

**THE HAGUE CONFERENCE ON PRIVATE
INTERNATIONAL LAW:
Current problems and perspectives**

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INTRODUCTION

It is a great honour for me to be invited by the Universidad del País Vasco, in the context of the Vitoria-Gasteiz course on international law and international relations, to introduce and discuss with you the work of the Hague Conference on Private International Law. “The Hague Conference on Private International Law” is a long and somewhat unusual name for an intergovernmental organisation. It can, as we shall see, be explained by its history; in the beginning, *i.e.* as early as 1893 there were first only *ad hoc* Hague Conferences and only in 1955 was an intergovernmental organisation born which took its name from that history. We will avoid that long name and from now on refer to “the Hague Conference”, or even “the Conference”.

I. THE ROLE OF THE HAGUE CONFERENCE IN AN INCREASINGLY INTERDEPENDENT WORLD

Mission of the Hague Conference

The work of the Hague Conference, unlike that of other international organisations established at The Hague such as the International Criminal Tribunal for the former Yugoslavia or the International Court of Justice, does not usually get a great deal of coverage by the media. In the past we did not seek it either, and it used to be said that the Hague Conference was “blessed by its obscurity”. Our policy has definitely changed in this regard, but the fact remains that the Conference is not a judicial body, it does not deal with war criminals and it does not produce judgements: its product are multi-lateral treaties or Conventions; its trade is of a legislative, to a certain extent also of an administrative, rather than a judicial character. In that respect, the Hague Conference is unique among the various international organisations in The Hague. What is also special is that the *content* of the Conventions deals with the daily lives of

individuals, families and companies; usually when one thinks of a treaty, one thinks of matters which are the business of States like: arms control or the fixing of boundaries. The Hague treaties are concluded *by* States, but are not primarily *for* States, but for their citizens: they deal with private law.

The *raison d'être* of these treaties is that the Earth is one, but the world is not: it is divided in innumerable legal systems of private law, much more than there are States: the United States of America alone has fifty-six systems of law, Mexico thirty-seven, Spain has, in principle at least the possibility to have seventeen different private law systems; the United Kingdom has three systems, China also has three systems, not counting Taiwan. As a result, a contract or will or marriage that is valid according to one legal system may not be valid according to another. We therefore have problems of conflicting applicable laws, which need to be resolved. But that is not the only series of problems: there is also a question as to which court has jurisdiction in an international case, because there may be more than one. If, for example, a sales contract is made in Toronto, but the goods are to be delivered in San Sebastian, and the goods are defect or the invoice remains unpaid, will the courts in San Sebastian or in Toronto have jurisdiction? There is a further question of whether in judgements from Japan or the United States can be recognised in Spain and vice versa: will Spanish decisions be recognised abroad? And then there are practical questions of international administrative and judicial co-operation, for example, on how to serve process on a defendant, or take evidence, in another country how to access a foreign court, how to obtain the return of the abducted child, etc.

All these problems arise because the world is still a patchwork of legal systems and, with increasing mobility and communication the number of people, families and companies that are faced with these problems is increasing exponentially. If there were one law for the world these problems would be less important – but although there are uniform laws in some areas, such as international transport, and important regional developments such as in the European Community, there remains an incredible diversity of laws. And this is not a transitional phenomenon. New developments in technology will lead to new laws or new applications of existing laws. Think, for example, of a fashionable distinction that we now make when it comes to protecting consumers. Laws in Europe generally protect consumers when they are sought for by businesses in the consumer's country: a so-called passive consumer can rely on the applicability of his or her home standards. But the outgoing, active consumer cannot rely on the consumer's home standards. But this distinction becomes blurred when (1) the whole planet becomes the business' market place: when can the business be said to be seeking out a consumer in specific location? and (2) the consumer acquires undreamt of possibilities from behind his or her screen to go out through browsers and search machines to find the best offer. The whole notion of consumers tends to appear in a new light. At this point, we see that in Europe the trend is to firmly maintain a high degree of consumer protection in e-commerce, whereas in the United States, the balance is struck in a different way, more favourable to business. As a result, a consumer in Europe who has ordered, through the web, software from the United States or Canada, which has been

delivered to him on-line or off-line and who is not satisfied with the product, may always sue the North American seller before the courts here in Europe, whereas an American consumer does not have the same certainty when he orders a similar product in similar circumstances from a European producer.

The example also illustrates that there is more than the technology that creates legal differences: it is also differing *values* that matter. In this case, of the different levels and methods of protection of consumers, we are faced with different lifestyles within what we tend to describe as one and the same culture: the western culture. But a more profound reason why legal differences are not likely to disappear rapidly is the coexistence on this planet of profound differences between cultures. In the past decade, in the euphoria of global economic expansion, we have been inclined to think of globalisation as a sort of a Twentieth Century variant of the colonialism of the Eighteenth and Nineteenth Century: the world is out there, and we are making it a place of western culture, civilisation, system, simply because our western tradition is more vigorous and irresistible than others.

The events following 11 September 2001, have reminded us as H. Patrick Glenn has remarked in his recent book “Legal traditions of the world”, that the world is far too complicated to be caught in a single dichotomy of a growing “us” and many smaller “them”. Estimates of the Islamic population of the world now approach or go beyond 900 million people, the result of a globalisation process of the Islam, Islamisation. There is also a process of Easternisation, as Asian techniques of management and organisation are making head way in the west. So, as Glenn suggests there now appear to be three globalisation processes going on at the same time, the West, Islam, and Asia. We may be heading towards some form of equilibrium, but in order to get there we need a mutual understanding and we need to work on the terms of co-existence with one and other. It is interesting to see how after “September 11th”, the number of publications about the Islam, the Koran, the relation between the Islamic world and western world, has increased enormously in western newspapers and other publications.

So technological developments and cultural diversity create a world in which people, despite increased mobility and growing reach of activity, will continue to be faced with a variety of legal systems, and therefore the need to be helped in accommodating these differences. Now each legal system will try to help, but it is most effective if this is done in a co-ordinated multi-lateral way, and that is why there is a Hague Conference.

What, then, is the mission of the Hague Conference in this complex, increasingly interdependent world?

In a recently drawn up strategic plan, we formulated our mission as follows:

- To be a forum for the Member States for the development and implementation of common rules of private international law in order to co-ordinate the relationships between different private law systems in international situations.
- To promote international judicial and administrative co-operation in the fields of protection of the family and children, civil procedure and commercial law.

- To provide high-standard legal services and technical assistance for the benefit of Member States and States Parties to Hague Conventions, their government officials, judiciary and practitioners.
- To provide high-quality and readily accessible information to Member States and States Parties to Hague Conventions, their government officials, judiciary, practitioners and the public in general.

This mission should be seen against the background of a rapid growth of the Organisation, and of the numbers of parties to Hague Conventions.

Challenges of globalisation

The Hague Conference, as we will see, started its life very much as a Europe centred organisation. Growth beyond Europe began in the 1980's when the USA, Canada, Australia and other common law countries joined the Hague Conference, and continued, thereafter, when several Eastern European and Latin American countries joined. Since early 2001, growth has been particularly rapid: fifteen countries have joined, an increase of more than 30%. Moreover, these countries belong to all different continents: New Zealand, Sri Lanka, Jordan, the Russian Federation, Georgia, Lithuania, Belarus, Bosnia and Herzegovina, Yugoslavia, Albania, South Africa, Brazil, Peru, Panama, and Malaysia, bringing the total number of Member States to 62. In addition, Ukraine and Costa Rica have been admitted, but should still accept the Statute. Meanwhile, the number of States Parties to one or more Hague Conventions, but not Member States of the Hague Conference has gone up to more than 50.

The effects of globalisation are also reflected in the steady rise seen in the number of visits to the Hague Conference website (www.hcch.net), which is now in its fourth year: it currently receives more than 10,000 hits per day. The Conference's secretariat also receives increasing numbers of requests for assistance and information, again from all parts of the world.

Globalisation not only has an impact on the Conference, it also poses considerable new challenges. Cultural differences, lack of infrastructure and little experience in private international law are factors, which will have to be faced here. These challenges are even greater as regards new activities of the Conference relating to developing countries in Africa, Asia and to a lesser extent in South America, which has a longer tradition in private international law. What we may see is a paradox: while the number of legal conflicts involving cross-border elements will continue to grow exponentially as a result of the impact of globalisation, at the same time the capacity to deal adequately with these conflicts by national legislators, administrators and court systems, particularly in many developing countries, will remain limited in the foreseeable future. This, in turn, means that besides its traditional activities, the Conference will have to provide or ensure education, training and practical assistance to these countries in order for them to be able to absorb existing and future Conventions and make them work.

Origin and evolution of the Conference

As mentioned before, the Hague Conference has its origin in the late Nineteenth Century, and it experienced palmy days around the time of the turn of the Century between 1893 and 1904, during which it produced no less than seven Conventions, in the field of marriage, divorce, marital property relations, protection of children and civil procedure. The great man behind this was Tobias Asser, the only Dutch citizen so far to receive the Nobel Peace Prize (1911).

Among his special qualities, there are two, which I would like to mention in particular.

First, while Asser was certainly a visionary, he was by no means doctrinaire. He strongly believed in the need to overcome legal obstacles to the international mobility of people and commerce. But he also recognized the reality of certain legal differences – of traditions and cultures – among different nations. In his view then, unification of private international law should not aim at creating one uniform “world private law”. Rather, it should lead to the building of bridges between different legal cultures – in other words, towards unity in diversity.

Second, Asser cared almost as much about the process to reach the results – the negotiation process – as about the end product – the treaties. Therefore, he paid much attention to the careful, rigorous preparation of the negotiations, but also to the need to listen, to persuade rather than to use force, to keep all delegates involved.

These two characteristics of Asser's approach – his aiming at unification while respecting legal diversity, and his caring for the right proportions of rigour and flexibility in the negotiation process – have remained guiding principles of the work of the Conference for more than a century now. They are as valid today, I believe, as they were in 1893.

The key to harmony, however, of the first generation of Hague Conventions – the principle of nationality – turned out to be a vulnerable one. The idea, as originally formulated by Pasquale Mancini, was that Italian or Spanish citizens would be followed by their Italian or Spanish law, wherever they went, as part of their cultural heritage and their personal freedom: their national law would always determine if and under what conditions they could obtain a divorce, have custody over their children, etc. However, this cosmopolitan nationality concept could not resist the upcoming nationalism at the time. It did not take long before States started to denounce the Hague Conventions of the first generation.

No wonder, then, that after the Second World War there was a broad view that the work of the Conference should make a fresh start. Commercial topics were put forward, such as the international sale of goods and the recognition of foreign companies. What was also new was that these matters were now discussed in a more open context with input from other sources than the negotiating experts alone. The Hague Convention on the Law Applicable to the International Sale of Goods of 1955 was based on extensive discussions within the International Law Association. This broader constituency, so to speak, of the treaty also added authority to a remarkable innovation. The Sales Convention provided, for the first time in an international treaty, for party autonomy: the possibility for

the buyer and the seller to choose themselves the law applicable to their contract – the notion of personal freedom re-appears here in a new form. Party autonomy has since become a key device of many treaties in the commercial field, including the 1980 European Convention on the Law Applicable to Contractual Obligations, but is also of increasing significance in the family law area.

Initially, after the Second World War, the family law topics had lost much of their attraction, but the “baby was not thrown out with the bath water”, as it were. The post-war situation with internationally broken families cried out for an international legal framework to provide maintenance support, in particular for children – but what law should apply to such international relationships? The 1956 Convention on the Law Applicable to Maintenance Support Towards Children sought to protect the child by giving priority to the law of the child's habitual residence – the place where the child lives, goes to school and has its friends. This concept of habitual residence, the factual centre of a person's life, has become a cornerstone for most of the Hague Conventions, which have seen the light since the Second World War. It has made it possible to overcome the limitations not only of the concept of nationality, but also of the rigid traditional common law concept of “domicile”.

Working methods; the effects of regional interpretation

The first six Sessions of the Hague Conference were organised on an ad hoc basis. It was only after the Second World War that the Conference obtained a permanent structure and a Statute of its own. The founding States all belonged to continental Europe, with the exception of the United Kingdom and Japan. French was the sole working language. In 1960, English was introduced as the second working language and the treaties have since been drawn up in English and French. One of the characteristics of the working methods of the Conference is that Drafting Committees draft article after article simultaneously in English and French, which in my view is enormously contributive to the quality, to the precision and the richness of nuances of the texts of the Conventions. The addition of English as an official language naturally implied the need for an extension of the legal staff and since 1964 the Hague Conference's legal staff has consisted of four lawyers supported by six-and-a-half administrative posts. Only recently has there been an increase to five lawyers and a small extension of the administrative staff.

The Statute also provides that the Conference will meet in principle every four years in Plenary meetings, in Diplomatic Sessions, and that the expenses for those meetings are born by the Government of the Netherlands. It is this feature, which distinguishes the Conference from other organisations such as UNCITRAL and Unidroit and forms the basis of its working cycle of four years. Each Diplomatic Session will decide on new topics. The Permanent Bureau carries out the scientific research and establishes contacts with academic and professional circles and produces a report, which is the basis for a first round of discussions of two weeks in the Academy building. After the discussion stage, the negotiations

begin and in usually two Special Commission meetings a Preliminary Draft Convention is produced which is then sent, about one year before the next Diplomatic Session, to the governments, but also to the many observing international organisations, for their comments. The next Diplomatic Session will then adopt the Convention and, again, decide on the future working programme.

In 1980, it was decided to allow non-Member States to participate in the work of the Conference with the right to vote where the subject matter lends itself thereto. This was first put to the test when in 1985 the 1955 Sales Convention was revised and then for the negotiations on the 1993 Convention on protection of internationally adopted children. These openings in turn have stimulated several non-Member States to apply for membership.

Over the years, as the body of Hague Conventions has expanded, the question of monitoring their application has become an evermore important one. Since 1977, the Conference has pioneered in organising from time to time meetings to review the practical operation of the Conventions and this has now become a standard procedure for many treaties on co-operation between courts or administrations. In addition to an extensive website (www.hcch.net), which informs all the Central Authorities immediately of any new countries that have joined or any new changes, a special database has been created with decisions and summaries in English and French of case law on the Child Abduction Convention (www.incadat.com). We have also started organising meetings where we will convene judges from various participating countries to familiarise them with a Convention, thereby promoting good co-operation across borders by judges: a revolutionary new idea. The next step will be a programme for the training of authorities and judges in the developing countries, which have difficulties in applying the various Conventions.

While globalisation has its own dynamics, another factor, which accelerates the Conference's evolution towards universalism, is the effect of regional integration. This is not a phenomenon limited to Europe; we also see it in Mercosur, for example. However, its effect is undoubtedly greatest in Europe and, since the Hague Conference traditionally comprises the EU countries as a core, "communitarisation" is increasingly bound to have a profound effect on the Hague Conference and its work.

For the Hague Conference, and to a lesser extent for other organisations active in the area of unification of private (international) law, this gives rise to several new questions:

- To what extent, if any, should the Community, which so far has no formal status under the Conference's Statute, be seen as a negotiating party in current negotiations?
- Should the Community be able to become a Party to future Conventions? This question is likely to receive an affirmative answer now the Community will probably become a Party both, to the future Hague Convention on the law applicable to securities, and to a future Hague Convention on jurisdiction and recognition and enforcement in civil and commercial matters.

- How should the relationship be defined between the geographical scope of these future Hague Conventions and community Regulations in the same area, such as “Brussels I”?
- What is the position of both individual Community Member States and of the Community as a whole in respect of each of the thirty-four Conventions negotiated since the Second World War? And more specifically:
- What is the position of the Community, respectively its Member States, with regard to the 1996 Convention on the International Protection of Children, which includes a so-called disconnection clause, negotiated with the support of the Community, in an effort to avoid conflicts between the potentially world-wide Hague Convention and regional instruments, such as Brussels II?

If the Community were a federal State, the answer to these questions would not be so difficult. At present, however, the situation is ambiguous, which is perhaps inevitable but not without risks. Uncertainty as to “who has competence to say what” may ultimately affect the credibility of the European Community and its Member States as negotiating partners, both in and outside the Hague Conference. The matter is complicated further, of course, by the fact that the Hague Conference is in comparison to the UN a relatively small organisation with now 62 Member States including all current Member States of the European Union, plus the Candidates, and is, moreover, an organisation in which Europe has always played a core role. For one thing, the present system of “one State, one Vote” is clearly coming under political pressure. It is no surprise then, that at the request of the United States of America and with support of the Asian Member States in particular, it was agreed for the negotiations at the XIXth Diplomatic Conference in June 2001, which focused on the worldwide Convention on Judgments, to proceed without voting and on the basis of consensus.

II. THE HAGUE CONVENTIONS IN THE AGE OF CYBERSPACE AND DIFFERING CIVILISATIONS

Influence of Hague Conventions

As the examples in Chapter I already suggest, the Hague Conference may deal and has dealt with a great variety of topics. The Conference has drawn up Conventions in the area of civil procedure, on the service of documents abroad, on how to take evidence in another country, how to avoid discrimination with regard to legal aid and do away with security for costs. The Convention abolishing legalisation, cuts through red tape and facilitates the free flow of marriage certificates, patents and other official and semi-official documents all over the world. Many Conventions have been drawn up in the field of family and family property law: on marriage, divorce, marital property relations, maintenance obligations towards children and spouses, trusts and successions and the formal of validity of wills, parental abduction and adoption, protection of children and

adults, the Abduction Convention. Then there is the field of commercial law: international sales of goods, agency, traffic accidents and product liability. All in all, in total 34 Conventions since the Second World War.

While the pace of ratifications of and accessions to the Hague Conventions varies considerably, the Conventions on judicial and administrative co-operation have seen remarkable growth in recent years. Two of them, the Convention abolishing legalisation (1961), and the Convention on the Civil Aspects of International Child Abduction (1980) now have more than 70 States Parties; in the case of the latter, half of the accessions have occurred within the last five years. Considering that these include jurisdictions as far apart as South Africa, Turkmenistan, Brazil and Hong Kong, the global character of the Convention becomes apparent. Other examples: the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) is now supported by 50 Contracting States within 9 years of its coming into being, certainly a record for Hague Conventions. The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad in Civil or Commercial Matters (1965) has recently found its way to China, Mexico, the Russian Federation, South Africa and Sri Lanka.

With a few exceptions, all of these treaties have entered into force and 115 States are now Parties to one or more Hague Conventions.

An account of the factors which determine whether a specific convention becomes a success in terms of a number of States Parties to it or which determine whether a specific country realizes a high or a low performance in terms of Hague Conventions to which it becomes a Party, would be a story apart. A basic factor is the fact that the Hague Conference, as an independent intergovernmental organization, does not form part of a political structure and, having as its purpose “the progressive unification of the rules of private international law”, has no political agenda. The Conference's influence and appeal, therefore, depend essentially on (1) the intrinsic high quality of its products, (2) their being known and perceived as such, which is a factor in part determined by external factors, and (3) the priority given to their implementation which is largely a matter beyond the control of the Conference. One may expect though that with the increasing interdependence of States the “market” so to speak for Hague Conventions will increase, not decrease.

Already, innovative new concepts developed in the Hague Conference, such as “habitual residence”, have become very influential in many countries, even beyond the context of Hague Conventions. The idea of party autonomy in the context of family law and the law of succession has a great potential as a concept giving effect to the growing role of individuals as mobile citizens with connections with many States. Some of these notions have already been picked up by legislators in various countries, even where the convention in question has not been ratified. The notion of party autonomy in marital property relations, for example, is the cornerstone of the 1978 *Hague Convention on the Law Applicable to Matrimonial Property Regimes*. It has been incorporated in the codes on private international law of Germany, Switzerland, Austria, and Quebec, even though they have not ratified that Convention.

The effect of Conventions in domestic law

If one looks at the effect of Hague Conventions within various legal systems one notices important differences. There is, for example, a difference in the mode by which treaties become applicable on the domestic plane. The varied composition of membership of the Hague Conference provides a good illustration of the different ways in which constitutions provide for the incorporation of conventions in domestic law. Broadly speaking, we may distinguish between three categories of systems:

- a) The first group admits the incorporation of a treaty into domestic law once the treaty has been duly approved by the competent State organs. This system of “monistic” inspiration can be found in Belgium, France, Luxembourg, the Netherlands, Spain, the United States, Japan and in Latin American States.
- b) In a second group of States, a treaty, strictly speaking, has no effect in the internal system and requires transformation by legislative act in order to produce that effect. In this regard, these systems reflect a “dualistic” inspiration. However, once parliamentary approval has been given, the treaty obtains a quasi-automatic applicability within the domestic system and to that extent the result comes close to that of the first “monistic” group. States, which belong to this category, include Germany, Italy and Turkey.
- c) A third group of constitutions – of dualistic inspiration – carries the requirement of transformation even further. In the United Kingdom, but also in Ireland, Australia, Canada and the Nordic States (Denmark, Norway, Sweden and Finland), the treaty is seen entirely as a matter for the executive. In the United Kingdom the capacity to include a treaty is a matter for the government, as is its ratification, and the performance of a treaty obligation. The treaty as such has no effect in the domestic order and the effect is produced only by the national rules, which purport to incorporate that treaty.

The first system of automatic incorporation of Hague Conventions makes it possible for the treaty provisions to have their effect without any interference and distortion of the domestic legislature. In practice, the only question, which has arisen as a matter of constitutional law in respect of conventions of this first group relates to the *publicity* needed for a convention to be cognisable.

Where an act of parliament is necessary to give effect to a treaty, even where no full transformation is required, such as in Germany or Italy, there is a risk that the international and domestic roads split ways. Thus, it took Italy eleven years after parliamentary approval had been given in 1966 before it ratified the 1961 Hague Legalisation Convention and there is a judgment of the *Corte de cassazione* from which one senses that the court did not actually realize that the Convention did not come into force for Italy until 1977.

An argument which is often brought forward in support of transforming the treaty provisions into statutory provisions is that it makes the treaty provisions

more accessible by moulding them into language and forms which are familiar to the public and the courts. This was the argument given by the German legislator when it was decided to spell out the provisions of the 1980 EEC *Rome Convention on the Law Applicable to Contractual Obligations* as well as the 1973 *Hague Convention on the Law Applicable to Maintenance Obligations* in the new German *Code on Private International Law*. If this trend persists, the German situation will come close to that of the most radical dualist system, that of the *United Kingdom*.

The principle in the United Kingdom is that a treaty has no effect in English law unless it is made part of domestic law. Usually a statute will be necessary. Yet, that statute may or may not refer to the treaty, may implement it in whole or in part, may or may not set out the treaty in whole or in part in a schedule and may or may not enact the terms of the treaty independently. An example:

The *Child Abduction and Custody Act* 1985 gives effect to the 1980 Hague Child Abduction Convention as well as to the European Convention on the same matter. This Act, in its schedule, reproduces the text of the Convention, but leaves out a rather crucial provision (Article 20) according to which the return of an abducted child may be refused if this would not be permitted “by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”. This is a rather surprising omission, the more so if one realizes that the Convention is very strict on the obligation for courts to return a child and does not contain a public policy provision.

The rank of Conventions in the domestic hierarchy of norms

A related series of issues relates to the rank of treaties in the hierarchy of norms applied by the domestic courts. Even if a treaty norm is recognised as being in principle applicable, there may be a further obstacle to its application in a particular case: there may be a conflict between the treaty norm and another norm of domestic law, or even another treaty norm. There is, of course, a relation with the first issue, the mode of incorporation of the treaty.

In some systems, which provide for automatic incorporation, such as France and Spain, conventions prevail over both prior and subsequent conflicting legislation. In Spain, this is subject to the condition that the treaty has been officially published (Article 96 of the Constitution). In France, the condition is whether reciprocity of application by the other Contracting State or States is guaranteed. Under the supremacy clause of the United States Constitution, on the other hand, treaties pre-empt conflicting state law but as regards conflicting federal law the rule is that because treaties and congressional enactments are of equal status, the one later in date must stand. In other words, if the US Congress were to enact a statute conflicting with a Hague Convention to which the US had already become a Party, within the US domestic system the statute would prevail. Fortunately, no such conflicts have arisen so far but the possibility of such a conflict is by itself a disturbing factor. There is no question that under public international law the United States would be bound to respect the treaty, but at the domestic level, the latest statute should prevail.

In systems providing for quasi-automatic incorporation, such as the Federal Republic of Germany, treaty provisions take precedence over all private law legislation. This has been decided repeatedly in Germany, for instance, with respect to the Protection of Minors Convention. A highly interesting question has recently arisen concerning a possible conflict between a Hague Convention, in this case the Hague Child Abduction Convention, and the German Constitution. The *Bundesverfassungsgericht* has already shown that it will not hesitate to accord priority to constitutionally guaranteed fundamental rights even over treaty provisions, but decided that the Child Abduction Convention is compatible with the German Constitution.

In systems such as that of the UK, which do not give any effect treaties within the domestic legal order, there is of course a complete separation between public international law obligations which are only binding upon the Crown and the contents of the treaty which are only accessible to the courts to the extent that they are incorporated by statute. Theoretically, parliament would remain entirely free to adopt legislation contrary to a previously ratified Hague Convention.

A special problem with regard to the rank of Hague Conventions in the hierarchy of norms in the domestic order is that where the provisions of the convention are said to be in conflict with another treaty. An example is a decision of the Full Court of the Family Court of Australia of October 1993. The appellant claimed that the Hague Child Abduction Convention, which has been incorporated into statutory law in Australia, was inconsistent with Article 3 of the *United Nations Convention on the Rights of the Child*, which Australia had also ratified. The contention was based on the idea that, since Article 3 of the *United Nations Convention on the Rights of the Child* says that the best interests of the child shall be of primary consideration in any action affecting the child, the Hague Convention is incompatible since it does not permit a full hearing on the best interests of the child, but obligates the court (after an expedited hearing on any defenses offered under Article 13 or 20) to order the return of the child “forthwith” (normally to the country where the child habitually resided prior to the wrongful removal or retention). A ruling in favour of this contention would have been damaging to the Hague Convention, the more so since the CRC is in force in more than 170 countries, including most of the countries which are Parties to the Hague Convention. Full hearings on the merits of custody would greatly delay proceedings and detract from the effectiveness of the Convention. The Family Court of Australia, fortunately, rejected this claim.

A recurrent theme: building bridges between civil and common-law systems

Cheshire in his treatise on Private International Law in 1938 still wrote: “owing to the fundamental differences between the common law upon which the Anglo-Saxon systems are founded and the civil law which forms the basis of the European systems, there seems little prospect of agreement being reached between the two groups”. Despite this pessimistic forecast, the UK participated in the Seventh Session and co-founded the organisation. Ireland followed and, starting in

the sixties, the United States, Canada, Australia and Cyprus became Members of the Conference. The accession of the United States to the Conference in 1964 was quite a revolutionary step for that country which had always maintained that its federal structure did not permit the union to deal with questions of private international law. That attitude changed radically when, as a result of the growing internationalisation of life and commerce in the course of the fifties, participation in the Conference became a practical necessity. The same went for Canada and Australia. One of the obvious changes, which resulted from the larger participation of common law countries, was the introduction of English as a second language in addition to French, and the expansion of the secretariat with a common law lawyer. It also meant that two quite different styles of legal thinking and drafting had to be brought into harmony. The common law tradition developed by the courts, where statutes are the exception and subject to narrow interpretation, versus a system of law which has its basis in a codification and which is being developed by the courts within the framework of the structure and purpose of that codification.

There are legal institutions in one system, which are not known in the other, such as the trusts, which is known in the common law and not in the civil law, and the reserved share (the *légitime*), which is known in the law of succession of the civil law countries and not in the common law. But of course their use is not limited to the territory of common law or civil law countries: people from both systems use them without thinking of boundaries. Bridging the profound differences between civil law and common law legal cultures became one of the main tasks of the Conference. It has required a lot of patience and imagination, but it definitely has produced results.

Let me just mention the Hague Trusts Convention of 1985 as an example: the trust is a legal device widely used in common law countries for all kinds of different purposes, but is an unknown animal in the civil law world. It is a sort of separate fund, but without legal personality of its own, administered by a trustee. So how do you handle this strange animal when it crosses the borders of a civil law system? The Trusts Convention *shows* how by explaining what a trust is and how it can have effect in France or in Spain without unduly interfering with their national laws.

New global issues I: Internet and e-commerce

Cyberspace, the information society, presents a huge new challenge to the Hague Conference because it affects almost any of our topics. We are feeling its impact in particular on our current negotiations on a worldwide Convention on jurisdiction of the courts and enforcement of judgments in civil and commercial matters. We started this project in 1996, and by 1999 had drawn up a preliminary draft Convention. By that time, e-commerce and Internet began to have a real impact on cross-border transactions, and it became clear that it would be impossible not to take them into account: a Convention just for the brick and mortar world would not do. But this opens up a whole new chapter of unforeseen difficulties. I already mentioned the problem of consumer contracts. But then think of torts.

You may have heard of the Yahoo case in France, where the judge ordered the service provider *Yahoo* to stop making available for French users, content that contained Nazi propaganda. *Yahoo* grudgingly obeyed the French order, and took the contents from its provider in the United States, but also started proceedings in the United States, so as to block the enforcement of the French order in the United States, and won. So we now have on the one hand a policy in the United States, based on the First Amendment to the Constitution, which is very strong on the protection of speech, and on the other hand, an equally understandable policy in France to protect what France sees as its fundamental values. It is clear that this will lead to a multiplication of contradictory judgments, and a race to the courts in different countries. It may well be that it will take some time, possibly extensive negotiations, before we can solve this kind of problem. At the same time, many legal solutions, which have been worked out for the brick and mortar world, will also work in cyberspace. For example, it should not matter whether business parties agree on a court to deal with issues arising under a contract, which they have made on-line or off-line. It may well be that we will first have to tackle such more limited problems before we come back to the larger judgments project.

New global issues II: conflict of civilisations

The percentage of the people in the world who are Muslim has been rising from its historical position of under 10% to now 16% of the world population, or 900 million in absolute numbers. As early as the 1960's, the Hague Conference in its Convention on the Recognition of Divorces and Legal Separations took care to make special provision for the recognition of divorces and legal separations obtained in an Islamic State provided that they "follow judicial or other proceedings officially recognised in [such a] State and which are legally effective there". In the Conventions on the Law Applicable to Maintenance Obligations, on the Law Applicable to Matrimonial Property Regimes, and on the Law Applicable to Succession to the Estates of Deceased Persons, among others, special provision was made for legal systems such as those of the Islam, which apply different legal regimes to different categories of persons, depending on their religion. The 1996 Convention on the International Protection of Children, deals explicitly with the provision of alternative family care by *kafala* as known in Islamic countries. The Colloquium "Islamic Law and its Reception by the Courts in the West", which Professor Christian Von Bar from Osnabrück University organised in 1998 in co-operation with the Hague Conference, highlighted the very significant mediating role which private international law plays in reducing tensions between western and Islamic civilisations.

In the light of the post 11 September 2001 developments, our work on bridge building with the Islamic legal systems has acquired a new significance. In September 2001 a meeting was convened by the Belgian Presidency of the European Union with representatives of several of the southern Mediterranean countries and the conclusion of that meeting was that it would be interesting to organise and experts meeting with authorities and judges from these countries

and western European countries to discuss questions of child abduction and contact between parents and children after divorce. There was agreement that this could be done by the Hague Conference in co-operation with the European Community and the Council of Europe. The difficulty here is that none of these countries has so far joined the Hague Child Abduction Convention.

But there is hope, the Moroccan Minister of Justice visited The Hague in May 2000 and made a solemn declaration to the effect that Morocco would accede to the Child Abduction Convention in the near future. Moreover, recently Morocco became a party to the 1996 Convention on the International Protection of Children.

III. NEW PARADIGMS FOR PRIVATE INTERNATIONAL LAW CONVENTIONS

The growing need for international judicial and administrative co-operation

The Hague Conference has always had a strong interest in promoting through its Conventions international judicial and administrative co-operation. The 1896, 1905 and 1954 Conventions on civil procedure have become classics in their field. The 1954 Convention is in force for more than 40 States. Yet, with the exception of Cyprus, there is no common law jurisdiction among those States, since the treaty is based upon formal, consular and diplomatic channels of transmission, which reflects the procedural tradition of the civil law systems where service of documents is seen as a formal act, performed by a State official, and the taking of evidence as a judicial function. Not so in the common law tradition, where the service of process is essentially the responsibility of the plaintiff and the taking of evidence a matter for the parties, not for the court.

Since 1960, the Conference has therefore endeavoured to revise the 1954 Convention, in three stages, so as to adapt its mechanisms to the needs of other legal systems, in particular those of the common law. The 1965 Convention on the service abroad, the 1970 Convention on the taking of evidence abroad and the 1980 Convention on international access to justice have been successful by the institutionalisation through the device of Central Authorities of the channels of transmission of documents of requests for the taking of evidence and legal aid and orders for costs of proceedings abroad.

In particular, after the US had become a Party to the 1965 and 1970 Conventions in 1969 and 1972, the significance of these treaties expanded enormously, and this was why in 1977 it was decided, for the first time in the Conference's history, to convene a meeting on the practical operation of the Conventions. That meeting, once again, highlighted the role of Central Authorities, and that led to the next step.

The 1980 Child Abduction Convention fills a gap left by the 1960 Convention on protection of minors, unlike the Council of Europe Convention, not by a traditional system of recognition and enforcement of judgments but by a mechanism of judicial and administrative co-operation. This mechanism of judicial

co-operation, reinforced by co-operation between Central Authorities, is based upon the idea that it is up to the court of the child's habitual residence and not of the place to which the child has been wrongfully removed to decide on the substantive question, the question of custody, and that this court should apply its own conflict rules. But this principle is only implicit in the Convention, because nowhere does the Convention establish an explicit direct basis of jurisdiction for the custody question nor does it establish conflict rules for that question. So, a judicial and administrative co-operation mechanism has filled in for traditional rules of jurisdiction and applicable law.

A further step was taken in the early 1990s when the Intercountry Adoption Convention was drawn up. Here there was no question even of a possible implicit consensus on rules of jurisdiction or applicable law, because both countries of origin and receiving countries could claim application of their rules. So the 1993 Convention does not contain any direct or even indirect bases for jurisdiction, but requires as a condition for recognising a foreign adoption that the administrative procedure of the Convention, through the co-operation between Central Authorities, has been respected (Article 23). Likewise, there are no rules on applicable law. So we are here even further away than in the case of the Child Abduction Convention from traditional rules of jurisdiction and applicable law: unification on a worldwide scale would not be achievable on these matters.

It may also be noted that the Intercountry Adoption Convention provides, for the first time, for the possibility of delegation by the Central Authorities of its powers, not only to other public authorities, but also to accredited private bodies. So privatisation has entered the stage of administrative co-operation, but in a strict framework.

The final stage, thus far, of this evolution has been reached with the 1996 Convention on the protection of children. For the first time, a chapter on judicial and administrative co-operation comes in to supplement the traditional set of chapters on jurisdiction, applicable law and recognition and enforcement, in order to reinforce and support the classical rules. Thus, for example, Article 35(2) provides that the authorities of the State where a parent resides may on his or her request make a finding on the suitability of that parent to exercise access to a child in another Contracting State and on the conditions under which access is to be exercised. And the authorities of the State of the habitual residence shall then admit and consider such information or evidence before reaching a decision. So here the co-operation mechanism may help facilitate the application of the traditional rules of jurisdiction and applicable law.

But the idea of co-operation has in the 1996 Convention taken on an additional significance, in that it has influenced the very nature of the jurisdictional rules of the Convention. Article 8 provides that the authority which has jurisdiction to deal with the child's person or property, normally that of the child's habitual residence, may if it considers that the authority, of for example the child's nationality, is better equipped to assess the best interest of the child, either directly or indirectly, transfer the handling of the case to that authority. The two authorities may communicate, and if the other authority also finds that this is in the child's best interests, it may assume jurisdiction.

Article 9 provides for a form of co-operation in the opposite direction. However, the authority of, for example, the nationality of the child may only assume jurisdiction if the authority of the habitual residence has accepted.

Of course, this idea of judicial co-operation is well known within many States – it is being extended here to the international sphere. Indeed, in an increasingly integrating world there is no good reason any more why co-operation among judges should stop at the frontiers while families move constantly cross State boundaries.

Predictability versus flexibility: the hazards of the judgments project

In May 1992 the Legal Adviser of the State Department suggested “that the Hague Conference resume work in the field of recognition and enforcement of judgments”. The idea put forward was that a new Convention should also contain provisions on direct jurisdiction – not an exhaustive list but a more limited “white” list of jurisdictional grounds that would be universally accepted. Also, there would be a “black” list of exorbitant grounds of jurisdiction that were universally condemned.

In the US, contrary to other countries, the law of jurisdiction is a matter of constitutional law. The Supreme Court is the final arbiter of state (and federal) court jurisdiction. But as a court, it cannot and will not construct jurisdictional rules. That is not the Court’s role: it cannot go beyond an elaboration of the due process clause of the XIVth Amendment. As a result, however, there remains an area of unpredictability as to jurisdictional grounds, which leads to litigation that could be avoided by clear rules. It is this lack of clarity, which a treaty could, at least in part, address.

At the same time, the focus on equity and a case-by-case analysis, so typical for the common law tradition but reinforced by the due process requirements of the US Constitution, is a reality. Moreover, we have here a basic feature of the US approach to civil procedure. And this explains why the US has been so insistent, not only that the Convention should leave room for a case-by-case analysis “outside” of the scope of the Convention – the so-called grey area – but also on flexibility within the Convention, in particular within the list of required bases of jurisdiction (the possible inclusion of an activity-based jurisdiction).

The civil law approach, dominant in Europe, Latin America and many countries in Africa and Asia, including China, Japan and Korea, is different. It is based on the idea that neatly listed legal rules in a comprehensive code are applied to a given set of facts. Both the Brussels Regulation and the Lugano Convention in Europe, but also the 1994 Mercosur Convention in South America, are clearly influenced by this tradition. It tends to favour inclusion of an exhaustive list of grounds of jurisdiction; it also tends to lead to a categorisation of bases of jurisdiction such as contracts, specific contracts, torts, branches, etc. The advantages of this approach are not negligible: they greatly enhance predictability of results, and bring economic benefits.

These differences of approach have played, and continue to play, also on a subconscious level, a more important role in the negotiations than one may

sometimes think. This partly explains why it took several rounds of negotiations before the idea of the grey area was accepted, and why there may be some continuing discontent with the way the grey zone is dealt with by the Convention. It also partly explains why the preliminary draft Convention has not perhaps in everyone's eyes struck the right balance between predictability and flexibility.

The question is, can the advantages of the civil law approach be combined with those of the US approach, which may be "more easily adjusted to changing economic necessities"?

The question arose perhaps in its clearest and purest form when the Special Commission which prepared the preliminary draft was faced with the problem of how to deal with (potentially) concurrent proceedings between courts of different Contracting States. In common law countries, the *forum non conveniens* doctrine provides a solution for this (as well as other) problems, which is flexible but may also lead to unpredictable results. This is why in the UK, for example, the courts have applied the doctrine with more constraint than in the US. In the civil law world, the *forum non conveniens* doctrine is not generally known and the first-come-first-served rule is applied. This leads to predictable results, but may not always do justice in the individual case.

A great effort has been made in articles 21 and 22 of the draft to combine the best of both approaches; with certain adjustments, the first-come-first-served rule applies in principle (article 21), but the court may decline jurisdiction if it would be clearly inappropriate for that court to exercise jurisdiction and if the court of another country has jurisdiction and is clearly more appropriate to resolve the dispute (article 22). Together these articles are a good illustration of the extent to which it has been possible to reconcile the positions, which initially seemed to be enormously far apart. To some extent, articles 21 and 22 provide a test case: the matter could probably not be carried much further forward. The alternative solution, which would be to leave this question to national law, is not very attractive. It would take away one of the advantages of a Convention which also deals with jurisdiction. Moreover, it would not solve the problem of conflicting proceedings, which may, in any event, arise at the recognition stage (article 28(1)(a)).

The 19th Session in June 2000 completed a text based upon consensus with many bracketed provisions. It has now been decided that an informal group of experts should assist the Permanent Bureau to provide a text, centred around a core, that has a realistic chance of being widely accepted

I remain firmly convinced that there is a great need for this Convention in light of the tremendous growth of global business and trade, and the resulting growth in global disputes and claims. Global business transactions will be fostered if parties know that a predictable legal system for resolving global disputes and enforcing judgments throughout the world exists.

Global economics and the conflict of laws: the securities project

In May 2000, the Hague Conference started a new project in a fast-track procedure. The challenge was to update the conflicts of laws in a specific

banking sector. There is a huge and rapidly growing market in which securities are taken as collateral in cross-border situations. But the conflict of law rules have not been adapted to the new market reality.

Traditionally, securities were held in a “*direct holding system*” in which owners of securities had a direct relationship with the issuer – the investors would either be recorded on the issuer’s register or be in physical possession of bearer securities certificates. Within this traditional holding system, transfers of securities had to be settled through the physical delivery of paper certificates, making such transactions labour-intensive, time-consuming and expensive. They were also risky, because the paper documents could be lost, mislaid, stolen or counterfeited. The costs of protecting against such risks and of delivering documents across long distances made the transfer of securities in a direct holding system an expensive process.

These disadvantages have led to the evolution of a system under which, for the vast majority of securities, the investor no longer has a direct relationship with the issuer. Rather, the investor’s interest in respect of the underlying securities is recorded on the books of an intermediary, which in turn has its interest recorded with another intermediary and so on up the chain.

In most countries, however, the legal regime currently in place to cope with the indirect holding system dates back, to a greater or lesser extent, to a time when securities were still directly held in certificated form by investors. The concepts of (physical) possession and delivery, however, do not operate satisfactorily in the context of the modern indirect holding system, as there can be no actual possession or delivery of the intangible property interests arising under that system.

The traditional conflict of laws rule for determining the enforceability of a transfer of property or a pledge of securities effected in the direct holding system is the *lex rei sitae* (also referred to as the *lex cartae sitae* or the *lex situs*). Under this rule, the validity of the transfer is determined by the law of the place where the security is located. But how does the *lex rei sitae* apply to a system where the securities are held through multiple tiers of intermediaries located in different jurisdictions? Is there another connecting factor, which is more appropriate in these circumstances? The Convention proposes a new conflicts rule, the place of the relevant intermediary approach (PRIMA). This rule has the enormous advantage of subjecting all of an investor’s interest with regard to a portfolio of securities to the law of one single jurisdiction. Parties to a transaction are therefore able to determine in advance, with certainty and without costs, which law will govern their rights and obligations. The aim is to complete the Convention by December 2002.

International co-operation to enforce private rights: wider application to the challenges of economic migration

The issue of asylum seekers – not for political or similar reasons covered by the Refugee Convention, but for economic reasons – is a burning one in all countries in the West. The numbers are staggering, including those of unaccompanied children. The prevailing approach is unilateral, through the admission procedure

of strangers. But this does not reach the root of the problem, which lies in the differences in economic security between the countries of origin and the countries of destination and the differences in welfare and stability between these two groups of countries. It is these differences that cause the migration of people from roughly South to roughly North, creating, and stimulated by, a flourishing industry of traders in people. If we want to address the problem at the root then international co-operation between the North and the South is essential. At present, co-ordination of emigration policies, if any, in countries of origin and of immigration policies in countries of destination is totally lacking. What is also lacking is a co-ordination between migration policies and development. There is no system in place to systematically control the activities of intermediaries. What could be the starting points for an attempt to deal with a problem through international co-operation?

First and foremost, this should be the basic right to a dignified existence, the right to grow up, live and work there where one's roots lie. Of course, this does not imply the negation of the basic right to freedom of movement, but it does acknowledge that migration is dignified only if it is based on free choice and not on economic pressure. Secondly, on a macro level there is the interest of the countries of origin not to lose what often are their best people. The brain drain and the departure of the economically most active are obvious negative consequences for countries of origin. Thirdly, countries of destination have an interest to impose limits to the influx of asylum seekers but they need the co-operation of countries of origin when they decide to send their citizens back. Moreover, the situation is more complicated because in some sectors of the economy, economic refugees are welcome, indeed indispensable. Fourthly, economic refugees, countries of origin and receiving countries all have a common interest in the repression of mediators who enrich themselves at the expense of others' misery. What is needed, therefore, is a system that reaffirms the basic right to a dignified existence for each human being, a set of procedures to integrate policies of migration and of development assistance and a co-operative framework of institutions in each participating State so as to implement the safeguards and procedures of the Convention.

It may with the involvement of the private sector where possible seem a remote analogy but it does appear to me that the Intercountry Adoption Convention may provide a model of inspiration for such a framework. The basic assumption of this Convention is that each child should preferably find a home in his or her country of origin and that intercountry adoption is acceptable only when that home cannot be found. Secondly, the Convention establishes a link between two previously unrelated areas: migration and legal protection through adoption. Thirdly, the Convention sets up a system of Central Authorities to co-ordinate the complex related issues internally as well as internationally. Fourthly, the Convention establishes a system of control over intermediaries.

Intercountry adoption is an area of migration, of children only, and for a very specific purpose and the analogy is of course relative. Yet, the analogy deserves to be further examined. The floods of migrants will continue to grow. They lead to a host of questions which cry out for an integrated approach:

questions related to the status of persons, including matters of social security, questions of proof (birth certificates, marriage certificates, diplomas, etc) which are often lacking, cultural tensions, political frictions, both within and between countries. The prevailing unilateral approach is clearly insufficient. A multilateral approach, building on bilateral efforts, is worth examining. Clearly, this is a matter, which transcends private international law. Yet, this is the time when we need to stretch our imagination and try and fully use the potential of international co-operation even beyond the traditional boundaries of private international law.

CONCLUSION

The Hague Conference on Private International Law, though it has a history of well over a century, has been going through a rapid and profound development in recent years. This reflects the changing character of private international law, which is no longer a discipline regarding the life and business of the elite, but of everyone. The challenge is to respond to new needs quickly and adequately, preserving the well-tested working method, adopting them where necessary, and to maintain the high and highly practical ideals of promoting legal security, the orderly and efficient settlement of disputes and the rule of law, while respecting the diversity of legal traditions.

