

Report on the ABLI/HCCH 4th Joint Webinar on “Cross-Border Commercial Dispute Resolution - Electronic Service of Documents and Remote Taking of Evidence”



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With the fourth instalment in their ongoing webinar series on “**Cross-Border Commercial Dispute Resolution**”, the Asian Business Law Institute (ABLI) and the Hague Conference on Private International Law (HCCH) returned to the topic of “**Electronic Service of Documents and Remote Taking of Evidence**”. Contrary to the first webinar in 2021, this session focussed not solely on the

HCCH 1970 Evidence but equally on the HCCH 1965 Service Convention. Having finally overcome the immediate constraints of the Covid-19 pandemic, this time the renowned speakers were able to elaborate more on the long-term development and visions in the practice of the two legal instruments with regard to their respective areas of law.

As always, formats like this have to manage the balancing act of providing both an introduction to the topic for an unfamiliar audience and in-depth details for experienced practitioners. In this respect, a **survey carried out at the beginning of the webinar** was revealing. While 10 % of participants had already worked with both Conventions and 29 % had at least heard of them, this event marked the first contact with the topic for 18 % of the audience. Among those who had worked with either Convention, a majority of 18 % had practical experience only with the HCCH 1965 Service Convention, and a minority of 2 % had so far dealt exclusively with the HCCH 1970 Evidence Convention. Although this last result is anecdotal in nature, it still seems to reflect the gap between the two Conventions in terms of their prevalence, with 84 vs. 68 Contracting Parties respectively...

I. Welcome Remarks (*Christophe Bernasconi*)

At the beginning of the webinar, the **Secretary General of the HCCH**, Christophe Bernasconi, offered his **welcome remarks** (pre-recorded). Setting up the stage for the ensuing presentations, he placed the implementation of the gradually developing use of new information technology (IT) in the broader context of the **meta-purpose of all Hague Conventions**, as provided for in Article 1 of the HCCH Statute: “The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”

Noteworthy, in his address, Bernasconi explicitly mentions *Sharia law* as the third major legal tradition next to common and civil law, instead of using a more general term like “religious law” or “Islamic law”. With due caution, this parlance could be a nod to the increased – and long overdue – commitment to the MENA region and sub-Saharan Africa, as shown by the continuation of the Malta Process and the establishment of a HCCH Regional Office for Africa (ROA). Further semantic observations concern the designation of the HCCH 2019 Judgments Convention as “our famous game changer”, as well as the recently introduced

terminology that more elegantly refers to the interplay of the Hague Conventions on transnational litigation, instead of a “package”, as a “comprehensive suite” that forms a robust framework designed to enhance the effective access to justice and attract foreign investment. Finally, the Secretary General recalled that the **digital transformation of the operation of the HCCH Conventions**, which is necessary to further the goals of justice at the heart of each instrument, is primarily “**incumbent on the [state] parties**”, who must embrace technology.

II. The HCCH Conventions: Use of Information Technology (*Melissa Ford*)

Second, **Melissa Ford**, HCCH Secretary of the Transnational Litigation and Apostille Division, contributed with a presentation striking the delicate balance between an introduction to the Conventions and the role of the HCCH Permanent Bureau (PB) in general and more detailed insights from the **2024 Special Commission (SC)** as well as from the **2022 Questionnaires**.

The latter is further testimony to a **certain discrepancy between the two HCCH Conventions**. Under the HCCH 1965 Service Convention (responding rate: 59 %) more than two-thirds of the Contracting Parties (67 %) permit the execution of service via different electronic means, such as email (20 %) and specific secured/encrypted variants (10 %) or online platforms (40 %) administered either by the government (33 %) or private service providers (7 %) respectively. Interestingly, no Contracting Party has yet reported that it uses distributed ledger technology (DLT) such as ‘block chain’. In addition, one-third of the respondents (33 %) also transferred the requests for service electronically. In contrast, under the HCCH 1970 Evidence Convention, there appears to be a split between Contracting Parties who accept electronic letters of request (55 %) and those who do not (45 %). On a positive note, however, a majority of States (76 %) allows the taking of evidence by video-link under Chapter I of the Convention.

The former acknowledges the notion of **technological neutrality of the HCCH Conventions** (C&R No. 13). In particular, the Special Commission confirms that Article 10 lit. a) of the HCCH 1965 Service Convention, originally addressing postal channels, also includes the “transmission and service by e-mail, insofar as such method is provided by the law of the State of origin and permitted under the law of the State of destination” (C&R No. 105). However, e-mail domains alone

are still not considered a substitute for the address of the person to be served. Hence, the Convention may not apply in such a case according to Article 1 (2). Similarly, the Special Commission recalled for the HCCH 1970 that Article 17 allows that a member of the judicial personnel of the court of origin, if duly appointed as commissioner for the purpose, directly examines a witness located in another Contracting State by video-link (C&R No. 50). In both instances, however, the major caveat remains that these provisions can be made subject to reservations by the Contracting States, which unfortunately a significant number of Contracting States still has opted for to this day (see C&R No. 17 and No. 107).

Last but not least, Melissa Ford put a special emphasis on the **introduction of the new country profiles** that will replace the practical information table for both legal instruments. Projected to be finalised within 3-4 months, this new section at the HCCH homepage (hcch.net) will contain information on the Central Authorities, direct contact details of contact persons, methods of transmission, data security and privacy, method of transmission, payment methods, acceptance of electronic letters of request and the use of video-link (Chapter I and II) or postal channels respectively.

III. China's Practice and Application of the HCCH Conventions (*Xu Guojian*)

Joining from the "Panda City" Chengdu, **Xu Guojian**, Shanghai University of Political Science and Law, elaborated on "**China's Practice and Application of the HCCH Conventions**". Professor Xu is particularly well, though not exclusively, known to readers of this blog for the numerous entries devoted to his work in the *col.net* repository on the HCCH 2019 Judgments Convention.

Overall, the **use of electronic means for service and taking of evidence is fairly advanced** in the People's Republic of China (PRC). In addition to becoming party to the HCCH 1965 Service Convention in 1992, and the HCCH 1970 Service Convention in 1998, which are impliedly neutral towards technological changes, the topic is also explicitly addressed in domestic law. Following the civil law legal tradition, the relevant provisions are codified within the PRC Law on Civil Procedure (as amended in 2024). For example, according to Article 283 (9) service may be affected by electronic means capable of confirming the receipt of the documents by the recipient, unless prohibited by the law of the country where

the party is domiciled. Furthermore, Article 283 (2) allows the remote taking of evidence abroad via instant messaging tools with the consent of both parties, if this procedure is not prohibited by the laws of that country.

In **domestic judicial practice**, these days, most courts in the PRC (90 %) use platforms like “court service”, SMS, or WeChat to serve documents upon defendants. Likewise, the use of an open-style judicial chain platform based on the blockchain technology providing reliable timestamps and digital signatures ensures the proof of delivery of a certain electronic document.

Moreover, Xu put a special emphasis on Chinese **data security regulations**. For example, the Data Security Law (2021) and the Personal Information Protection Law (2021) which emphasize strict controls on cross-border data transfers and impose limitations on how data is collected, stored and transferred in the PRC. Comparable to the legal framework in the European Union (EU), litigants need to be aware of these laws when dealing with Chinese parties or data located in the PRC.

IV. England & Wales: Use of E-Service and Remote Taking of Evidence (*Lucinda Orr*)

In the final presentation, **Lucinda Orr**, ENYO Law LLP (London), provided valuable insights on “**The Use of E-Service and Remote Taking of Evidence in England & Wales**”. In her dual capacity as practising barrister and appointed Examiner of the Court (2023-2029), she has gained first-hand experience of incoming and outgoing requests for legal assistance in numerous cross-border cases.

Following the ratification by the United Kingdom (UK) of the HCCH 1965 Service Convention in 1969, as well as the HCCH 1970 Service Convention in 1976, the **Senior Master** was designated as the **Central Authority** in both instances for the (non-unified) legal system of England & Wales. The Senior Master is a senior judicial office within the King’s Bench Division of the High Court of Justice, who also serves as the King’s Remembrancer and Registrar of Judgments as well as in many other capacities according to Section 89 (4) of the Senior Courts Act 1981.

Regarding **service of documents**, the relevant procedure is set out in Part 6 Section V (Rules 6.48-52) of the English Civil Procedure Rules (CPR), which

authorise the Senior Master to determine the method of service (R. 6.51). As a rule, service is usually effectuated by means of process server and takes several months. Moreover, the United Kingdom has paved the way for direct service through solicitors as “other competent persons” under Article 10 lit. b) of the HCCH 1965 Service Convention, which allows for a much smoother process. Besides the above encouragement of personal service, English law is generally very generous in relation to the use of electronic means of service where agreed upon between the parties (R. 6.23 (6) CPR in conj. with PD 6A) or authorised by the court (R. 6.15 CPR), which has recently been ordered more frequently in favour of service via email and social media platforms (e.g. Instagram; Facebook) and even via Non Fungible Token (NFT) when the defendant shows evasive behaviour (see e.g. *NPV v. QEL, ZED* [2018] EWHC 703 (QB); *D’Aloia v. Persons Unknown* [2022] 6 WLUK 545). However, pursuant to the responses to the HCCH 2022 Questionnaire, para. 31, the UK had not, at least at that time, permitted the execution via such method within the framework of the HCCH 1965 Service Convention. However, this may again be due to the fact that in such situations the address of the person concerned is typically unknown and the Convention therefore does not apply at all.

The procedures applicable to the **taking of evidence** can be found in the Evidence (Proceedings in Other Jurisdictions) Act 1975 as well as in Part 34 (R. 34.1-21) of the CPR. In 2023, 5,955 letters of request under Chapter I, and 1,439 letters of request under Chapter II of the HCCH 1970 Evidence Convention were received in England & Wales. Since the powers of the court are limited to the scope of evidence admissible in English civil proceedings under Section 2 (3) of the 1975 Act, these requests must be carefully drafted as English law does not allow for “fishing expeditions”. Again, the **requests may be made by foreign courts or private parties**. As foreign courts do not usually instruct local solicitors, their specific questions are dealt with by the Government Legal Department – GLD (formerly known as the “Treasury Solicitor’s Department”) which will, for example, examine the witnesses in the presence of a Court Examiner and stenographer and return the signed transcript – but no video recording – via the official channels. Whilst most of these depositions or examinations in Greater London are conducted using video-link technology, depositions in other regions are still generally executed in person by agent solicitors. Similarly, applications by private parties to the Senior Master under R. 34.17 CPR are usually made *ex parte*. Therefore, a duty of full and frank

disclosure applies. In contrast to the procedure of the GDL, the deposition or examination is also accompanied by a videographer so that the proceedings can be followed or streamed remotely. Although the parties also receive a video recording, this data file is only made available to them in a laborious manner via a USB flash drive.

Drawing on her personal experience, Lucinda Orr, also shared the **general observations** that letters or requests transmitted by the Contracting States are very popular in South-East European Countries (SEE), in particular Romania, Poland and Bulgaria as well as in Turkish divorce cases, while requests directly from parties are more common in the United States (USA), Canada and Brazil. Furthermore, she also stressed that private parties should definitely engage a local solicitor *before* their request has been reviewed and sealed by the Senior Master.

IV. Outlook (*Anselmo Reyes*)

As final remarks, **Anselmo Reyes**, Justice with the Singapore International Commercial Court (SICC) and former Representative of the HCCH Regional Office for Asia and Pacific (ROAP), put forward **two long-term perspectives for the HCCH Conventions**. In his view, the HCCH itself could develop (into) a hub to which judges could easily reach out to effect service abroad. Equally, in terms of evidence, the HCCH could seek a Memorandum of Understanding with the Standing International Forum of Commercial Courts (SIFoCC) guaranteeing compliance with applicable evidence law, which in turn would result in a blanket general permission for the taking of evidence by Commercial Courts in HCCH Contracting States. Envisioning the future of the HCCH as a **one-stop shop for service and evidence requests** would further the goals of justice and finally create a level playing field in relation to arbitration.

Admittedly, given the current international political climate and the organisation's financial resources, these proposals – just like the ideas put forward in another context of a permanent court or panel of legal experts ensuring the uniform interpretation of the HCCH Conventions –, may at first glance appear almost utopian. However, as Melissa Ford noted, the establishment of the country profiles could be regarded as a modest first step towards a more active and centralised role for HCCH...

