

This week at The Hague: A few thoughts on the Special Commission on the HCCH Service, Evidence and Access to Justice Conventions

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The Special Commission on the practical operation of the 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions will take place in The Hague from 2 to 5 July 2024. For more information (incl. all relevant documents), [click here](#). Particularly worthy of note is that this is the first meeting in the history of the Hague Conference on Private International Law (HCCH) in which Spanish is an official language - the new language policy entered into force on 1 July 2024.

A wide range of documents has been drafted for this Special Commission, such as the usual questionnaires on the practical operation and the summary of responses of Contracting States. These documents are referred to as Preliminary Documents (Prel. Doc.). Particularly interesting is the document relating to **Contractual Waiver and the Service Convention** (*i.e.* when the parties opt out of the Convention), the conclusions of which I fully endorse (Prel. Doc. No. 12, [click here](#), p. 10).

Country profiles have also been submitted for approval (Prel. Docs 9 and 10), a practice which is in line with what has been done with other HCCH Conventions. A document on **civil and commercial matters** has also been issued and while it basically restates previous Conclusions and Recommendations, it includes the suggestion made by some States to develop “a list-based approach to identify the scope of “civil or commercial matters”” and recommends not following that route but rather take a case-by-case approach (Prel. Doc. 11, [click here](#)) - a very wise approach.

Moreover, it is worth noting that **revised versions of the Service and Evidence Handbooks** have been submitted for approval. A track changes version of each

has been made available on the website of the Hague Conference. The Handbooks are usually only available for purchase on the HCCH website so this is a unique opportunity to view them (although not in final form).

For ease of reference, I include the links below:

Service Handbook (track version, clean version)

Evidence Handbook (track version, clean version)

With regard to the **Service Handbook**, a few changes are worth underscoring. I will refer to changes in comparison to the **4th version of the Handbook**. While I will refer to the track changes version, please note that not all changes have been marked as changes as this version refers to changes made to an intermediate version circulated internally:

1. **P. 61 of the track changes version - Service on an agent** - The clarification of the two lines of cases that have emerged regarding service on an agent (*e.g.* the US Secretary of State) and whether the document should be sent abroad is particularly interesting.
2. **P. 66 of the track changes version - Service by postal channels on Chinese defendants** - The emphasis on China's opposition to postal channels is particularly significant, given the litigation regarding service on Chinese defendants through postal channels.
3. **P. 69 *et seq.* of the track changes version - Substituted service** - a welcome addition to underscore that this type of service is also used when the Convention does *not* apply.
4. **P. 87 *et seq.* of the track changes version - a practical example from Brazil on how to locate a person to be served** - this is an interesting example and it enriches the Handbook by including an example from Latin America.
5. **P. 101 *et seq.* of the track changes version and glossary - EU digitalisation** - a fleeting reference is made to the modernization initiative of the European Union.
6. **P. 145 *et seq.* of the track changes version - Water Splash, Inc. v Menon decision by the US Supreme Court** - The position of the US regarding article 10(a) has been updated and all the previous case law of lower and appeal courts has been deleted.

The above-mentioned changes are very welcome and will be very useful to practitioners.

On a more critical note, it should be noted that it is unfortunate that the **Annex on the use of information technology** featured in a previous edition of the Service Handbook has been deleted (previously **Annex 8**). In this Annex, there were references to the latest case law on electronic service by electronic means (approx. 26 pages), including email (incl. references to the first case and the evolution in this regard), Facebook, X previously known as Twitter, message board, etc. and an analysis whether the Service Convention applied and why (not).

Unfortunately, very few excerpts of this Annex have been included throughout the Handbook. The concept of address under Article 1(2) of the Service Convention vs email address is of great importance and it has remained in its place (p. 88 of the track version version).

As a result, the Service Handbook contains now very few references to “service by e-mail” (1 hit), “electronic service” (3 hits), “e-service” (2 hits) or “service by electronic means” (10 hits, see in particular, p. 100) and no hits for “service by Facebook” or “service by Twitter”. It also seems to focus on e-service executed by Central Authorities of the requested State according to domestic laws (as opposed to direct service by email across States). And in this regard, see for example the comment from China (Prel. Doc. 15, [click here](#), p. 41).

Having said that, an **additional document on IT** was drafted (Prel. Doc. No 13, [click here](#)), which summarises the way in which information technology can be used to enhance the above-mentioned Hague Conventions and focuses specifically on electronic transmission, electronic service and video-link.

With regard to **e-service**, Preliminary Document No 13 notes among other things that Contracting Parties remain divided as to whether or not service - of process or otherwise - via e-mail or other forms of e-service is within the scope of Article 10(a) postal channels (p. 9). See in this regard the comment from the European Union (Prel. Doc. 15, [click here](#), p. 38). This casts a shadow on the ‘functional equivalence’ approach of this Convention. Moreover, this document only discusses e-service very briefly and the literature referred to in the Prel. Doc. is outdated pertaining to one or two decades ago. On the other hand, however, reference is made to the 2022 responses to the Questionnaire and two recent

cases.

Another perhaps unfortunate deletion is the **relationship between the Service Convention and the applicable EU regulation** (No. 2020/1784). The Handbook merely dedicates a half page to this important relationship (p. 169 of the track changes version) and does not analyse the similarities and the differences between them, as was the case in previous versions. A missed opportunity.

On a positive note, the graphs and tables have been improved and made more reader-friendly and a new Annex has been included “Joining the Convention” (new States can only accede to the Convention).

With regard to **Evidence Handbook**, it could be noted that this Handbook has been subject to a more recent update in 2020, as well as the publication of a Guide to Good Practice on Video-Link in the same year. Therefore, in a way there are less new developments to include. In particular, it has been noted that sections of the Guide to Good Practice on Video-Link have been included into the Evidence Handbook. A question may then arise as to whether the Guide will remain a stand-alone document (but apparently, it will not – for now the free version of the GGP can be downloaded. Hopefully, the Handbook will also be translated into as many languages as the Guide was).

As with the Service Handbook, the graphs and tables have been improved and made more reader-friendly.

Of great significance is the delicate split of views with regard to the possibility of obtaining direct taking of evidence by video-link under Chapter I of the Evidence Convention. In my view, this is the Achilles’ heel of the Evidence Convention since without direct taking of evidence under Chapter I, there is a real danger that this instrument has become obsolete. Let alone the fact that the Evidence Convention has no specific safeguards for the direct taking of evidence.

In sum, the Service and Evidence Conventions work well in a paper environment. However, these Conventions are struggling to keep up with technological developments as some States are reluctant to accept the ‘functional equivalence’ approach of some of their provisions, in particular art. 10(a) of the Service Convention and art. 9(2) of the Evidence Convention (direct service by postal channels and direct taking of evidence by the requesting State). An easier implementation of IT is the electronic transmission of requests, something that is

left as a long-term goal (see below), the effecting of e-service by the Central Authority of the requested State or the use of video-link in the indirect taking of evidence. A question then arises as to how fit are these Conventions for the future and that is something that only time will tell.

This aside - the updating of the Handbooks and the drafting of the preliminary documents is a huge enterprise. The drafters should be congratulated, as these documents will certainly be of great benefit to the users of both Conventions.

At the end of a meeting of the Special Commission, Conclusions and Recommendations are adopted. In this regard, Prel. Doc. No. 13 submits a few proposals regarding information technology (see pages 15-17). In particular, it stands out [for the long-term] “the proposal for the development of an international system to facilitate the e-transmission of requests or alternatively, to propose how a decentralised system of platforms for the transmission of requests may function effectively.” In that respect, a question arises as to how to combine synergies and avoid overlapping efforts at the international and the EU level.

A link to the Conclusions & Recommendations will be added to this post once they have been made available.