

# The Hague Conference on Private International Law\*

Hans van Loon\*\*

## 1. INTRODUCTION

Among the international organisations at The Hague, the Hague Conference on Private International Law is unique in that it is the only intergovernmental organisation with a “legislative” mission. However, its “laws” take the form of multilateral treaties or conventions, which are not primarily aimed at facilitating the relations between States, but rather the lives of their citizens, private and commercial, in cross-border relationships and transactions. Although our world is increasingly interconnected, it is still composed of a great variety of legal systems, reflecting different traditions of private and commercial relationships. When people cross borders or act in a country other than their own, these differences may unexpectedly complicate or even frustrate their actions. For example, in some countries marriages take place according to various religious forms, while other countries require a civil marriage; will either system give effect to the other’s form of marriage? Two cars collide in Austria, injuring the passengers, all of whom are Turks; will Austrian or Turkish law apply in deciding damages or compensation? A patent certificate issued in California must be produced for official use in Russia; is there a way to avoid cumbersome legalisation formalities? A London trustee wishes to acquire property; can he do so in Italy where trusts do not exist? A Moroccan-Dutch couple separates and the father takes their children to Morocco; does the wife have a remedy if her custody rights are ignored?

There is an endless range of questions that may arise with regard to such cross-border situations. Solutions provided at the national, or even at the regional level, are increasingly insufficient in the light of progressing globalisation. The task of the Hague Conference on Private International Law is to develop and service frameworks of multilateral legal instruments which, despite the differences between legal systems, will allow individuals as well as companies to enjoy a high degree of legal security.

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\*\* Hans van Loon is the Secretary General of the Hague Conference on Private International Law.

## 2. ORIGINS

The Hague Conference is the oldest of the international legal institutions at The Hague. The first Hague Conference was held in 1893 on the initiative of Tobias M.C. Asser (Nobel Peace Prize 1911). Initial attempts to convene such a conference in Europe had failed, including one that was to have taken place in Rome in 1885, spurred by Pasquale Mancini, Asser's principal source of inspiration. It was only under Asser's initiative in 1893 that opportunities of time and venue were seized. In 1889 seven South American States had successfully concluded a diplomatic conference on private international law in Montevideo, and The Hague in the Netherlands offered a "neutral" place for Europe to respond with its own international conference, free from powerful rivalries. Moreover, Tobias Asser had the support not only of his Government but also of a group of eminent friends and colleagues from European countries, including Louis Renault (France), A. Pierantoni (Italy), and F. Martens (Russia). Their common vision was to remove legal obstacles to international private relations and transactions through the negotiation of treaties, based on straightforward principles and acceptable to all nations.

The first Hague Conference was so successful that it was immediately followed in 1894 by a second Diplomatic Conference. Once again, Asser presided over the Conference, with Fedor de Martens leading the negotiations for Russia. Martens returned to Saint Petersburg impressed by these conferences and the importance of Asser's diplomacy in their success. There is no doubt that these factors played a role in his advising Czar Nicholas II to propose The Hague as the venue for the first Peace Conference in 1899, again to be chaired by Tobias Asser, with Fedor de Martens acting as *aide-de-camp*.

The first Hague Peace Conference having been successfully completed, most notably by the creation of the Permanent Court of Arbitration, Asser went on to lead the third (1900) and fourth (1904) Hague Conferences on private international law, each one organised on an *ad hoc* basis without the support of any permanent secretariat. The 1904 Hague Conference welcomed Japan as the first non-European delegation. Together, these first four conferences produced seven Conventions:

- Convention of 1896 relating to civil procedure (later replaced by that of 1905);
- Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage (replaced by the Marriage Convention of 1978);
- Convention of 12 June 1902 relating to the settlement of the conflict of laws and jurisdictions concerning divorce and separation (replaced by the Divorce Convention of 1970);
- Convention of 12 June 1902 relating to the settlement of guardianship of minors (replaced by the Protection of Minors

Convention of 1961 and now by the Convention on the Protection of Children of 1996);

- 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 (replaced by the Matrimonial Property Regimes Convention of 1978);
- Convention of 17 July 1905 relating to deprivation of civil rights and similar measures of protection (replaced by the Protection of Adults Convention of 2000).
- Convention of 17 July 1905 relating to civil procedure (replaced by the Convention on Civil Procedure of 1954, and the Service Convention of 1965, the Evidence Convention of 1970 and the Access to Justice Convention of 2000).

The work stagnated after the Fourth Session when the international political climate deteriorated and perverted nationalism won ground in Europe, effectively discrediting nationality – the cornerstone of most of the early Hague Conventions – as any sort of guiding principle. Even before the First World War, countries had begun denouncing the conventions that they had so happily agreed upon a decade before. In the Interbellum a fifth (1925) and a sixth (1928) Hague Conference were held, for the first time including a delegation from the United Kingdom, but no conventions were adopted. It was not until after the Second World War that the phoenix arose from its ashes.

In 1951 the seventh Hague Conference took place, whose participants institutionalised the work by creating a permanent organisation: the Hague Conference on Private International Law. The implementing statute, which came into force in 1955 and was originally signed by 16 States (all European with the exception of Japan), provided that diplomatic conferences should take place in principle every four years, and created a small permanent secretariat to organise and prepare these conferences for the development of new conventions. Meetings were to take place, as they do to this day, at the Peace Palace at The Hague. In the beginning, the sole official language was French, but when the United States, Canada, and other common law countries joined the Hague Conference in the 1960s, English became its second official language.

With the growth in its membership, bridging the gap between common law and civil law systems became an important challenge for the Hague Conference. The concept of “habitual residence” became prominent as a connecting factor in international situations, both in order to determine which law to apply and which court should have jurisdiction. This concept was adopted at the expense of both the nationality principle, so popular during the first generation of Hague Conventions, and the principle of domicile, the primary connecting factor in the common law jurisdiction. Techniques were found to accommodate differences between civil and common law systems for the service of process abroad and

for the taking of evidence abroad; to reconcile different conceptions of the succession of estates of deceased persons and the administration of such estates; and to recognise the institution of the trust, widely used in the common law world but practically unknown in civil law systems.

In the 1980s and 1990s other States such as Australia, China and several Latin American countries joined the Conference. During the last seven years the number of new Member States has increased by more than a third, so as to now include 66 States. Countries from Europe include all EU States, plus Albania, Belarus, Bosnia and Herzegovina, Croatia, the FYR of Macedonia, Georgia, Iceland, Monaco, Montenegro, Russian Federation, Serbia, Switzerland, Turkey and Ukraine. Countries from the Americas include Argentina, Brazil, Canada, Chile, Mexico, Panama, Paraguay, Peru, Suriname, United States of America, Uruguay and Venezuela. Countries from Asia/Oceania include Australia, the People's Republic of China, Israel, Japan, Jordan, the Republic of Korea, Malaysia, New Zealand and Sri Lanka. Countries from Africa include Egypt, Morocco and South Africa. India's admission as a Member is under consideration. Four more States (Colombia, Costa Rica, Ecuador, Paraguay and Zambia) have been admitted but have yet to accept the Statute of the Conference.

Since the entry into force of the revised Statute of the Conference on 1 January 2007 (in English and French, both texts being equally authentic from that date), Membership is also open to Regional Economic Integration Organisations. On 3 April 2007 the Council on General Affairs and Policy of the Conference unanimously decided to admit the European Community (EC), a Regional Economic Integration Organisation in terms of Article 3 of the revised Statute, as its first Member Organisation. This decision was followed by a ceremony during which the Presidency of the Council of the European Union, on behalf of the EC (which formally until then had enjoyed observer status within the Organisation), deposited the instrument of acceptance of the Statute of the Hague Conference. The admission of the EC came in addition to the individual membership of all 27 European Union Member States, all of which continue to be Members of the Conference in their own right.

With the continuing growth of signatures, ratifications and accessions to the Hague Conventions, 129 States in all parts of the world are now connected to the Hague Conference, either as Member States or as Parties to one or more of the Hague Conventions which are also open to non-Member States of the Organisation.

### 3. SIGNIFICANCE OF THE CONFERENCE'S WORK

Since 1951, the Conference has adopted thirty-six Conventions in three major areas:

- INTERNATIONAL LEGAL CO-OPERATION AND LITIGATION

- **International Judicial and Administrative Co-operation:**

- Convention of 1 March 1954 on Civil Procedure (now replaced by the Service, Evidence and Access to Justice Conventions)
    - Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
    - Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
    - Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
    - Convention of 25 October 1980 on International Access to Justice

- **Jurisdiction and Enforcement of Judgments:**

- Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods
    - Convention of 25 November 1965 on the Choice of Court
    - Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
    - Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
    - Convention of 30 June 2005 on Choice of Court Agreements

- INTERNATIONAL COMMERCIAL AND FINANCE LAW

- **Contracts:**

- Convention of 15 June 1955 on the Law Applicable to International Sales of Goods (replaced by the Sales Convention of 1986)
    - Convention of 15 April 1958 on the Law Governing Transfer of Title in International Sales of Goods
    - Convention of 14 March 1978 on the Law Applicable to Agency

- Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods

**Torts:**

- Convention of 4 May 1971 on the Law Applicable to Traffic Accidents
- Convention of 2 October 1973 on the Law Applicable to Products Liability

**Securities:**

- Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (adopted on 13 December 2002)

**Trusts:**

- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (see also *infra*, under wills, estates and trusts)

**Recognition of Companies:**

- Convention of 1 June 1956 on Recognition of the Legal Personality of Foreign Companies, Associations and Foundations

• INTERNATIONAL FAMILY AND PROPERTY RELATIONS

**International Protection of Children:**

- Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Applicable Law) Convention of 1973)
- Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Enforcement) Convention of 1973)
- Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors (replaced by the Protection of Children Convention of 1996)
- Convention of 15 November 1965 on Jurisdiction, Applicable Law

and Recognition of Decrees Relating to Adoptions (replaced by the Intercountry Adoption Convention of 1993)

- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (see also *infra*, under relations between (former) spouses)
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see also *infra*, under relations between (former) spouses)
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- 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

### **International Protection of Adults:**

- Convention of 13 January 2000 on the International Protection of Adults

### **Relations between (former) Spouses:**

- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations
- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages
- Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes

### **Wills, Estates and Trusts:**

- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions

- Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons
- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
- Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons

The attached chart outlines the current status of signatures, ratifications and accessions: [http://www.hcch.net/upload/statmtrx\\_e.pdf](http://www.hcch.net/upload/statmtrx_e.pdf).

It would be misleading to measure the success of a Hague Convention only in terms of the number of States that have formally adopted it, as its beneficial effects are not limited to ratifying states. Since the Hague Conference produces treaties and, unlike the European Community, has no power to promulgate regulations or directives, States remain free, even if they have agreed to a Convention text at a Diplomatic Conference, to adopt or not adopt the Convention into their own system. In order for Hague Conventions to acquire the force of law in a country, they must pass through the constitutional procedures of that country. This is sometimes a slow process, and as a result countries will often, without formally adopting a Convention, simply borrow the text or some of the rules therein and incorporate them into their internal laws. Similarly, other international organisations may use Hague Conventions as a model. This has been the case, for example, with the Council of Europe, the Organisation of American States, and, more recently, the European Union.

Over the years the Conference has generally been most successful when it has attempted to establish channels for co-operation and communication between courts and authorities in different countries. While not radically impacting various internal laws, conventions such as those Abolishing the Requirement of Legalisation (92 States parties), on the Service of Judicial and Extra-Judicial Documents Abroad (56 States parties), on the Civil Aspects of International Child Abduction (80 States parties) and on Protection of Children and Co-operation in respect of Intercountry Adoption (74 States parties) nevertheless help to facilitate cross-border activities and solve otherwise intractable problems. The Legalisation or Apostille Convention has been a blessing to countless people in need of producing official documents abroad who otherwise would have encountered long delays and unnecessary costs. The Child Abduction Convention is another eloquent example of an instrument that has been enormously beneficial, in this case for the prevention and correction of wrongful removals of children worldwide. Likewise, the Intercountry Adoption Convention is setting universal standards for the conditions which must be fulfilled before a child may be adopted abroad, as well as providing the machinery for international co-operation in light of those standards.

A common feature of many Hague Conventions is that they operate through administrative agencies, typically Central Authorities, designated by each State bound by the Convention. These Central Authorities are in regular, often constant, contact with one another and with the secretariat – the Permanent



Bureau – of the Conference, through long distance communication as well as regular meetings both at the Peace Palace and in different regions of the world. More recently, the Conference has been instrumental also in promoting cross-border co-operation among courts in different States Parties to Conventions. A special database, <www.incadat.com>, enables courts of one country to consult case law of courts of other countries concerning the Child Abduction Convention, thus assisting in achieving uniform interpretation of the Convention. Likewise, a Judges' Newsletter, also published via the Internet (see <www.hcch.net> and then "Publications"), provides a unique forum to facilitate the exchange of ideas, good practice and international developments. The result is that a number of these Conventions have become frameworks for permanent co-operation, creating the bases for worldwide networks that connect thousands of people and organisations. This also means that the Hague Conference has changed as an organisation; it now devotes over 60% of its resources to post-Convention services such as monitoring Conventions and providing assistance to the Central and other authorities. Early 2007 saw the initial establishment of an International Centre for Judicial Studies and Technical Assistance to consolidate the provision of services offered by the Hague Conference to the growing number of officials and judges in need of assistance (particularly from developing countries and countries in transition) and to focus on strengthening and expanding the efforts to ensure the effective implementation in particular of the Hague Conventions on the Protection of Children and on Judicial and Administrative Co-operation.

The following graph illustrates the way in which the Organisation has developed over the past 40 years:

<b>Evolution of the Hague Conference, 1965-2007</b>			
	<b>1965</b>	<b>1980</b>	<b>2007</b>
Member States	23	27	66
Member Organisations	-	-	1
States Parties to Conventions	25	53	129
No. of Conventions	11	26	36
No. of Authorities <sup>2</sup>	23	450+	1500+
Permanent employees (FTE)	11	11.5	21.3
Products and services	- Development of new instruments	- Development of new instruments	- Development of new instruments - Promotion - Implementation - Support - Monitoring

<sup>2</sup> *I.e.* authorities established under the Statute and under various Hague Conventions, such as National Organs, Central and other National Authorities. Not included are the accredited bodies under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

At the same time, the development of new Conventions continues. When in force, the Hague Convention concerning the law applicable to indirectly held securities, will help to reduce credit costs world wide by providing legal certainty and predictability to securities transactions, now worth more than a trillion Euros/Dollars/Yens per day. It is hoped that the most recent Hague Convention adopted on 30 June 2005 will, once in force, do for choice of court agreement and ordinary court judgments what the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does for arbitral agreements and arbitral awards, namely to provide a reliable legal framework enhancing party autonomy in commercial settings.

Presently the Conference is working on a new global Convention on the international recovery of child support and other forms of family maintenance. This Child Support and Maintenance Project, in which more than 70 States have been involved so far, has the potential to benefit tens of thousands of children and other family dependants from around the world, as well as to relieve the burden of taxpayers. For the future, the Conference is considering issues related to environmental damage, questions concerning non-marital relationships, choice of law in international contracts, cross-border mediation in family matters and treatment of foreign law and further work in the area of international finance, and on international migration.

#### 4. THE HAGUE CONFERENCE AMONG OTHER INTERNATIONAL ORGANISATIONS

Given its role as a law-making body, the Hague Conference has a sphere of operation different from the adjudication and arbitration institutions at The Hague. Nevertheless, the various Hague institutions are interconnected in several ways. Occasionally the International Court of Justice may deal with a dispute between States concerning a question of private international law or even a Hague Convention. The Arbitration bodies at The Hague sometimes draw inspiration from Hague Conventions, and increasingly their judges and arbitrators have gained prior experience as experts or delegates at the Conference. Almost every year former participants of the Hague Conference are invited to teach at the Hague Academy of International Law; similarly, staff members of the Hague Conference regularly teach at the Academy. Given its wide range of activities and interests, the Conference works closely with a large number of international and regional, intergovernmental and non-governmental organisations to avoid duplicated work, to create synergy, to pool the best available expertise and to ensure the most effective operation of its Conventions. With increasing globalisation and regional activity in the field of private international law, the need for the Hague Conference is growing exponentially. Never have its products and services been in such high demand. The support of the host country has always played an integral role in the Conference's success and is highly appreciated.

Continuing co-operation with other international and national institutions at The Hague, the Government of the Netherlands, and the City of The Hague is an essential element of the expanding life of the Conference.