding State and such Contracting States which have not raised an objection to the accession within six months (art. 58(3).

co-operation provisions of the Convention provide the basic framework for the exchange of information and for the necessary degree of collaboration between administrative (child protection) authorities in the different Contracting States. The following are some of the areas in which the Convention is particularly helpful:

a. PARENTAL DISPUTES OVER CUSTODY AND CONTACT

The Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. The Convention avoids the problems that may arise if the courts in more than one country are competent to decide these matters. The recognition and enforcement provisions avoid the need for re-litigating custody and contact issues and ensure that decisions taken by the authorities of the country where the child has his or her habitual residence enjoy primacy. The co-operation provisions provide for any necessary exchange of information and offer a structure through which, by mediation or other means, agreed solutions may be found.

b. REINFORCEMENT OF THE CHILD ABDUCTION CONVENTION

The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.

c. UNACCOMPANIED MINORS

The co-operation procedures within the Convention can be helpful in the increasing number of circumstances in which unaccompanied

minors cross borders and find themselves in vulnerable situations in which they may be subject to exploitation and other risks. Whether the unaccompanied minor is a refugee, an asylum seeker, a displaced person or simply a teenage runaway, the Convention assists by providing for co-operation in locating the child, by determining which country's authorities are competent to take any necessary measures of protection, and by providing for co-operation between national authorities in the receiving country and country of origin in exchanging necessary information and in the institution of any necessary protective measures.

d. CROSS-FRONTIER PLACEMENTS OF CHILDREN

The Convention provides for co-operation between States in relation to the growing number of cases in which children are being placed in alternative care across frontiers, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of Kafala, which is a functional equivalent of adoption but falls outside the scope of the 1993 Intercountry Adoption Convention.

e. OTHER FEATURES OF THE CONVENTION

The Convention is based on a view that child protection provisions should constitute an integrated whole. This is why the Convention's scope is broad, covering both public and private measures of protection or care. The Convention overcomes the uncertainty that otherwise arises if separate rules apply to different categories of protective measure when both may be involved in the same case.

Furthermore, the Convention takes account of the wide variety of legal institutions and systems of protection that exist around the world. It does not attempt to create a uniform international law of child protection; the basic elements of such a law are already to be found in the 1989 *UN Convention on the Rights of the Child*. The function of the Hague Child Protection Convention is to avoid

legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems having diverse cultural or religious backgrounds. It is of great significance that one of the first States to ratify the Convention was Morocco, whose legal system is set in the Islamic tradition.

C. FINANCE LAW: THE SECURITIES CONVENTION

1. PURPOSE OF THE CONVENTION

The basic purpose of the Hague Securities Convention is to provide legal certainty and predictability as to the law governing crucial legal issues relating to dealings in securities held with an intermediary – dealings worth more than a trillion of Euros/dollars per day and growing rapidly[46]. This purpose is achieved by the creation of a

46 Over the past two decades there has been a marked change in the way in which shares, bonds and other investment securities are held, traded and settled. Two developments merit particular attention. First, a move from direct holdings, *i.e.*, holdings in which there is no intermediary between the issuer and someone claiming ownership or lesser rights in the securities (*i.e.*, an investor whose rights result from a record on the register maintained by or for the issuer or who is in physical possession of security certificates), to holdings through a securities account with a custodian or other securities intermediary. In such intermediated holding systems, the investor's interest results from the credit of the securities to the investor's securities account maintained by its intermediary (*e.g.*, a bank or broker-dealer). Another development, independent from the first, is a move towards the elimination or reduction of paper (dematerialisation) by the issue of either completely dematerialised securities or the immobilisation of global notes, or jumbo certificates, with an ICSD (International Central Securities Depositary) or CSD (Central Securities Depositary), and the concentration of paper-based individual securities in the hands of an ICSD, CSD or custodian with whom they are deposited. As a result, securities held with an intermediary are transferred between account holders by mere computer entry (electronic recording) rather than by the physical movement of paper certificates. For more details, see the background report prepared prior to the negotiations: *Report on the Law Applicable to Dispositions of Securities Held*

uniform conflict of laws regime (Arts. 4, 5 and 6) that displaces any national conflict rules in this matter and that provides the parties to a disposition of securities held with an intermediary with the highest possible assurance as to which substantive law is applicable in their specific situation. This *ex ante* legal certainty is essential for the smooth operation of the financial markets. The Hague Securities Convention thus brings very important benefits to market users, market participants and the financial system as a whole. As it allows for easier access to international capital, the Convention is also very important for emerging markets[47].

2. Scope of the convention (art. 2)

The Convention-determined substantive law determines the nature of the right of an account holder (investor) against its intermediary and third parties as well as the effects against the intermediary and third parties of a disposition of securities held with an intermediary. Thus, it is not necessary to classify an account holder's rights relating to the securities themselves and resulting from a credit of securities to a securities account as proprietary or personal or otherwise in order to determine whether the Convention applies. The Convention applies to all securities held with an intermediary, including those that embody rights that are personal in nature, however the legal nature of these rights is classified in any legal system and whether or not the account holder has rights directly against the issuer.

The *ex ante* certainty provided by the Convention is particularly crucial for any person who takes a security interest in securities held with an intermediary, as it will easily allow this person to

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Through Indirect Holding Systems, prepared by Christophe Bernasconi, Preliminary Document No 1 of November 2000 (available at http://www.hcch.net, under the headings "Conventions" and "36").

47 It has to be noted that the Securities Convention is open to ratification, acceptance, approval or accession by *any* State (see art. 17).

determine, ahead of a transaction, the conditions it has to fulfil to perfect its interest and thus to be able to oppose its interest against any third party.

The Convention-law also determines whether an interest extinguishes or has priority over another person's interest; it applies in particular to the priority between (i) a person who acquired an interest in securities in good faith, for value and without notice of an adverse claim (a so-called "bona fide purchaser" (BFP) or "protected purchaser") and (ii) an adverse claimant.

The law determined by the Convention will also govern whether an intermediary has any duties to a person other than the account holder who asserts, in competition with the account holder or another person, an interest in securities held with that intermediary. This includes the question whether so-called upper-tier attachments are permissible (*i.e.*, attachments of an account holder's interest at a level above that of its own intermediary).

The Convention also deals with a number of other important considerations. These include: (i) the protection of rights on change of the applicable law (art. 7); (ii) the role of the Convention in insolvency proceedings (art. 8); (iii) the determination of applicable law for Multi-unit States (art. 12); and (iv) certain transitional provisions for determining priorities between pre-Convention and post-Convention interests and for dealing with pre-Convention account agreements and securities accounts (Arts. 15 and 16).

Finally, it is important to stress that the Convention only deals with choice of law; thus, it has no effect on the substantive law that will be applied once the choice of law determination has been made (in other words, when a State becomes a party to this Convention, this has no impact on this State's substantive law).

3. The convention's conflict of laws rules in particular (arts. 4 to 6)

Under the Convention's primary rule (art. 4), the applicable law is determined on the basis of an express governing law agreement between the account holder and the relevant intermediary, if that

agreement is articulated in either of two ways: If an account holder and its relevant intermediary expressly agree that the law of a particular State will govern their account agreement, that law also governs all the article 2(1) issues; if, however, the account holder and its relevant intermediary expressly agree that the law of a particular State will govern all the article 2(1) issues, that law governs all these issues, whether or not there is also a choice of a separate law to govern the account agreement. The parties may expressly agree to have the law of one State govern all the article 2(1) issues and that of a different State govern the account agreement. The law chosen by the parties to the account agreement applies only if the relevant intermediary has, at the time of the agreement on governing law, an office ('Qualifying Office') in the State whose law is selected which, alone or with another office or third party (which does not have to be in the selected State), serves certain functions relating to the maintenance of securities accounts (though not necessarily the particular account in question), or is identified, by any specific means, as maintaining securities accounts in that State (though not necessarily the particular account in question).

If the applicable law is not determined in this manner, there are certain fall-back provisions (art. 5) in the Convention that would result, ultimately, in application of the law of the jurisdiction in which the intermediary is incorporated or otherwise organised. The Convention provides fairly detailed provisions as to how these determinations are to be made, including factors that are to be disregarded in the analysis.

Article 6 sets forth a list of factors that must be disregarded when determining the applicable law under the Convention.

4. Assessment of the convention's importance

The need for definitive rules that reflect the reality of how securities are held today has become critical as a consequence of the rapidity and volume of data transfer across borders made possible by technological developments. In light of the current lack of clarity on

the choice of law, cross-border securities transactions may become impractical because of the costs of obtaining legal opinions in multiple jurisdictions and of compliance with many potentially applicable laws. The Hague Securities Convention represents significant international progress toward achieving:

- Greater certainty as to the laws applicable to clearance, settlement and secured credit transactions that cross national borders;
- Greater efficiencies in the global capital markets;
- Reduction of risk to participants, including legal and systemic risk and a reduction of cost in cross-border transactions;
- Facilitation of capital flows internationally.

It is against this background that the G30 recommends that "the Hague Convention be ratified as quickly as possible by as many nations as possible"[48].

IV. THE WORK CURRENTLY IN PROGRESS

A. THE JUDGMENTS CONVENTION (CHOICE OF COURT CONVENTION)

In 1996, the Member States of the HCCH decided to include in the Agenda of the Nineteenth Session the question of jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters. The initial idea was to develop a comprehensive instrument, based on the concept of a "mixed" convention, *i.e.*, a convention in which jurisdictional grounds were divided into three categories: a "white list", which contained a number of specified

48 Group of Thirty (G30), *Global Clearing & Settlement – A Plan of Action*, January 2003 (Recommendation 15).

grounds of jurisdiction; a "black list", which contained other specified grounds of jurisdiction; and a so-called "grey area", which consisted of all other grounds of jurisdiction under the national law of Contracting States. The idea was that where the court had jurisdiction on a "white" ground, it could hear the case, and the resulting judgment would be recognised and enforced in other Contracting States (provided certain other requirements would be satisfied). "Black list" grounds were prohibited: a court of a State party could not take jurisdiction on these grounds. Courts would be permitted to take jurisdiction on the "grey list" grounds, but the resulting judgment would not be recognised under the Convention.

As work proceeded on drafting, however, it became apparent that it would not be possible to draw up a satisfactory text for a "mixed" convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, in particular the Internet, on the jurisdictional rules that might be laid down in the Convention. Thus, in June 2001, it was decided to postpone further work on the comprehensive project and instead to focus on core areas on which consensus could be reached. Against this background, the Member States of the HCCH decided to start working on a Convention that would make *exclusive choice of court agreements* as effective as possible in the context of international business transactions (civil or commercial matters)[49]. The hope is that the Convention will do for choice of court agreements what the New York Convention of 1958[50] has done for arbitration agreements.

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49 Exclusive choice of court agreements concerning consumer contracts and employment contracts are excluded from the scope of the Convention. In addition, the Convention will also be inapplicable to a long list of proceedings that are governed by more specific legal regimes including family law, wills and succession, antitrust matters and rights *in rem* in immovable property.

50 *Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards*. The future Hague Convention will avoid interference with arbitration by

The current draft of the Convention is based on three key obligations that would be imposed on the courts of States parties: (1) the chosen court must be obliged to hear the dispute; (2) all other courts must be obliged to decline jurisdiction; and (3) the judgment given by the chosen court must be recognised and enforced by courts in other countries[51].

It is planned to hold the Diplomatic Session to finalise this important instrument at the beginning of 2005.

B. A NEW GLOBAL INSTRUMENT ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

The other major work currently in progress relates to the preparation of a new global instrument on the international recovery of child support and other forms of family maintenance. Such a new instrument has the potential to benefit hundreds of thousands of persons, children and adults, in many States around the world, and to contribute to the reduction of welfare/social security dependency. Ensuring the inclusion in the process of all relevant States and NGOs is an important element in establishing a firm foundation on which to build the new instrument. It is against this background that, in addition to the Member States of the HCCH, States parties to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* and relevant international and non-governmental organisations are invited to participate in this project.

Work on the development of a new international instrument is never undertaken lightly. In the area of international maintenance

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precluding its application to arbitral proceedings and by denying enforcement to a judgment if the issuing court acted contrary to an arbitral agreement among the parties.

51 For more information, see the *Preliminary draft Convention on exclusive choice of court agreements*, and the accompanying *draft Report*, drawn up by MASATO DOGAUCHI and TREVOR C. HARTLEY, available at http://www.hcch.net, under the headings "Work in Progress" and "Jurisdiction and foreign judgments in civil and commercial matters".

obligations, where there already exists a complex web of international (including the four existing Hague Conventions of 1956, 1958 and 1973[52], and the UN New York Convention of 1956 mentioned above), regional (including the *Inter-American/ Montevideo Convention of 1989 on Support Obligations*), and bilateral arrangements, there is even more need for caution. In fact very careful analysis and review of the international instruments had been carried out in Special Commissions at The Hague in 1995 and 1999, and the conclusion drawn at the 1999 Special Commission was that the existing international framework is in need of modernisation. The reasons for this are summarised in the background report for the negotiations: "The international system for the recovery of maintenance is excessively complex; provisions for administrative co-operation need to be overhauled and properly monitored; for a variety of reasons, including lack of cost effectiveness, the international system is under utilised and needs to be made accessible to a much wider range of maintenance and child support recipients; the system does not make enough use of the savings in cost and time made possible by the new information technologies; and it does not take into account many important developments that have occurred in national systems, particularly child support systems, which are designed to improve the efficiency with which liability is established and payments are calculated and then enforced"[53].

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52 The four existing Conventions are: the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children*, the *Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children*, the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*, and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. Colombia is not a party to any of these Conventions.

53 Preliminary Document No 3 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and

There are four central goals for the new instrument. The first is *simplicity*; there is a hope and expectation that the new instrument will introduce a greater degree of coherence and order into the complex and often confusing existing international arrangements. The second is *efficiency*; the procedures set out in the new instrument should offer improved efficiency both in terms of providing a better service to the family members involved in maintenance cases, and in terms of cost effectiveness for the States involved. The third is *universality*; there is a wish to build an instrument that is capable of near universal ratification or accession. The fourth is *co-operation and compliance*; a system is needed which ensures that Contracting States carry out their obligations in a responsive and conscientious manner[54].

Again, one might mention that all Preliminary Documents prepared in relation to this project are, to the extent possible and subject to adequate resources, made available in Spanish; furthermore, on an exceptional basis, Spanish interpretation is available at all Special Commission meetings relating to this important project.

V. CONCLUSIONS

This article provides a fractional overview of some of the most important features of the HCCH and its main activities in various fields of law. Unfortunately, within the limits of a Law Review

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Other Forms of Family Maintenance, *"Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance"*, Report drawn up by WILLIAM DUNCAN, Deputy Secretary General, paragraph 185.

54 For more information on this project, see *The Hague Project on the International Recovery of Child Support and Other Forms of Family Maintenance – The First Meeting of the Special Commission on a New Global Instrument*, Note by WILLIAM DUNCAN, Deputy Secretary General, Hague Conference on Private International Law, in: The *Judges' Newsletter*, Volume VI / Autumn 2003, pp. 73-78 (available at <http://www.hcch.net>).

article, it is not possible to cover or even address all of the HCCH's Conventions and the related, multi-facetted work conducted by the Permanent Bureau[55]. In our shrinking world, Private International Law issues have become so important, both in terms of frequency and substance, that it affects the life and business of millions of people on a daily basis. If Tobias M.C. Asser had not had his extraordinary vision more than a century ago, the need for an organisation like the HCCH, *i.e.*, a single global player to harmonise the PIL rules at a world-wide level, would be so patently obvious that the international community would instantaneously set up the relevant organisation – and most likely provide it with significantly more funding than what is currently the case for the HCCH[56].

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55 Among the other important Conventions developed under the auspices of the HCCH and which could not be presented in this article, one might mention in particular the *Hague Convention of 13 January 2000 on the International Protection of Adults*, the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, the *Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons*, the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, the *Hague Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions*, etc. On all these Conventions, see <http://www.hcch.net>, under the headings "Conventions" and the number of the respective treaty.

56 A comprehensive description of the working-model of the HCCH can be found at pp. 51-58 of the *Strategic Plan* of the HCCH, issued in April 2002 and available at <http://www.hcch.net>, under the headings "Work in Progress" and "Special Commission on General Affairs and Policy". This Strategic Plan was prepared by the Permanent Bureau after an independent study of an external auditor had concluded in 2001 that a "30% resource gap" must be closed for the HCCH to remain "fit" (see the references in para. 005 of the Strategic Plan referred to above); see also the update on the Strategic Plan issued for the Special Commission meeting

We hope that this article assists in further promoting the HCCH in Central and South America in general, and in Colombia in particular. May we also express the hope to see Colombia joining some of the Conventions presented in this article and to which this State is not yet a party. In particular, we believe that the existing Service and Evidence Conventions, the Child Protection Convention and the Securities Convention are important treaties that would greatly benefit Colombia and strengthen its position as a Member of a constantly growing network of States co-operating at the international level in civil and commercial matters. Finally, we also hope that Colombia may play an active role in the ongoing negotiations on the judgments (choice of court) Convention and the Maintenance Obligations Convention. There is no doubt that Colombia would be both beneficiary and partner in these continuing and important enterprises.

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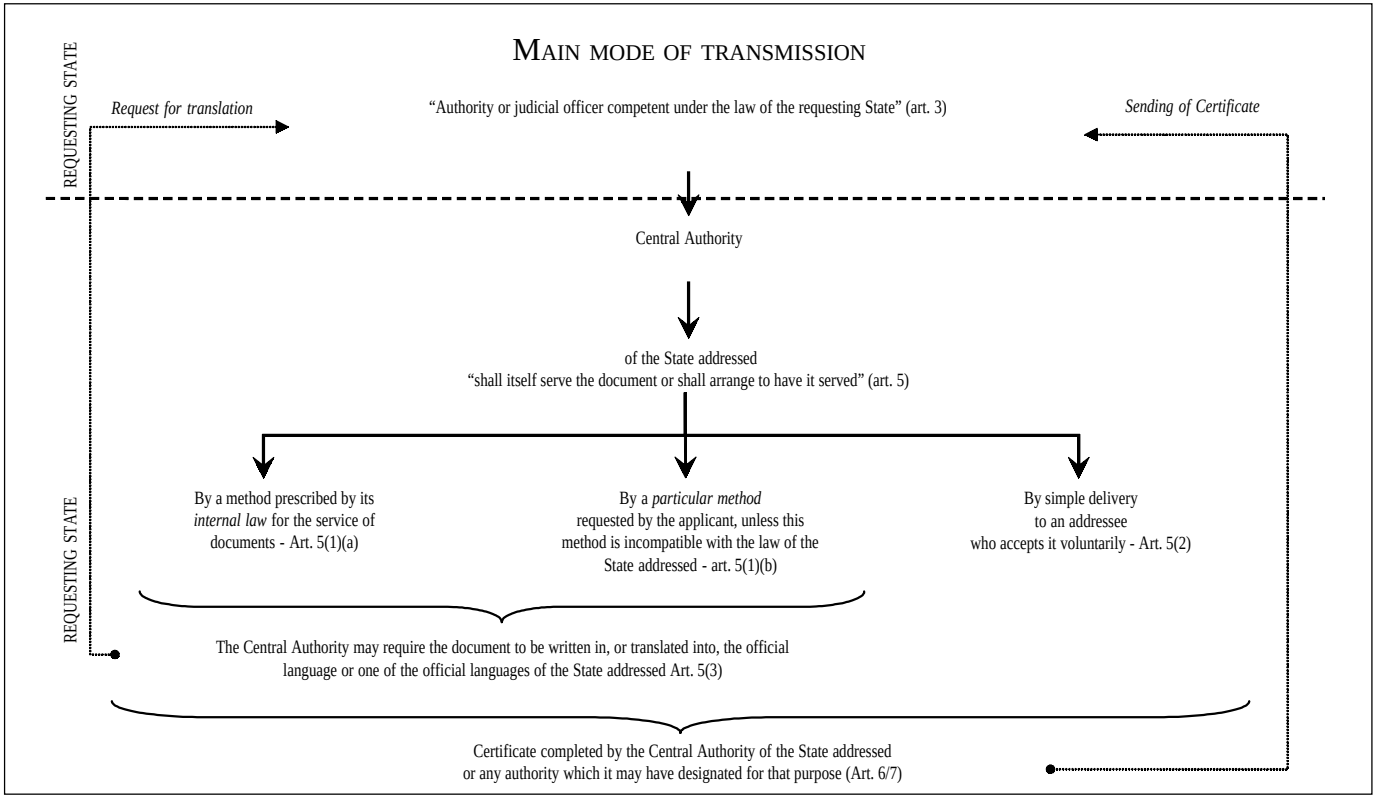
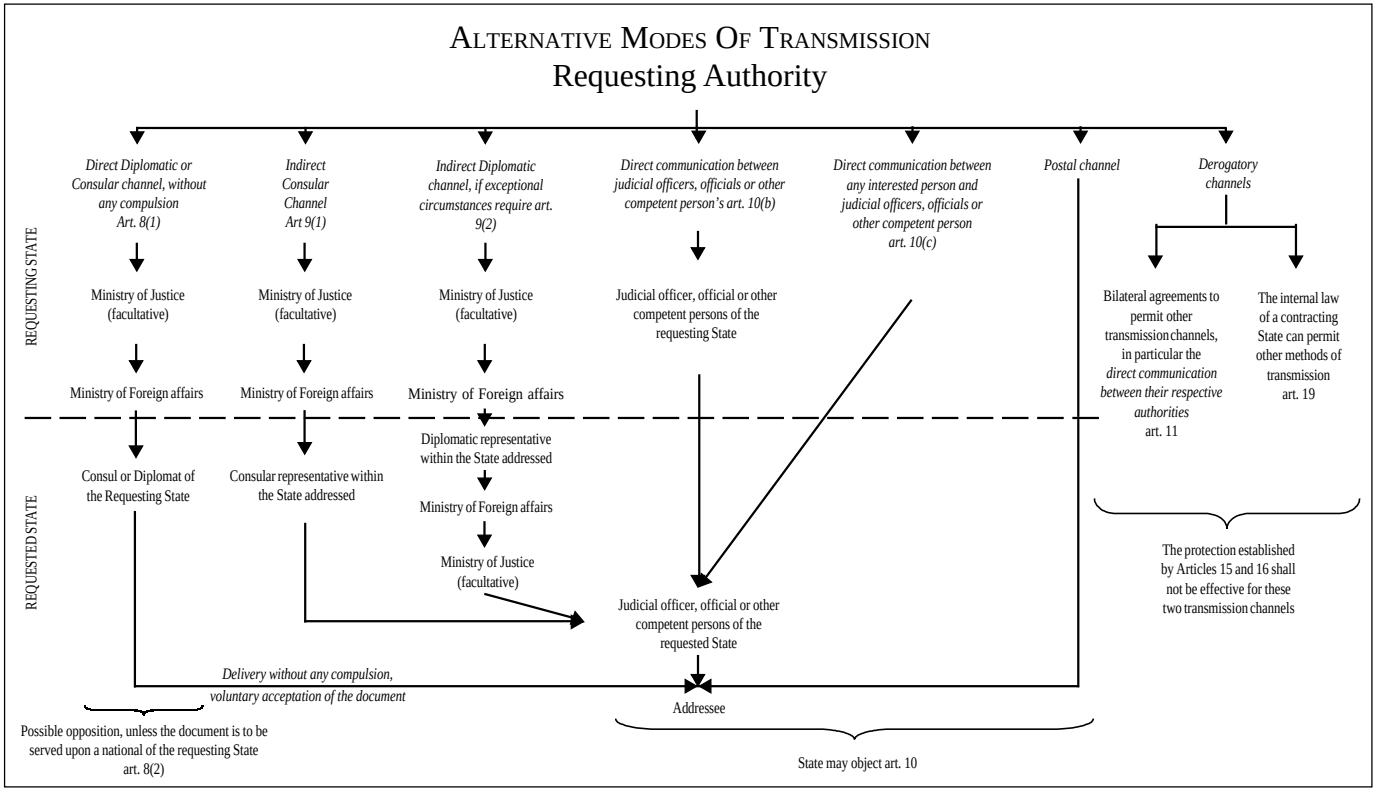
on General Affairs and Policy of 2004, which provides a summary overview of the implementation between April 2003 and March 2004 of the Strategic Directions set out in Chapter IV of the original Strategic Plan.

APPENDIX 1


MAIN MODE OF TRANSMISSION
REQUESTING STATE
Request for translation
"Authority or judicial officer competent under the law of the requesting State" (art. 3)
Sending of Certificate
Central Authority
of the State addressed
"shall itself serve the document or shall arrange to have it served" (art. 5)
REQUESTING STATE
By a method prescribed by its internal law for the service of documents - Art. 5(1)(a)
By a particular method requested by the applicant, unless this method is incompatible with the law of the State addressed - art. 5(1)(b)
By simple delivery to an addressee who accepts it voluntarily - Art. 5(2)
The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed Art. 5(3)
Certificate completed by the Central Authority of the State addressed or any authority which it may have designated for that purpose (Art. 6/7)

APPENDIX 2


ALTERNATIVE MODES OF TRANSMISSION
Requesting Authority
REQUESTING STATE
REQUESTED STATE
Direct Diplomatic or Consular channel, without any compulsion Art. 8(1)
Indirect Consular Channel Art 9(1)
Indirect Diplomatic channel, if exceptional circumstances require art. 9(2)
Direct communication between judicial officers, officials or other competent person's art. 10(b)
Direct communication between any interested person and judicial officers, officials or other competent person art. 10(c)
Postal channel
Derogatory channels
Ministry of Justice (facultative)
Ministry of Justice (facultative)
Ministry of Justice (facultative)
Judicial officer, official or other competent persons of the requesting State
Bilateral agreements to permit other transmission channels, in particular the direct communication between their respective authorities art. 11
The internal law of a contracting State can permit other methods of transmission art. 19
Ministry of Foreign affairs
Ministry of Foreign affairs
Ministry of Foreign affairs
Diplomatic representative within the State addressed
Consul or Diplomat of the Requesting State
Consular representative within the State addressed
Ministry of Foreign affairs
Ministry of Justice (facultative)
The protection established by Articles 15 and 16 shall not be effective for these two transmission channels
Judicial officer, official or other competent persons of the requested State
Delivery without any compulsion, voluntary acceptation of the document
Addressee
Possible opposition, unless the document is to be served upon a national of the requesting State art. 8(2)
State may object art. 10