

THE PROTECTION OF CHILDREN'S RIGHTS - IN PARTICULAR FROM THE POINT OF VIEW OF PRIVATE INTERNATIONAL LAW: SUMMARY OF COURSE

Hans van LOON

Introduction to the theme

As *Diagram 1* sets out, the concept of private international law is not uniform. In this course, Private International Law (PIL) is understood to encompass questions of jurisdiction, of applicable law, of recognition and enforcement of foreign judgments and of judicial and administrative co-operation.

Private international law used to be seen as flowing from domestic rather than international sources. The influence of international sources is growing, however, in particular through multilateral treaties or conventions. Those treaties may either unify substantive rules or rules of private international law. The CIDIP and Hague Conference conventions have focused on unification of private international law but have also sometimes unified substantive provisions: a good example is the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

The internationalization of human rights law, through multilateral instruments, has been spectacular. The UN Covenants on Civil and Political and on Social, Economic and Cultural Rights, the American Convention on Human Rights and the European Convention on Human

Rights have had a considerable, sometimes crucial, impact on domestic law, in particular where effective international complaints procedures are available. A new phenomenon is the *United Nations Convention of 20 November 1989 on the Rights of the Child* (CRC), which is now in force in over 170 countries. The CRC does not provide for a complaints procedure but has a reporting system. The CRC now provides a framework for the unification of private international law for children, as illustrated by *diagram 6*.

Private international law in Latin America experienced the influence both from Dutch statutists, who emphasized the territoriality principle and, to a lesser extent, the influence of the *Code Napoléon* and Mancini who emphasized the nationality principle. The Montevideo Conventions of 1898 and 1940 followed the territorial approach and put the domicile principle first, whereas the Lima Convention of 1878 was based on the nationality principle. The Code Bustamante tried to harmonize both influences.

As *diagram 3* illustrates, the unification of private international law in Latin America (Lima in 1878, Montevideo I in 1889) preceded the unification efforts which started in Europe (the first Hague Conference in 1893). Since CIDIP-I (Panama) in 1975, Inter-American Conferences have taken place every four or five years and produced a large number of conventions. Since 1951, Sessions of the Hague Conference have taken place every four years. The preparation process of Hague conventions is a highly structured one, stretching over four years (see *diagram 4*). The decision to include a topic in the agenda of the Conference is preceded by (a) a selection stage and followed by (b) a research stage, (c) a discussion stage and (d) a drafting stage. After the convention has been adopted, a report is drawn up and the proceedings are published in what may be called (e) the consolidation stage. The Permanent Bureau continues to monitor the practical operation of conventions, in particular through meetings of Special Commissions of experts, charged with the application of the conventions in practice.

Diagram 5 builds on *diagram 3* and presents an overview of the Inter-American and Hague private international law conventions dealing with

children's law. It includes a reminder of the decision of the International Court of Justice in the *Boll* case, which dealt a blow to the nationality principle which was still prominent in the 1902 Hague Convention on the Guardianship of Infants. The prominent principle in the *Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* became the principle of habitual residence, but the nationality principle was nevertheless maintained.

Diagram 6 provides a summary of the human rights instruments on children's law. After the League of Nations in 1924 adopted the first Declaration of the Rights of the Child, the United Nations adopted such Declarations in 1948 and 1959. In 1986 a specific declaration was adopted on foster care and adoption: the *United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (General Assembly Resolution 41/85 of 3 December 1986). It took until 1989, however, before the United Nations adopted a binding multilateral instrument on the protection of children's rights: the *Convention of 20 November 1989 on the Rights of the Child* (CRC). The CRC has an extraordinary broad scope and so provides a general framework for other instruments, including PIL conventions on the protection of children. Conversely, the CRC depends for its effective operation on other instruments, including PIL conventions on the protection of children. There are implicit references to these PIL conventions in the CRC provisions on international maintenance obligations, international child abduction and intercountry adoption.

Intercountry adoption as an illustration of the interaction between treaty-making in the field of PIL and human rights law

The work of the Hague Conference on intercountry adoption provides an excellent illustration of the interaction between treaty-making in the field of private international law and in the field of human rights law. As the Preamble of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* brings out, both the 1986 UN Declaration and the 1989 CRC have been major sources

of inspiration for this Convention. A comparative overview of the relevant articles on (intercountry) adoption in the UN Declaration and the CRC is presented in *Diagram 7*. See also Annex A. *Diagram 8* summarizes the system of the 1993 Hague Convention.

Custody of children and international child abduction

Diagram 9 sketches the overall development of the Conventions on Protection of Minors and Child Abduction in the Inter-American and the Hague contexts. The 1961 Convention on the Protection of Minors did not provide a mechanism for the return of abducted children. This then led to the Canadian proposal to draw up a convention on international child abduction: see *diagrams 11 and 12*. In 1989, an Inter-American Convention on the International Return of Children was adopted at Montevideo. *Diagram 13* compares the Hague and Montevideo Conventions.

International recovery of maintenance obligations

Diagram 14 sketches the origin and relationship of the various conventions on maintenance obligations. In 1956 and 1958, two Conventions were adopted at The Hague; one on law applicable to maintenance obligations towards children, and one on enforcement of judgments concerning maintenance obligations towards children only. These Conventions were revised in 1973 and extended to maintenance obligations towards children and adults. In 1989, an Inter-American Convention on jurisdiction, applicable law and recognition and enforcement of judgments concerning maintenance obligations was adopted at Montevideo. *Diagrams 15 and 16* summarize the main aspects of these Conventions. The United Nations, in its 1956 New York Convention on the Recovery Abroad of Maintenance, has established a Convention on administrative co-operation: it is limited to the transfer of judgments and does not provide for their recognition or enforcement (see *Diagram 17*).

Diagram 1 Concept of Private International Law. Unification of Private International Law. Human Rights Law.

A. Concept of private international law (PIL)

- Broad French approach: PIL consists of:
 - (a) law of nationality
 - (b) legal status of foreigners
 - (c) conflict of laws
 - (d) conflict of jurisdictions: international competence of courts and recognition and enforcement of judgments
- Italian/German concept of PIL: (c) only.
- Common law systems (UK, Canada, US) of PIL: (c) and, in particular, (d).
- Most Latin-American systems of PIL follow broad French approach (except (a)): (b), (c) and (d).

In this course: PIL will refer to following questions:

1. which court/authority has jurisdiction to deal with a matter?
2. which law will the court/authority apply?
3. will the decision be recognized/enforced abroad?
4. how do courts/authorities co-operate in international situations?

PIL has, traditionally, its source in national law, but increasingly international multilateral treaties (conventions) provide *international* sources:

B. Unification of PIL

- (a) Unification of *substantive* laws
 - ex.: United Nations Convention on Contracts for the International Sale of Goods (1980)

(b) Unification of PIL

ex.: Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) — diversity of substantive laws remains intact.

Increasingly, techniques are combined:

ex.: 1993 Hague Convention on Intercountry Adoption

C. Human rights law

Respect for human rights preliminary to PIL: if human rights are denied to foreigners, PIL cannot exist. But theories on "national treatment" or "minimum standard" for foreigners are not efficient unless State protects *all* citizens within its jurisdiction: both foreigners and nationals. In other words: minimum protection of human rights is needed if PIL is to exist.

Unification of human rights law through multilateral conventions (unification of *substantive* law) (UN, OAS, Council of Europe). Machinery for effectuating these conventions (domestic procedures; international complaints procedure; reporting system).

Universality of 1989 Convention on the Rights of the Child (CRC): now in force for over 170 States.

CRC now provides framework for unification of PIL concerning children (see Diagram 6).

Diagram 2 History of International Unification of Private International Law: Influences on Unification in Latin America

Private International Law (PIL) only needed when there is

- (a) diversity of laws, and
- (b) significant mobility across frontiers

Hence, no PIL in Rome, and in Great Britain only since \pm 1750.

11th - 14th C Medieval Italy (Bologna, Modena, Florence, etc.): statutists (Bartolus) (unilateral rules)

13th - 16th C French statistists: Dumoulin, d'Argentré: territoriality principle (bilateral rules)

17th - 18th C Dutch statutists: Huber, Voet: territoriality principle; comitas

19th C 1804 Code Napoléon: nationality principle
“Copernican revolution”: starting point not laws, but legal relationship: Von Savigny. Source of law is not State but “international community of interactive nations”, based on Roman law, Christian beliefs and mutual convenience.

Mancini: introduced

- (a) principle of nationality (not nationalistic but cosmopolitan): States should respect “national sphere of freedom”;
- (b) public policy (*ordre public*) exception.

Latin America

Influence Dutch statistists (territorial “imperium” of new independent legal orders) and Von Savigny

influence Code Napoléon and Mancini

1898

Montevideo II

1878 Congress of Lima

20th C

10 of 10

1928

↓ Code B
Montevideo II

1

Diagram 3 History of International Unification of PIL: Latin America, CIDIP and Hague Conference

1878	Lima	
1889	Montevideo I	
		1893 1st Hague Conference
		1894 2nd Hague Conference
		1900 3rd Hague Conference
		1904 4th Hague Conference
	1914-1918	First World War
1928	Code Bustamante	1925 5th Hague Conference
1939/40	Montevideo II	1928 6th Hague Conference
		Second World War
1939-1945		
1948	Charter OAS	
	Inter-American	
	Council of Jurists	
		1951 7th Hague Conference
		1955 Statute Hague Conference
		enters into force
		1956 8th Session
		1960 9th Session
		1964 10th Session
		1968 11th Session
		1972 12th Session
1975	CIDIP-I Panama	1976 13th Session
1979	CIDIP-II Montevideo	1980 14th Session
1984	CIDIP-III La Paz	1984 15th Session
1989	CIDIP-IV Montevideo	1988 16th Session
		1993 17th Session: Centennial
		Hague Conference
1994	CIDIP-V Mexico City	1996 18th Session
	CIDIP-VI ...	

Diagram 4 Preparation process of Hague Conventions

Before Session

A. Selection stage: suggestions for topics may be made by

- governments
- international organizations
- Permanent Bureau

Recommendation by Special Commission on general affairs and policy of the Conference to Plenary Session

Plenary Session Decision

Year 1

Year 2-3

B Research stage \Rightarrow Report

Special Commission

C Discussion stage: one meeting of Special Commission

D Drafting stage: two meetings of Special Commission \Rightarrow preliminary draft plus report

Year 4

Plenary Session Adoption of Convention

Year 5 and following

E Consolidation stage: Report; Actes et documents (Proceedings)

Special Commission

F Monitoring stage

Diagram 5 Children's Law in PIL Conventions

1889 Montevideo (based on reciprocity):

- (a) *patria potestad* (including *obligaciones alimenticias*)
- (b) *filiación*
- (c) *tutela*
- (d) *adopción*

dispersion of applicable laws (e.g. (a) law of place where authority is exercised; (b) law governing celebration of marriage; (c) law of minor's domicile)

1940 Montevideo: *idem*, but definition of domicile: habitual residence with intention to stay.

1902 (adopted 1900) Hague Convention on Guardianship of Minors (based on reciprocity), deals only with (c) *tutela* — nationality principle.

1956 Hague Convention on the Law Applicable to Maintenance Obligations Towards Children

1958 (adopted 1956) Hague Convention Concerning the Recognition and Enforcement of Decisions on Maintenance Obligations Towards Children

1958 International Court of Justice, Boll case: Netherlands v. Sweden. Blow to nationality principle — hence need to revise 1902 Guardianship Convention. Result:

1961 (adopted 1960) Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors

1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors

1965 (adopted 1964) Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption

1989	Inter-American Convention on Support Obligations	1973	(adopted 1972) Hague Convention on the Law Applicable to Maintenance Obligations (revises 1956 Convention) Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (revises 1958 Convention)
1989	Inter-American Convention on the International Return of Children	1980	Hague Convention on the Civil Aspects of International Child Abduction: • Central Authority • no public policy exception
		1993	Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
1994	Inter-American Convention on International Traffic in Minors	1993- 1996	Revision 1961 Hague Convention on Protection of Minors

Diagram 6 Human Rights Instruments on Children's Law

1900 Ellen Key publishes "The Century of the Child", but no trace of children's law in early Latin-American or Hague Conventions.

1919 International Labour Organization: first international conventions to set minimum age for industrial employment of children.

1924 League of Nations' Geneva Declaration of the rights of the child (see text)

1948 UN Declaration of the Rights of the Child (see text)

Since 1948 many human rights conventions, not only focusing on certain acts (forced labour, genocide), but also for specific population groups (women, disabled persons, refugees), and general (UN Covenants, American and European conventions). These conventions generally apply to children.

1959 UN Declaration of the Rights of the Child (see text)

1986 UN Declaration on Adoption and Foster Care

1989 UN Convention on the Rights of the Child (CRC) (see text)

raison d'être: children's specific needs and vulnerability demand a particular response from international community.

General trend: child from *object* of protection to *subject* of rights; shift from private, charitable to public and political approach; development towards universality.

CRC provides general *framework* for PIL (conventions) on children. CRC also *depends* for its effective operation on "implementation" by PIL (conventions):

- International child protection in family situation: Articles 1, 4, 5, 7-9, 12, 18, 20
- International maintenance obligations: Article 27(4)
- International Child Abduction: Articles 10-11
- Intercountry Adoption: Articles 20-21, 35
- Monitoring of conventions: CRC Committee

Intercountry adoption as an illustration
of the interaction between treaty-making
in the field of PIL and human rights law

Diagram 7 Comparison between UN Declaration (D) (1986) and Convention on the Rights of the Child (C) (1989) on Adoption

D 5, C 21	1. best interests of child paramount principle
D 1-3, C 18	2. priority care by own parents; State should support
D 17, C 21	3. subsidiarity of ICA
D 15, 22 C 21	4. need to involve and inform child's biological parents
D 20, C 21	5. need for special protection in ICA
D 19, C 35	6. no child abduction and illicit placement
D 20, C 21	7. no "improper financial gain"
D 8-9, C 7-8	8. importance of identity and nationality
D 24, C 20	9. pay due regard to child's background
D 22	10. facilitate migration
D 23	11. ensure legal validity of adoption abroad

Intercountry adoption as an illustration
of the interaction between treaty-making
in the field of PIL and human rights law

*Diagram 8 System of the Hague Convention of 29 May 1993 on
Intercountry Adoption*

A Nature, structure, objectives and scope

1. Nature: substantive provisions on safeguards and procedures; limited role for PIL: see Ch. V
2. Structure
 - (a) division of responsibilities between countries of origin and receiving countries (Articles 4-16, 17; Articles 5-14, 15)
 - (b) co-operation
3. Objectives
 - (a) safeguards - Chapter II
 - (b) co-operation - Chapters III and IV
 - (c) recognition - Chapter V
4. Scope: Articles 2-3

B Intermediaries

1. Central Authorities: Article 8
2. Accredited bodies: Articles 9-12; 32
3. Others: Article 22; 32

C Procedure

1. Steps to be taken in country of origin: Articles 5, 16, 29
2. Steps to be taken in receiving country: Articles 4, 14-15
3. Placement: Article 17
4. Transfer: Articles 18, 19, 20

D Recognition, effects, follow-up

1. Recognition: Articles 23-24
 - (a) no further specified conditions
 - (b) certification
 - (c) recognition by operation of law
 - (d) refusal of recognition
2. Effects: Articles 26-27
 - (a) effects common to all adoptions
 - (b) effects of full adoption
 - (c) conversion
3. Follow-up: Articles 30-31
 - (a) reports
 - (b) confidentiality and access

Custody of children and international child abduction

Diagram 9 (see also Diagram 5) Development of Conventions on Protection of Minors and on Child Abduction

1889 Montevideo (based on reciprocity).

1940 Montevideo (*idem* — habitual residence with *animus manendi*).

1902 Hague Convention on Guardianship of Minors (based on reciprocity). Nationality principle, but law of habitual residence if national law makes no provision for guardianship or if urgent measures are needed.

Domicile v. nationality as connecting factor.

On one hand: Alfonsin: "nationality pertains to public law, domicile to civil law; therefore use domicile". Problem of dual nationality: which one is effective? Unreal nationality (ICJ Nottebohm).

On other hand: domicile may be fictional (hence: habitual residence). Nationality harder to change than domicile.

1958 Boll case: Netherlands v. Sweden.

1961 Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors

Hague Convention of 1961 does not deal with child abduction, hence:

- 1980 Council of Europe Convention
- 1980 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- 1989 Inter-American Convention of 15 July 1989 on the International Return of Children
- 1993-1996 Revision of 1961 Hague Convention

Custody of children and international child abduction

Diagram 10 System of Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors

A Principles and scope

1. reciprocity
2. care of minor's person and property
3. jurisdiction, applicable law, recognition—not enforcement of decisions
4. co-operation between courts and authorities

B Jurisdiction

1. State of habitual residence of minor: Article 1
2. Application to custody measures in divorce cases: Article 15
3. State of nationality: Article 4
4. Transfer of habitual residence: Article 5
5. Danger; urgent measures: Articles 8/9

C Applicable law: Article 2

D Recognition: Article 7

E Co-operation: Articles 4, 10, 11

Flaws: Article 4

Article 5

Article 7

Articles 10-11

(Continúa)

Custody of children and international child abduction

Diagram 11 Sources of the Hague Child Abduction Convention

A 1961 Hague Convention on Protection of Minors

Proposed article to the effect that “The [fraudulent] removal of the habitual residence of the minor does not bring about a change in jurisdictional bases referred to in this Convention” was in the end not accepted. Some experts felt that a removal, even if fraudulent, was acceptable provided child was being removed to country of his or her nationality.

Omission of any reference to “legal kidnapping” left gap in Convention. No reference to nationality in Child Abduction Convention.

B Uniform Child Custody Jurisdiction Act

In United States custody decrees are not protected by the “Full Faith and Credit Clause” of the US Constitution.

The UCCJA (1968) now adopted in all US states provides for *jurisdiction* in custody matters “in the State which had been the child’s home State within 6 months before commencement of the proceeding and the child is absent from his State because of his removal or retention by a person claiming his custody, and a parent or a person acting as parent continues to live in this State ...”.

Child Abduction Convention does not try to establish a court’s jurisdiction.

C Canada — Extra-Provincial Custody Orders Enforcement Act

The EPCOEA (1974) provides for easy *enforcement* of custody orders made abroad unless evidence is provided that child “did not at the time the custody order was made, have a real and substantial connection with the province, state or country” in which order was made. Court may refuse to order return if it is “satisfied that a child would suffer serious harm if the

child remained in or was restored to the custody of the person named in a custody order”.

EPCOEA does not cover hypothesis of joint custody order.

Child Abduction Convention does not only apply where custody order has already been made, but also where wrongful removal or retention occurred before any custody order had been made.

D Swiss proposal

Swiss proposal made at Council of Europe in 1976 was based on idea of a “restoring of custody” by restricting defenses in order to avoid a hearing on the merits. It prompted basic principle of an almost automatic, speedy turnover of child which had been wrongfully removed or retained.

Custody of children and international child abduction

Diagram 12 System of Hague Child Abduction Convention

A Basic approach

Options were:

1. facilitating enforcement of decisions
2. expediting the return of the child
3. defining more narrowly jurisdiction of courts
4. giving courts power to decline jurisdiction for reasons of wrongful removal or retention
5. strengthening administrative co-operation

Convention is fully built around 2 and 5. Merits of custody are fully deferred to courts which deal with this problem after child's return (Articles 16 and 19 giving, in a negative way, effect to 3 above). Note that Convention does not focus on facilitating enforcement of decisions: see Article(s) 14 (and 15). Acceptance of principle of prompt return implies a degree of self-denial by courts, which has natural inclination to make its own assessment about interests of children who are presently in its jurisdiction. Cf. Article 3 CRC.

European Luxembourg Convention is built on 1 and 5. Inter-American Convention same approach as Hague Convention.

B Substantive principles

See Articles 1 and 3. Convention protects "rights of custody". Custody is not just "possession" of child, but broader: includes right to determine child's place of residence: Article 5. Important e.g. where parents have *joint custody* but only one has *care and control*.

Custody rights may (a) have arisen automatically under law of State of habitual residence of child, or (b) may have been defined under a decision or agreement under law of that State.

Return may be refused *only* if

13(1)a)

13(1)b) burden of proof on abductor

12)

13(2)

20

C Procedural matters

Device of Central Authorities (CA's) — their duties: Articles 6 and 7.

Applicant has three options:

1. apply to CA of child's habitual residence (Article 8)
2. apply to CA of any other Contracting State (where child is thought or known to be) (Article 8)
3. bypass CA and apply directly to courts of a Contracting State (Article 29)

Idea is first to try and obtain voluntary return of child; if necessary, provisional measures; negotiations. If that fails: institute proceedings.

D Monitoring: Special Commission

Custody of children and international child abduction

Diagram 13 Comparison of Hague and Montevideo Conventions on International Child Abduction

- A Basic approach:** similar, *cf.* Articles 1 and 3.
- B Substantive principles:** *cf.* Articles 12, 13 and 20 (Hague) and 11, 14 and 25 (Montevideo)

C Procedural matters: Central Authorities — duties

Applicant's options under Montevideo more limited: Article 6; but stronger for enforcement of foreign access order: see Article 21.

D Monitoring

Article 27 Montevideo
Special Commission (Hague)

E Other matters

- reservations (permitted by Montevideo, not by Hague)
- relationship with other conventions (Article 34 of both Conventions)

International recovery of maintenance Conventions

Diagram 14 Origin and relationship of Conventions on Maintenance Obligations

1930's League of Nations work on child support - not successful

1937 Unidroit

1952 ECOSOC Geneva

(a) model bilateral for enforcement

1956 Hague (1) applicable law (children)

1958 Hague (2) enforcement (children)

+

(b) model multilateral for co-operation

UN recovery of maintenance (all)

1973 Hague (1) applicable law (all)
Hague (2) enforcement (all)

1989 Inter-American Convention (all) (double Convention)
1. jurisdiction
2. applicable law
3. recognition and enforcement

p.m. 1968/1988: Brussels/Lugano Convention (all) (double Convention)
— Article 5(2).

International recovery of maintenance Conventions

Diagram 15 Applicable law

A Scope

Maintenance obligations arising from

- family relationship, in particular relations between parents and children (all Conventions). Question of filiation separate from support (Hague 1956: Article 5; Hague 1973: Article 2; Montevideo: Article 5).
- relations between spouses
- relations between ex-spouses
- relations between persons related by affinity
- reimbursement by maintenance debtor to public body for benefits provided for maintenance creditor

B Applicable law

1. Common law systems: *lex fori*
2. — Hague 1956/1973: law of habitual residence of creditor (Hague 1956, Article 1; Hague 1973, Article 4) but “fall back” provisions (Hague 1956, Article 3; Hague 1973, Articles 5-6)
 - change in connecting factor
 - special rule for support between ex-spouses (Hague 1973, article 8)
 - special rule for public bodies (Hague 1973, Article 9)
3. Montevideo: most favourable law: Article 6 (n.b. reciprocity!)

C Qualification of the applicability of the designated law

Hague 1973: Article 11, Montevideo: Articles 21-22.

International recovery of maintenance Conventions

Diagram 16 Recognition and enforcement

A Scope: cf. Diagram 18

- periodical payments; lump sums
- order in favour of public bodies (Hague 1973, Articles 18-20)
- decision/settlements (Hague 1973, Article 21)

B Conditions for recognition and enforcement

Hague 1973, Chapter II; Montevideo, Articles 11 *et seq.*

1. Indirect basis of jurisdiction, in particular court of creditor's habitual residence
2. Refusal of recognition and enforcement.

C Procedure for recognition and enforcement

Hague 1973, Chapter III; Montevideo, Articles 14-18.

D Public bodies

Hague 1973, Chapter IV.

E Relation to other conventions

Hague 1973, Articles 23, 29; Montevideo, Article 29.

International recovery of maintenance Conventions

Diagram 18 Administrative co-operation: the New York Convention

A Scope: cf. Diagram 18

B Machinery

- transmitting agencies
- one receiving agency

C Transmitting the claim

D Action by receiving agency

E Transfer — *not* enforcement — of judgments

ANNEX

INTRODUCTORY NOTE

on the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*

At its Seventeenth Session - its Centennial - in May 1993, the Hague Conference on Private International Law drew up a *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, which was immediately signed on 29 May 1993 by Mexico, Costa Rica, Romania and Brazil, and hence bears that date.

The Hague Conference had already drawn up a *Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption* at its Tenth Session in 1964, but this Convention, first signed on 15 November 1965, had not become a success because it was drawn up mainly with the European situation of the 1960's in mind: international adoptions spanning relatively short geographical distances and between countries with more or less comparable socio-economic, cultural and legal systems. When this Convention entered into force, in 1978, the social reality underlying intercountry adoption of children had already dramatically changed, as a result of the increasing placement of children from the Third World with families in industrialized countries. It is estimated that since the early 1980's, approximately 20,000 children have been migrating annually for purposes of adoption from rising numbers of developing countries, and more recently also from Eastern Europe, to Western Europe, North America, Israel and Australia. This has opened up quite new avenues for permanent child care for the benefit of children, but it has also increased uncertainty and delay in the proceedings as well as the risks of ill-prepared adoptions and of abuse.

The phenomenon of intercountry adoption thus having taken worldwide dimensions called for a new approach: a framework for international co-operation with more emphasis on the need to define substantive safeguards and procedures for courts, administrative authorities and private

intermediaries, than on traditional rules of conflict of jurisdiction and of applicable law. Worldwide agreement on the rules of jurisdiction and applicable law was moreover unlikely to be expected given the existing divergencies between legal systems as illustrated by the partly conflicting regimes of the *Inter-American Convention of 24 May 1984 on Conflicts of Laws Concerning the Adoption of Minors* and those of the 1965 Hague Convention.

An important precedent for the new Convention was the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, which also stepped aside from the traditional techniques of private international law in order to respond to a specific international phenomenon by establishing a system of judicial and administrative co-operation, through Central Authorities designated by each State Party to the Convention, for the immediate return of wrongfully abducted or retained children. A major source of inspiration during the negotiations became the *United Nations Convention on the Rights of the Child* (CRC), adopted on 20 November 1989, and which in its Article 21 calls upon States to conclude *inter alia* multilateral agreements to protect children in intercountry adoption.

The idea for the Convention was first tested in another forum, the International Law Association, before it was submitted by the Permanent Bureau to the Hague Conference's Sixteenth Session in 1988, where it was warmly received. The topic was included in the agenda for the next Session on the condition that countries of origin of adopted children, most of which were not Members of the Conference, would participate. The Permanent Bureau, with the help of a special fund to which many Member States contributed, was able to assure the participation of a large number of then non-Member countries. In the negotiations which took place under the Chairmanship of Mr T.B. Smith, QC (Canada), almost seventy States and twenty international organizations, both governmental and intergovernmental, took part. For the first time, interpretation from Spanish to English and French was ensured in order to facilitate participation by the numerous Latin American countries. As of this date (31 December 1994) the Convention has been signed by seventeen States, ratified by Mexico and Romania and is expected to enter into force in early 1995.

Objectives and scope of the Convention

The objectives of the Convention are defined in Article 1:

- (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

The Convention, therefore, clearly puts the rights of children first in intercountry adoption, as does the CRC (Article 21). It is furthermore based upon the recognition that unilateral action by either the State of origin or the receiving State, or both, is not enough but that they need to co-ordinate their policies, including those on emigration and immigration, and to co-operate in intercountry adoptions. Finally, the Convention does not pretend to unify the rules of conflicts of jurisdiction or of applicable law amongst the Contracting States but does provide for recognition of adoptions properly carried out.

According to Article 2, the Convention applies, mandatorily, wherever a child habitually resident in one Contracting State (the "State of origin") has been, is being, or is to be moved to another Contracting State (the "receiving State"), either for purposes of adoption in the receiving State, or after having been adopted in the State of origin. It therefore applies both in the configuration where the adoption takes place for the first time in the receiving country (*e.g.* adoptions from the Philippines, Korea, India) and where the country of origin insists that the adoption order is made there before the child leaves for abroad (*e.g.* adoptions from Latin American countries, Sri Lanka, Eastern Europe). It should be noted that the Convention does not impose the institution of adoption upon any legal system and can also be applied where the internal laws of a country do not provide for or allow adoption.

The Convention covers both full adoptions (leading to a termination of the parent-child relationship) and simple adoptions (where this parent-child relationship remains at least in part intact). It applies to adoptions whether they are created by judicial order, by an administrative decision or by a private arrangement, and whether the adoption involves relatives or strangers. The Convention applies to all children, whatever their nationality or legal status, provided they have their habitual residence in the country of origin. Similarly, the Convention applies to all spouses and single persons (but not to non-marital relationships), whatever their nationality and legal status as long as they are habitually resident in the receiving State. Concerning the specific questions which arise when the Convention is to be applied to refugee children, a Special Commission of the Hague Conference, which met from 17 to 21 October 1994, drew up a Recommendation on the application of the Convention to refugee children and other internationally displaced children.

Substantive requirements

The co-operative framework of the Convention is based upon an agreed division of responsibilities. Chapter II of the Convention defines a number of substantive requirements of the Convention, responsibilities for which lie partly with the country of origin (Article 4), partly with the receiving State (Article 5). These responsibilities are neither exhaustive nor mutually exclusive. They are not exhaustive because other substantive requirements may be found elsewhere in the Convention, in particular in Chapter VI and, moreover, the Convention only sets minimum standards and does not prevent a State from setting higher standards for intercountry adoption. The responsibilities are, moreover, not mutually exclusive in the sense that they merely require each of the two States involved to do what it is in the best position to do. Therefore, the State of origin is primarily responsible for ensuring that the child is "adoptable", that due consideration has been given to alternatives to intercountry adoption - *i.e.* permanent care by a suitable family, *cf. Preamble*, second and third paragraphs - within the State of origin, that the necessary consents have been freely given after counselling and information of the effects of the consent, including, where appropriate, the consent of the child (Article 4). Likewise, the receiving

State is primarily responsible for determining that the prospective adoptive parents are eligible and are suited to adopt, that they have been appropriately counselled and that the child will be effectively allowed to enter and reside permanently in that State. As we will see, Article 17 offers a procedure to resolve any conflicts that may arise between the State of origin and the receiving State as a result of diverging adoption requirements.

Central Authorities and accredited bodies

Chapter III deals with the Central Authorities which should be designated by each Contracting State (Federal States may designate more than one such Central Authority). There is an international as well as an internal aspect to the functions of Central Authorities: internationally, their task is to co-operate with their counterparts in other Contracting States; internally they are to promote co-operation among the competent authorities. Their responsibilities are both of a general and of a case-specific character; the latter responsibilities may be delegated to "accredited bodies" (Articles 9-12). While the device of the Central Authority is well known from other Hague Conventions, including the Hague Child Abduction Convention, the appearance of accredited bodies is a novelty. It reflects the present reality that private organizations play an important role as intermediaries in the intercountry adoption process. Their role is recognized but also defined and regulated by the Convention, in particular as to their competence, non-profit objectives and the need for supervision (Article 11, see also Article 32).

Procedural requirements

Chapter IV deals with the procedures which precede and follow the making of the adoption and for which the Central Authority and its delegates have special responsibility. These requirements concern the preparation of reports, both on the prospective adopters (home study) and the child, the placement process, emigration from the State of origin and immigration into the receiving State, the making of arrangements for the transfer of the child, exchange of information during the adoption process

and measures to be taken in the hopefully exceptional case when, before the adoption, the placement turns out not to be in the child's best interests.

Of special importance is Article 17 which exemplifies the basic idea of co-operation between the State of origin and the receiving State, as well as of co-ordination of child care and migration policies. While recognizing the right of the State of origin to decide on the placement of the child, Article 17 *c* gives the Central Authority of the receiving State the right to veto a placement to which it does not agree. One reason may be that the receiving State finds that the adoption would be contrary to mandatory provisions of its law, most often its own internal law, concerning adoption (e.g. age requirements). Once the receiving State has given the green light, however, it may no longer raise any bars (Article 17 *d*).

Article 22 of the Convention deals with the problem of so-called "independent" or "private" adoptions (adoptions carried out through intermediaries other than accredited bodies). While all applications have to be made to a Central Authority, another public authority or an accredited body (Article 14), other bodies and persons may act as intermediaries under the Convention, but only under certain conditions: firstly, the Contracting State must have made a specific declaration to that effect; secondly, they must meet the requirements fixed by the Convention; thirdly, the names and addresses of these bodies and persons must be made known to the Secretariat of the Hague Conference; fourthly, the reports on the child and prospective adoptive parents should in all cases be prepared under the responsibility of the Central Authority or an accredited body; and, finally, any State of origin may veto the activities of such other bodies or persons in the adoption process concerning its children.

Recognition and effects of the adoption

Where the Convention requires the approval of the two States directly involved (the State of origin and the receiving State) for the entrustment of the child to the prospective adoptive parents (Article 17 *c*), there is no reason why the resulting adoption made in either of the two States should not be recognized by the other State and, hence, in all, less involved,

Contracting States. This is the principle of Article 23 which provides for recognition by operation of law of a certified adoption to which Article 24 makes an exception only for extreme cases, such as fraud or duress exerted on a mother while giving her consent. The Convention also specifies some of the effects of the recognition which extends in all cases to the legal parent-child relationship and the vesting of parental responsibility on the prospective adoptive parents. Where the adoption, under the laws of the State where it was made, terminates all legal bonds with the child's mother and father (full adoption), the Convention guarantees rights "equivalent" (not necessarily equal) to those of a child adopted in full adoption in the recognizing State. The latter provision does not, therefore, apply to simple adoptions, but the Convention contains a special provision for the conversion of simple adoptions to full adoptions (Article 27).

General provisions

Chapter VI contains, in addition to a number of standard articles, several important substantive provisions. Article 29 restricts contact between the prospective adoptive parents and the child's parents before it has been determined that the child is free to be adopted and that the applicants are eligible and suited to adopt. The purpose of this is to avoid situations such as those that have been frequently seen recently in Romania, but are also well-known in Latin America and Asia, where prospective adopters, often guided by local brokers, visit the birth parents at home who then, in exchange for money or under pressure, consent to the adoption of their child. Articles 30 and 31 (which should be read in conjunction with Article 16(2)) contain provisions on the information of the child's origin, including the identity of the birth parents as well as the medical history. All Contracting States are required to preserve such information even where, as is the case in certain Asian countries, they do not yet allow children to have access to such information. As such societies evolve, they may in the future decide to disclose such information, which will then be available because it will have been preserved. Article 31 adds that personal data gathered or transmitted under the Convention must be treated confidentially. Article 32 includes a general provision against the making of improper financial gain. Article 33 underlines the supervising role of the Central

Authority: any competent authority, which finds that any provision of the Convention has not been respected, is to inform immediately the Central Authority of its State. The Convention also for the first time codifies in Article 42 what has become a practice under several other Hague Conventions on judicial and administrative co-operation: periodic meetings of Special Commissions to review the practical operation of the Convention.

A detailed report on the Convention drawn up by Professor G. Parra-Aranguren (Venezuela) has already been published and has also appeared in the *Proceedings (Actes et documents)* of the Seventeenth Session of the Hague Conference on Private International Law, published in 1995.

The Convention entered into force as between Mexico, Romania and Sri Lanka on 1 May 1995. It has also been ratified by Cyprus, Poland and Spain, and has been signed by twenty-three States (17 July 1995).