



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

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ISSN

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# **UNIFICATION OF INDIAN LAWS AND THE HCCH** **(HAGUE CONFERENCE ON PRIVATE** **INTERNATIONAL LAW)**

AUTHORED BY - AASTHA

## **Abstract**

The Hague Conference on Private International Law is an intergovernmental organisation dealing with unification of laws in countries all around the world, especially for those with different legal systems. It is their objectives to make easier the process of resolution of any conflict arising on the personal laws of individuals concerned with civil and/or commercial matters. Through this paper, the existence of the Conventions of this Conference with the Indian laws is discussed and analysed aiming towards identifying the points of unification and any future growth towards this unification. India is a Party to four of its Conventions which will be brief explained and thereafter analysed based on official material available.

**Key Words-** Hague Conference, Conventions, Apostille, Service, Evidence, Child Adoption

## **1. INTRODUCTION**

### **1.1 History of the HCCH**

The Hague Conference on Private International Law (HCCH) saw its origins in the late 19<sup>th</sup> century and under a decade, the Conference had managed to adopt several Conventions, though they have all almost been completely replaced by modern Conventions. With growth over the years, many countries showed interest in the purpose of the Organisation thus, ever so slightly increasing the numbers of participants. However, due to the outbreak of the 2 World Wars several complications arose and all progress made towards the unification of private international laws came to a sudden halt and no further Conventions were adopted until after the wars ended.

In 1951, a Conference was finally held after a long hiatus of almost 20 years, during which they adopted a Statute that would, upon enforcement, establish the HCCH as a permanent intergovernmental body, governed by its Members and supported by a secretariat- the Permanent

Bureau. The Statute of the Hague Conference on Private International Law came into effect on 15 July 1955. Initially, French was the only official language at the HCCH until 1964, when English was formally introduced as the second official language of HCCH. The inclusion of the English language allowed the participation of more common law countries such as the United States, Canada and Australia, allowing the HCCH to take one step towards one of its objectives of establishing relations between common and civil legal systems. A notable growth in migration and trade was observed post-war which led to an increase in issues related to private international law, attracting the attention of several non-member States. It was after this that one of HCCHs' most successful Convention, the Apostille Convention, was adopted in 1961.

The HCCH witnessed an expansion in its members near the end of the 20<sup>th</sup> century that played an important part in transforming HCCH into the global intergovernmental organisation that it is today. With the growth, they also adopted various Conventions expanding their area of reach, delving deep into matters that had never been looked into before such as intercountry adoption, divorce, and so on. Today, HCCH has introduced more than 40 Conventions and boasts of 91 members<sup>1</sup> and 65 non-members who have either signed, ratified one or more Conventions or are in the process of becoming a member.

## 2. INDIA AND THE HCCH

India, a federal state, deposited its instrument of acceptance of the Statute of the Hague Conference on Private International Law and became the 69<sup>th</sup> member to the HCCH on 13 March 2008 with 28 States and 7 Union States. At the time of acceptance of the Statute, India had already become a Contracting Party to 4 Conventions of the Organisation, namely-

1. the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents [12] also known as the 1961 Apostille Convention on 26 October 2004,
2. the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [14] on 23 November 2006,
3. the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or

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<sup>1</sup> Out of which 1 is a Regional Economic Integration Organisation i.e., the European Union. Statute of the Hague Conference on Private International Law, 1955 Article 3 (9) states that Regional Economic Integration Organisation means an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.

- Commercial Matters [20] on 7 February 2007 and,
4. the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption [33] on 6 June 2003.

### **2.1 1961 Apostille Convention**

The Apostille Convention was concluded at the HCCH as the 12<sup>th</sup> Convention on 5 October 1961 and came into force on 24 January 1965. As aforementioned it is also known as the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents and is considered to be the most successful Convention of the HCCH. It contains 15 Articles and has a total of 126 Contracting Parties and Signatories<sup>2</sup> including both members and non-members of the HCCH, 82 and 44 respectively.

With an increase in global relations increased the mobility and interactions between different states, thus naturally increasing the need to produce public documents in a foreign country. These public documents required proper authentication which would be conducted through long and tedious legalisation processes with multiple procedures and authorities. This Convention reduced the tediousness of this process and simplified it to a single formality-presenting a certificate known as the Apostille. An Apostille is a certificate issued by the State of Origin, authenticating the origins of the public document for presentation before another Contracting Party, which would be the foreign country. It allowed the circulation of public documents internationally for individuals, families and commercial operators.

### **2.2 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**

This Convention was adopted by the HCCH on 15 November 1965 and came into force on 10 February 1969. It is the 14<sup>th</sup> Convention of the Organisation and has a total of 31 Articles. It has 82 Contracting Parties and Signatories, inclusive of both members and non-members- 69 and 13 respectively.

From the name of the Convention, it is quite evident that the Convention is related to the transfer

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<sup>2</sup> Contracting Parties refers to parties that have deposited its instrument of ratification, accession, acceptance, or approval and are bound by the Text of the Convention and have to introduce laws in accordance to the Convention in their own countries. Signatories are parties that have deposited the instrument of ratification, accession, acceptance, or approval but do not have to introduce laws in accordance to the Convention in their own countries.

of judicial and extrajudicial documents in civil or commercial matters that may be required in cross-border cases, which would normally be rather costly and time-consuming owing to the distance. However, this task is simplified through the existence of this Service Convention. It provides for channels for transmission that transfer the related documents from one Contracting Party to another, while not restricting the Contracting Parties from utilizing alternative channels.<sup>3</sup> The Service Convention governs only the transmission of the documents and does not prescribe any rules related to the actual service of process.

### **2.3 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**

This Convention was adopted by the HCCH on 18 March 1970 and came into force on 7 October 1972. It is the 20<sup>th</sup> Convention of the Organisation and is made up of 42 Articles. It consists of 66 Contracting Parties and Signatories, 61 of which are members to the HCCH.

With a step forward in trade and migration arose multiple issues relating to private international law, thereby increasing the need for international judicial proceedings between individuals in which evidence is a key essential. Obtaining the evidence across States can prove to be difficult, owing to the possibility of difference in legal systems of the States. Therefore, this Convention was introduced to overcome the possible differences. It establishes a uniform framework of cooperation mechanisms to facilitate and essentially simplify the taking of evidence abroad.<sup>4</sup>

### **2.4 Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption**

This 33<sup>rd</sup> Convention was introduced on 29 May 1993 and came into force on 1 May 1995. It consists of 48 Articles mainly relating to the adoption of children across borders and protection of the rights of children. It has 105 Contracting Parties and Signatories out of which 73 are member States.

This Convention came into being to deal with any issues arising during the process of intercountry adoption and it takes into account the principles laid down in other international instruments on

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<sup>3</sup> Alternative Channels include diplomatic or consular channels mentioned in Article 8 and 9, and postal channels and direct communications mentioned under Article 10 of the Convention.

<sup>4</sup> The Convention achieves this with two separate and independent systems: (1) Letters of Request and (2) diplomatic officers, consular agents, and commissioners, the former available to all Contracting Parties of the Convention.

protection of children, especially the United Nations Convention on the Rights of the Child (UNCRC). The primary aim is to ensure that any intercountry adoption happens in the best interests of the child while safeguarding the rights of the child.<sup>5</sup> It stipulates the safeguards that act as benchmark of minimum standards to be followed by the Contracting Parties though it places no restriction on further improvement thereof. These stipulations aim towards guaranteeing the best possible adoption practices and elimination of abuse against children. A responsibility has been cast upon the receiving State and the State of origin to share the burden and benefits of regulating the adoption.

### 3. DISCUSSION

India had become a member to 4 of the Core Conventions<sup>6</sup> of the Organisation by 2007 which was much after the introduction and adoption of these Conventions, done through Conferences held with members of the Organisation. The contents of these Conventions had been decided in their respective years of adoption, and countries joining thereafter were required to ratify the Convention, if and only if they were ready to comply by the Articles of the Convention. The Organisation in itself has never held an imposing existence on countries that are not members to it. It even allows non-member countries to become Signatories to its instruments without imposing mandatory requirements on them.

Most Conventions give power to the Contracting Parties to object against the accession of a State wanting to accede to the Convention. As per Article 12 of the 12<sup>th</sup> Convention, Contracting Parties possess this right however, they are required to make such objections within a period of 6 months after receiving the required notifications stipulated under Article 15 of the Convention<sup>7</sup>, which was before 15 May 2005 for India. India had faced objections from 6 countries-

1. **Belgium:** The objection was received on 20-04-2005 but was withdrawn on 09-01-2008.
2. **Germany:** The objection was received on 21-04-2005 and thereafter this Convention has not been applicable between India and Germany.
3. **Finland:** The objection was received on 02-05-2005 but was withdrawn on 05-10-2009.
4. **Netherlands:** The objection was received on 13-05-2005 but was withdrawn on 16-09-

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<sup>5</sup> This includes prevention of illicit practices, including the abduction, sale of, or traffic in, children.

<sup>6</sup> Core or main Conventions are characterised on the basis of the recent adoption, popularity or practical relevance.

<sup>7</sup> Enunciates a list of things the Ministry of Foreign Affairs of the Netherlands shall give a notice of to the States already Parties to the Convention and to the acceding States.

2008.

5. **pain:** The objection was received on 13-05-2005 but was withdrawn on 12-02-2008.
6. **Portugal:** The objection was raised on 25-05-2005 which was after the expiration of the 6 months period. Therefore, there were no legal consequences.

India has made objections against 2 countries, one being China, who is a member State and the other being Kosovo, who is a non-member State and therefore the Convention will not enter into force with them. The 14<sup>th</sup> Convention provides for this right of the Parties under Article 28 however, there appears to have been no objections raised by any of the countries. The 20<sup>th</sup> Convention does not provide for such a right in its text but the Convention will enter into force between the acceding State and the Contracting State 60 days after the Contracting State has declared its acceptance to the accession.<sup>8</sup> The 33<sup>rd</sup> Convention equips the Parties with this right under Article 44 but neither have any of the countries nor has India made any objections against each other.

Furthermore, the application of these Conventions is not majorly visible in the precedents of law but there have been several notable instances where the basic principles of these Conventions have been utilised. Though the case is not directly related to the Apostille Convention, in the case of *Gurmeet Singh Sidana v. Ameet Singh Sawhney*<sup>9</sup> the applicability of this Convention was recognised by the Court however, as per circumstances of the case the Apostille Certificate was deemed not applicable. Similarly, in the matter of child custody in *Jasmeet Kaur v Navtej Singh*<sup>10</sup> the Court recognised that the requirements of the Convention on Taking Evidence abroad in Civil and Commercial Matters, which is concerned with the method of transmission of documents, had been complied with.

The Convention on Taking of Evidence Abroad in Civil or Commercial Matters has a notable occurrence under the Order XXVI Rules 19-22 and Section 78 of the Code of Civil Procedure 1908 (CPC). However, it should be taken into notice that the provisions of this Code have been in existence since before India signed the Convention in 2007. There was even the case of *Wooster Products Inc. v. Magna Tek Inc. & Ors.*<sup>11</sup> in which a letter of request was issued by a

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<sup>8</sup> Convention of 18 March 1970 on the Taking of Evidence abroad in Civil and Commercial Matters, Article 39

<sup>9</sup> MANU/DE/6756/2023

<sup>10</sup> LNIND 2017 DEL 3749

<sup>11</sup> [1989] AIR 6

court in Ohio, US and the Court followed the text of the provisions mentioned above. Another case of *Aventis Pharmaceuticals Inc. v. Barr Laboratories Inc.*<sup>12</sup> applied the Convention as well as the provisions of CPC which are in conformity with each other.

In *R.K. & Anr. v. Central Adoption Resource Authority (CARA)*<sup>13</sup> discussed the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in depth and came to the conclusion that CARA, the Central Authority for the Convention in India, does not provide for direct and private adoptions which fall under the purview of the Hindu Adoptions and Maintenance Act 1956 (HAMA) as opposed to the indirect adoptions, those which are conducted through a third party. There were even lengthy discussions on the depth of relation between the Juvenile Justice (Care and Protection of Children) Act 2015 and the Convention and it was established that it dealt with indirect adoptions. Furthermore, in the case of *Supriyo (alias Supriya Chakraborty) and Anr. v. Union of India*<sup>14</sup> an understanding was derived from the Preamble of this Convention, emphasising the “full and harmonious development of the child” and how intercountry adoption can offer advantages for the child.

Countries do not have differences in just legal systems but also in culture, customs and the like. These affect not only the domestic laws of that country but also the international laws as differences in cultures can also cause conflicts among individuals implying that the personal laws of a country can hamper relationships between individuals. India is a federal country made up of a variety of cultures, ethnicities and customs with a rich history deeply connected to our ancestry. There are various concepts which have never existed in India that have been fairly present in foreign countries for a while. This difference is a major reason why India is currently a Party to a handful of Conventions, though India is taking gradual steps towards adopting some of these foreign concepts such as child abduction. As per Indian laws and customs, it is not possible for a parent to abduct their own child from the other parent, if the matter of custody has not yet been decided, as it is not considered a punishable act. India is still in the process of considering whether or not to become a Signatory to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction as there have arisen various instances of such international

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<sup>12</sup> MANU/PH/2170/2009

<sup>13</sup> LNIND 2021 DEL 1538

<sup>14</sup> 2023 SCC OnLine SC 1348

disputes.<sup>15</sup>

#### 4. CONCLUSION

The Hague Conference on Private International Law has its roots from the late 19<sup>th</sup> Century. It has slowly and steadily developed and grown over the years becoming the prominent Organisation that it is today- with more than 40 Conventions and 91 members. India is a Party to this Organisation as well and has ratified 4 Core Conventions of the HCCH- the Apostille Convention, the Service Convention, the Evidence Convention and the Adoption Convention. These Conventions have their own roles to play and functions to fulfil even in the Indian society, though the impact has not been exceptionally large until now.

The use of these Conventions will proportionally increase with the increase in issues relating to private international law, which would be a natural response to the sudden growth of intercountry relations between individuals in various matters. Though these Conventions leave an impression of being more inclined towards the Western culture which can lead to a biased application, with proper time and consideration States will be able to develop an advance and refined version of the benchmark of minimum standards mentioned in these Conventions. The member countries cannot go against these Instruments however, no restriction has been placed on the positive growth of these principles and procedures.

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<sup>15</sup> Mentioned in notice attached to *Report of Justice Rajesh Bindal Committee to Examine The Civil Aspects of International Child Abduction Bill, 2016 and The Protection of Children (Inter-Country Removal and Retention) Bill, 2016*, issued by Ministry of Women and Child Development on the subject of 'Accession to the Hague Convention on the Civil Aspects of International Child Abduction, 1980-reg.' dated 04-05-2018, <https://wcd.nic.in/sites/default/files/Hague%20Convention.pdf> (last visited Nov. 17, 2023)