

## **Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014)**

A Special Commission met in The Hague from 20 to 23 May 2014 to review the practical operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention), of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention), and of 25 October 1980 on International Access to Justice (Access to Justice Convention). The Special Commission (SC) was attended by 130 participants from 53 States and eight international governmental and non-governmental organisations, representing Members of the Hague Conference on Private International Law, Contracting States to one or more of the Conventions under review, non-Contracting States that are actively exploring the possibility of joining at least one of the Conventions under review, and interested international organisations. A primary focus of the meeting was a draft new edition of the Practical Handbook on the Operation of the Evidence Convention (Draft Evidence Handbook) and a draft updated edition of the Practical Handbook on the Operation of the Service Convention (Draft Revised Service Handbook), which had been prepared by the Permanent Bureau in consultation with Contracting States to the Conventions concerned.

Participants unanimously approved the following Conclusions and Recommendations (C&R), developed in furtherance of prior C&R of the SC.

### **I. GENERAL COMMENTS**

1. The SC reaffirms the importance of effective cross-border judicial and administrative co-operation in civil and commercial matters, and notes with great satisfaction that a number of States have become, or are considering becoming, party to the Service, Evidence and / or Access to Justice Conventions. The SC encourages States that are party to the *Hague Convention of 1 March 1954 on civil procedure* to consider becoming party to the Conventions. The SC welcomes the accession of Albania, Armenia, Australia, Belize, Brazil, Colombia, Croatia, Korea, Moldova, Montenegro, Morocco, Serbia and The former Yugoslav Republic of Macedonia to one or more of the Conventions since its last meeting in 2009.
2. The SC encourages Contracting States to publicise the C&R among users of the Conventions, including judicial authorities, judicial officers, practitioners, and Central Authorities.
3. The SC recalls the requirement for Contracting States to designate a Central Authority for each Convention, and to inform the depositary of this designation. The SC calls on Contracting States that have not done so to fulfil this requirement.
4. The SC notes that the Service Section and Evidence Section of the Hague Conference website are a very helpful source of information relating to the practical operation of the Conventions concerned, and encourages Central Authorities to publicise them. The SC encourages Contracting States to provide the Permanent Bureau with information to be published in the practical information charts available on these Sections, and to update this information as required, in particular the contact details for Central Authorities.

## II. PRACTICAL HANDBOOKS ON THE OPERATION OF THE SERVICE AND EVIDENCE CONVENTIONS

5. The SC acknowledges the importance of the Practical Handbooks on the operation of both the Service and Evidence Conventions. The SC invites the Permanent Bureau to finalise the text of the draft versions presented at the meeting, incorporating the outcome of the discussions and case law and practice reported by States in response to the Questionnaires, in co-operation with the Drafting Committee. The SC notes that once finalised, these texts will be circulated to the SC for comment and endorsement before being submitted to the Council on General Affairs and Policy of the Hague Conference ("the Council") for final approval.
6. Acknowledging the general invitation of the Council of Diplomatic Representatives that the Permanent Bureau attempt to increase revenue from the sale of its publications, the SC recommends that the Permanent Bureau identify ways in which the Service and Evidence Handbooks may be disseminated, and to whom, free of charge.
7. The SC encourages States to arrange for the translation of the Service and Evidence Handbooks into their languages, and expresses its gratitude to the People's Republic of China and the American Association of Private International Law (ASADIP) for their offers to translate the Handbooks into Chinese (simplified and traditional) and Spanish, respectively.

## III. EVIDENCE CONVENTION

### *Status and operation of the Evidence Convention in general*

8. The SC recalls that, pursuant to Article 39(4), the Evidence Convention only applies between an acceding State and an existing Contracting State if the accession is accepted by that existing Contracting State. The SC urges all Contracting States to consider each accession with a view to its acceptance.
9. The SC notes that the practical operation of the Evidence Convention would be further improved by more timely execution of Letters of Request, and better communication with Central Authorities, including by e-mail, at all stages of the execution of a Letter of Request.

### *Functions of Central Authorities*

10. The SC welcomes the practice reported by Contracting States whereby Central Authorities:
  - a. promptly acknowledge the receipt of Letters of Request to the Requesting Authority and / or interested parties;
  - b. promptly respond to enquiries from Requesting Authorities and / or interested parties about the status of execution;
  - c. communicate to the Requesting Authority and / or interested parties an indication of steps to be taken for execution.
11. The SC welcomes the use of electronic tools that allow the status of requests to be checked online, noting the importance of taking into account considerations of privacy and confidentiality.

### *Use of the Model Form*

12. The SC recalls its recommendation for the Model Form to be used (*cf.* C&R No 54 of the [2009 SC](#)) and notes that many Central Authorities prefer Letters of Request to be issued using the Model Form, and welcomes the *Guidelines for Completing the Model Form* developed by the Permanent Bureau.

### *Costs for execution and reimbursement*

13. The SC notes that Article 14(2) of the Evidence Convention confers a right to require the reimbursement of "fees paid to experts and interpreters" and the "costs occasioned by the use of special procedure" requested under Article 9(2). The SC concludes that Article 14(2) does not provide for the Requested State to require advance payment of costs.

14. The SC concludes that a Requested State may require reimbursement of fees paid and / or costs occasioned pursuant to Articles 9(2) and 14(2) even if the evidence is no longer sought (*e.g.*, where the Requesting Authority withdraws the Letter of Request).
15. The SC acknowledges that electronic payment facilitates reimbursement, and encourages Contracting States to provide the Permanent Bureau with relevant information for inclusion in the practical information charts on the Evidence Section.

*Grounds for refusal (incl. Art. 23)*

16. The SC recalls the exhaustive nature of the grounds for refusal set out in Articles 12(1) and 23 of the Evidence Convention.
17. In addition to providing the information specified in C&R No 4, the SC invites Contracting States to provide the Permanent Bureau with information concerning acts that typically do not fall within the functions of the judiciary in their State (*cf.* Art. 12(1)(a)) for inclusion in the practical information charts on the Evidence Section.
18. Recalling the objective of Article 23 to “ensure that a request for the production of documents must be *sufficiently substantiated*” (*cf.* C&R No 29 of the [2003 SC](#) and C&R No 51 of the [2009 SC](#)), the SC recommends that States refrain from applying Article 23 to refuse the execution of Letters of Request for the production of documents that are specified in the request, or otherwise reasonably identified. The SC notes that one Contracting State that regards the Evidence Convention as mandatory, and that has revisited its Article 23 declaration, considers that the making of a “qualified declaration” has encouraged Requesting Authorities in States that do not regard the Evidence Convention as mandatory to use the Convention.
19. The SC notes that, while Article 23 only applies to Chapter I of the Evidence Convention, applications for permission to take evidence under Chapter II may be subjected to the same conditions of specificity.

*Taking of evidence by video-link*

20. The SC recalls that the use of video-links to assist the taking of evidence abroad is consistent with the framework of the Evidence Convention (*cf.* C&R No 55 of the [2009 SC](#)). The SC acknowledges that Article 17 does not preclude a member of judicial personnel of the court of origin (or other duly appointed person), who is located in one Contracting State, from examining a person located in another Contracting State by video link.
21. Further to a proposal by the delegation of Australia to consider an optional protocol to facilitate the taking of evidence, without compulsion, by video-link under the Evidence Convention, and with a view to promoting the further use of modern technologies, the SC recommends that the Council establish an Experts’ Group at its next meeting to investigate the issues that may arise with the use of video-link and other modern technologies in the taking of evidence abroad. The SC further recommends that the Experts’ Group study existing instruments and current practice, and explore potential ways to address these issues, including the desirability and feasibility of an optional protocol or any other instrument.

**IV. ACCESS TO JUSTICE CONVENTION**

22. Recognising the continuing importance and increasing use of the Access to Justice Convention, the SC recalls the usefulness of creating multi-lingual forms and further translations of the Convention, with a view to encouraging further accessions by States (*cf.* C&R No 64 of the [2009 SC](#)).

## V. SERVICE CONVENTION

### *Assistance in locating the person to be served*

23. Recognising that there is no obligation to provide assistance in locating the person to be served under the Service Convention, the SC notes that many Contracting States have reported employing a variety of practices to assist, as a Requested State, in circumstances when the address is incomplete or incorrect. Some have even reported assistance when the address is unknown. The SC encourages Contracting States to provide such assistance consistent with their legal and structural capabilities, when able to do so.
24. The SC encourages Contracting States to provide the Permanent Bureau with information regarding such assistance for inclusion in the practical information charts on the Service Section of the Hague Conference website.

### *Use of the model form*

25. The SC recalls C&R No 29 of the [2009 SC](#), reaffirming the mandatory use of the Model Form, and welcomes the *Guidelines for Completing the Model Form* developed by the Permanent Bureau. The SC also notes the importance of sending Model Forms that are fully, correctly and clearly completed, preferably with word processing technology and not by hand. The SC also notes that the appropriate use of the Model Form can mitigate delays and avoid unnecessary costs.
26. The SC stresses the importance of returning a properly completed certificate under Article 6 to the applicant (*i.e.*, the forwarding authority).
27. The SC invites Contracting States to submit copies of the Model Form in their languages to the Permanent Bureau so that it can prepare trilingual Model Forms.

### *Informal delivery (Art. 5(2))*

28. The SC recalls that no translation of the documents to be served is required for informal delivery.
29. The SC notes that some Contracting States do not have domestic legislation providing for informal delivery. However, the SC recognises that informal delivery is a valid form of service under the Service Convention when the documents are voluntarily accepted by the addressee.

### *Responding to inquiries regarding the status of execution*

30. The SC welcomes the practice reported by certain Contracting States whereby Central Authorities promptly respond to enquiries from Requesting Authorities and / or interested parties about the status of execution, and encourages all Contracting States to embrace this practice where possible.

### *Costs for service and reimbursement*

31. The SC recalls C&R No 22 of the [2009 SC](#).
32. In response to concerns voiced by some Contracting States about difficulties with payments for costs incurred for service, the SC notes that the methods referred to in C&R No 15 (above) regarding the Evidence Convention are equally applicable to payments under the Service Convention.

### *Service of documents under Article 10(b) and (c)*

33. The SC recommends that persons forwarding requests for service under Article 10(b) (c) inquire with authorities in the receiving State, before sending a request for service in order to properly identify to whom the request should be sent.

### *Protection of the defendant*

34. The SC recognises that the types of relief against a default judgment contemplated in Article 16 (incl. appeal and other forms of redress) are a matter for domestic law.

*Grounds for refusal*

35. The SC recalls the exhaustive nature of the grounds for refusal set out in Article 13(1) of the Service Convention.

*Service by electronic means*

36. The SC welcomes the study conducted by the Permanent Bureau on the use of information technology in the operation of the Service Convention as part of the Draft Revised Service Handbook.
37. The SC notes that, subject to domestic law of the Requested State, requests for service transmitted under the main channel of transmission (the Central Authority) may be executed by electronic means under Article 5. The SC also notes developments in the use of information technology under the alternative channels of Article 10.
38. The SC invites the Permanent Bureau to continue to monitor developments in this area and encourages States to report such developments to the Permanent Bureau.

**VI. MATTERS RELEVANT TO THE OPERATION OF BOTH THE SERVICE AND EVIDENCE CONVENTIONS***Electronic transmission of requests*

39. The SC encourages the transmission and receipt of requests by electronic means in order to facilitate expeditious execution. Contracting States should consider security matters when evaluating methods of electronic transmission.

*"Civil or commercial matters"*

40. The SC recalls its former C&R on the term "civil or commercial matters" (*cf.* C&R Nos 13, 14 and 46 of the [2009 SC](#)) and recommends that this term be interpreted liberally and in an autonomous manner, and applied consistently across both the Service and Evidence Conventions.
41. The SC welcomes the flexible practice reported by Contracting States, by not refusing to execute requests based solely on the entity making the request, but focussing instead on the substantive nature of the matter referred to in the request.

**VII. TIMING FOR THE NEXT SPECIAL COMMISSION MEETING**

42. The SC recommends that the Council consider, in approximately four to six years, the timing for the next SC meeting. In doing so, the Council may wish to take into account any substantive revisions to the Service and Evidence Handbooks, new or ongoing issues in the practical operation of the Service, Evidence and Access to Justice Conventions, the work of any potential Experts' Group (*cf.* C&R No 21), and other developments in the use of information technology in the context of cross-border civil procedure.