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**LES MÉCANISMES PRATIQUES POUR FACILITER LA COMMUNICATION
INTERNATIONALE DIRECTE ENTRE AUTORITÉS JUDICIAIRES DANS LE CADRE
DE LA CONVENTION DE LA HAYE DU 25 OCTOBRE 1980
SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT INTERNATIONAL D'ENFANTS**

Rapport Préliminaire

établi par Philippe Lortie, Premier Secrétaire

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**PRACTICAL MECHANISMS FOR FACILITATING DIRECT INTERNATIONAL
JUDICIAL COMMUNICATIONS IN THE CONTEXT OF THE
HAGUE CONVENTION OF 25 OCTOBER 1980
ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

Preliminary Report

drawn up by Philippe Lortie, First Secretary

*Document préliminaire No 6 d'août 2002
à l'intention de la Commission spéciale de septembre / octobre 2002*

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for the attention of the Special commission of September / October 2002*

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I. INTRODUCTION

1 During the Fourth Special Commission Meeting to review the practical operation of the *1980 Hague Convention on the Civil Aspects of International Child Abduction* (22-28 March 2001) (hereinafter the *Fourth Special Commission Meeting*) the issue of the feasibility and limitations of direct judicial communications and the development of a network of liaison judges was addressed in the context of issues surrounding the safe and prompt return of the child (and the custodial parent where relevant). The following were the Recommendations and Conclusions adopted by the Special Commission, which focused on international judicial communications between judges or between judges and other authorities:

"Direct judicial communications

5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.

5.6 Contracting States should actively encourage international judicial co-operation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases.

In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

- *communications to be limited to logistical issues and the exchange of information;*
- *parties to be notified in advance of the nature of proposed communication;*
- *record to be kept of communications;*
- *confirmation of any agreement reached in writing;*
- *parties or their representatives to be present in certain cases, for example via conference call facilities.*

5.7 The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications."

2 In further exploration of the practical mechanisms for facilitating direct international judicial communications, Professor William Duncan, Deputy Secretary General, drew up a Questionnaire addressed to Member States of the Hague Conference on Private International Law and to States Parties to the *1980 Hague Convention on the Civil Aspects of International Child Abduction*¹ (hereinafter the *1980 Hague Convention*). Responses were also sought from the international governmental and non-governmental organisations invited to attend the Fourth Special Commission. Respondents were also invited to identify and comment upon matters concerning direct international judicial communications, which were not addressed specifically in the Questionnaire.

¹ Questionnaire concerning Practical Mechanisms for facilitating Direct International Judicial Communications in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Preliminary Document No 2 of January 2002 for the attention of the Special Commission of September / October 2002.

3 The present Preliminary Report is in part a summary of the responses to the Questionnaire received before 15 August 2002 from 16 jurisdictions, namely, Austria, Bosnia and Herzegovina, Chile, China (Hong Kong Special Administrative Region), Denmark, Finland, France, Germany, Iceland, Netherlands, Poland, Switzerland, the United Kingdom (England and Wales, Northern Ireland and Scotland) and Uzbekistan, and from one non-governmental international organisation, the International Centre for Missing and Exploited Children (ICMEC). The Preliminary Report also draws on conclusions and recommendations of various international judicial conferences and seminars that have examined this subject,² academic literature, existing national laws and regional norms in force, the Judges' Newsletter,³ as well as contacts with a number of individuals.⁴ In essence, this Preliminary Report offers an inventory of the different mechanisms in place to facilitate direct international judicial communications. It also identifies the difficulties and constraints States and judges may have with regard to these mechanisms. The Report will provide valuable information to continue to explore the practical mechanisms for facilitating direct international judicial communications.

² See the judicial seminars and conferences listed under paragraphs 46-47, *infra*.

³ The Judges' Newsletter on International Child Protection, a publication of the Hague Conference on Private International Law, Butterworths – Lexis Nexis, more specifically Vol. III / Autumn 2001 and Vol. IV / Summer 2002 (the latter focuses particularly on direct international communications between judges).

⁴ In this respect the author would like to thank Gordon Marantz, ADR Centre, Osler, Hoskin & Harcourt LLP (Toronto Office), former President of INSOL International for their discussions on cross-border insolvency.

II. BACKGROUND

4 The creation of an international network of liaison judges was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children by Lord Justice Mathew Thorpe (Judge of the Court of Appeal, England and Wales).⁵ It was recommended that relevant authorities (e.g. court presidents or other officials, as appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other States, in respect, at least initially, of issues relevant to the *1980 Hague Convention*. It was felt that the development of such a network would facilitate at the international level communications and co-operation between judges and would assist in ensuring the effective operation of the *1980 Hague Convention*.

5 The idea of an international judicial liaison network received further support at the two International Judicial Conferences held at De Ruwenberg in June 2000 and October 2001, and at the Common Law Judicial Conference on International Parental Child Abduction, hosted by the United States Department of State at Washington, D.C. in September 2000. The International Network of Liaison Judges currently includes judges from 9 Contracting States.⁶

6 Direct international judicial communications also received support from those seminars and conferences. These connections can be very useful in some cases in order to resolve some of the practical issues surrounding return. Furthermore, they may result in immediate decisions or settlements between the parents before the court in the requested State. In particular, courts could possibly suggest and produce settlements between the parents to facilitate the return process, to remove practical obstacles to return, to help to ensure that the prompt return may be effected in safe and secure conditions for the child (and sometimes for an accompanying custodial parent), and to pave the way for any proceedings on the custody issues which are to take place in the country to which the child is returned. The end result is that direct international judicial communications may reduce the possibility of a refusal of the application for return. For example, some courts may refuse an application for return based on Article 13(b) of the *1980 Hague Convention* because the mother who looks after the child is not permitted to enter the country to which the infant is to be returned.⁷ In such cases, the concerned judges, through direct communications in writing and/or telephone, can jointly assist that arrangements are in place to make possible an immediate return of the child accompanied by the abducting parent. In some cases undertakings may be given by the applicant parent relating to this or to other aspects of the return. Such "undertakings" cannot usually be enforced without permission of the court of the requesting State. In order to alleviate this difficulty, the concerned judges may agree that the "undertakings" and mutual obligations of the parents should be enforced by safe harbour orders or mirror orders in the courts of both States. In his article, published in the Summer 2002 Issue of the Judges' Newsletter, Justice Carl Eberhard lists examples of matters that can be regulated by such orders:⁸

~~safe~~ safe - return orders and, if possible under local law, reversal of an arrest warrant in accordance with the competent district attorney;⁹

⁵ See The Judges' Newsletter, *supra*, note 3, Vol. III / Autumn 2001, at p. 16.

⁶ Argentina, Australia, Canada, China (Hong Kong Special Administrative Region), Cyprus, Denmark, Iceland, New Zealand and the United Kingdom (England and Wales, Northern Ireland and Scotland). See Judges' Newsletter *ibid.* at pp. 16-18.

⁷ Justice Carl Eberhard, Judge at the First Family Senate, Regional Court of Appeal Frankfurt/Main, Mediator (BAFM), "International Communications between Judges - Direct International Communications between Judges", Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3, at pp. 16-17.

⁸ *Ibid.*

⁹ In a recent article published in Vol. IV / Summer 2002 of the Judges' Newsletter, *supra*, note 3, at p. 61 Justice Jacques Chamberland, Judge at the Court of Appeal of Quebec, examines the abandonment of criminal proceedings. He reminds us that in most jurisdictions "[t]he situation is particularly delicate in that the control over these criminal charges is not that of the parents from the moment the charge is laid by the State. The decision to lay a charge, and to bring it to its conclusion is not a power that is exercised or supervised by the courts, unless, of course, there is an

- /// obligations to share the expenses for flights, legal proceedings or lawyers;
- /// assurance of the court of the country to which the child returns that the child can provisionally stay with the mother till the regular decision;
- /// permission for the mother to take care of the child at the previous domicile of the family;
- /// appropriate regulations of the right of interim access pending the determination of the return proceedings;
- /// provisional obligation for the father to provide maintenance for the child and, by way of exception, for the mother;
- /// mutual obligations for both parents to take part in legal proceedings concerning custody and access, or to visit a family counselling centre together, or to participate in mediation proceedings.

7 Moreover, direct international judicial communications can be very helpful from a general point of view: experiences with regard to procedures and methods that have been developed in the course of past and current proceedings can be exchanged between the judges. Through direct international judicial communications, judges from different jurisdictions may be able to inform each other and learn from one another on how proceedings regarding the applications under *1980 Hague Convention* for return and regular custody are dealt with. Judges will then better understand how their colleagues work in other jurisdictions. Ultimately, such exchanges may well lead to an increased appreciation of different "jurisdictional cultures".

III. RESPONSES TO THE QUESTIONNAIRE

8 The original text of the questions has been reproduced below in order to assist in reading the compilation of the answers received. Therefore, the text follows the same structure as set out in the Questionnaire.¹⁰ On several issues, the answers have been supplemented by additional research. The Permanent Bureau is grateful to the 16 jurisdictions that have responded to the Questionnaire and invites other jurisdictions to do the same in the future.¹¹

A. The feasibility and/or desirability of the appointment of a liaison judge or authority

A.1. Has a nomination been made in your country of a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority in cases involving child abduction or access/contact?

9 Six jurisdictions¹² out of the 16 that have responded to the Questionnaire have nominated a liaison judge in accordance with paragraphs 5.5 and 5.6 of the Conclusions and Recommendations of the Fourth Special Commission Meeting.¹³ In one jurisdiction out of these six, a nomination was informal; the judge volunteered to be a liaison judge.¹⁴ It is also interesting to note that, out of the six jurisdictions, two are of civil law tradition¹⁵ and another one is a mixed system comprised of both civil law and common law traditions.¹⁶

A.2. If an appointment has not yet been made in your country, would such a nomination face any legal difficulties or constraints? Are there specific concerns you would like to raise regarding the feasibility and/or desirability of an appointment of a liaison judge/authority?

10 Out of the 10 jurisdictions¹⁷ that have not yet appointed liaison judges it does not appear that such nominations would face any legal difficulties or constraints, with the exception of two jurisdictions.¹⁸ The reasons stated for not nominating a liaison judge range from the need for administrative and law reforms to reasons of practicality and necessity.

11 In the case of one of the exceptions mentioned,¹⁹ it appears that there is no legal barrier to such nomination; the difficulty in that jurisdiction would seem to be limited to having the appropriate court administrative regulation in place. In the case of the other exception,²⁰ it appears that it would not be possible to make such an appointment if it entails the delegation of executive functions or, for instance, the obligation to consult or inform public authorities. The only viable way to carry out such functions would be through the creation of a public authority ("liaison officer"). Under German law governing judges, a judge can only voluntarily

¹⁰ See, *supra*, note 1.

¹¹ See, *supra*, par. 3.

¹² China (Hong Kong Special Administrative Region), Denmark, Iceland, United Kingdom (England and Wales, Northern Ireland and Scotland).

¹³ See, *supra*, par. 1.

¹⁴ China (Hong Kong Special Administrative Region).

¹⁵ Denmark and Iceland.

¹⁶ Scotland.

¹⁷ Austria, Bosnia and Herzegovina, Chile, Finland, France, Germany, Netherlands, Poland, Switzerland and Uzbekistan.

¹⁸ Bosnia and Herzegovina, and Germany.

¹⁹ Bosnia and Herzegovina.

²⁰ Germany.

assume the function of a “judicial contact” in the aforementioned area. However, according to the German response to the Questionnaire, the transfer of a function that is solely assumable on a voluntary basis does not seem to be the most efficient solution.

12 Another jurisdiction is contemplating the possibility of nominating a liaison judge in the light of its law reform with regard to the implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter the *1996 Hague Child Protection Convention*).²¹

13 Without being opposed to direct judicial communications, four jurisdictions²² have not appointed a liaison judge because it would seem that the Central Authority can play a liaison role similar to the one envisioned for a liaison judge. Three of those jurisdictions²³ indicate that, if the need for a cross-border communication arises in a specific case, the judges dealing with the case in different Contracting States could co-operate directly with each other. But it is also their view that the initiation of such direct contact should be established with the assistance of the Central Authorities and not with the assistance of a liaison judge.²⁴ The fact that judges in many jurisdictions are not vested with administrative tasks and logistic functions concerning case management would explain the reluctance to nominate a liaison judge tasked with similar cross-border administrative responsibilities. In addition, one jurisdiction remarked in its response that agreements between judges resulting from cross-border direct communications are alien to civil law systems.²⁵

14 One jurisdiction indicated that in practical terms there would be no need to appoint liaison judges/authorities because it is the judges (*Magistrats*), usually family law judges, which carry out the function of the Central Authority in that jurisdiction.²⁶ As part of their scope of duties, the judges working in that Central Authority perform relevant activities connected with facilitating the information flow in cases covered by the provisions of the Convention (*i.e.* information exchange among judges, between judges and other, including foreign, bodies). In this specific case, the domestic communications between the Central Authority and the family courts are facilitated by the fact that the Central Authority is located in the Ministry of Justice that is also responsible for the family courts.

15 Finally, most of the jurisdictions that have not nominated a liaison judge/authority note the need to make the division of tasks between the liaison judge or authority and the Central Authority under the *1980 Hague Convention* very clear to avoid overlap and duplication of work. All the liaison appointments that have been made were of actual judges and the same is contemplated for the jurisdictions that have answered the Questionnaire in that respect and that have not yet made an appointment. To date a Central Authority or person acting in a non-judicial capacity has not been nominated to fulfil the liaison role.

16 In addition to the response received from France to the Questionnaire, views of French *Magistrats* were also expressed at the October 2001 De Ruwenberg (Netherlands) International Judicial Seminar on the *1980 Hague Convention* and in the ensuing articles published in the Summer 2002 Issue of the Judges’ Newsletter. In her article published in the Summer 2002 Issue of the Judges’ Newsletter, Justice Marie-Caroline Ceyron-Bouillot outlined some of the concerns expressed by French *Magistrats* attending the Seminar.²⁷ The first outlined difficulty

²¹ Netherlands. See, par. 41, *infra*, for further discussion of the *1996 Hague Child Protection Convention*.

²² Austria, Finland, France and Poland.

²³ Austria, Finland and France.

²⁴ In its response Austria indicated that a judge could initiate such contacts on his/her own.

²⁵ Finland.

²⁶ Poland.

²⁷ Marie-Caroline Ceyron-Bouillot, Juge aux affaires familiales, Tribunal de grande instance de Lyon (France), “Direct Relationships between Judges of Different Competent Countries: The Opinion of a Judge”, *The Judges’ Newsletter*, Vol. IV / Summer 2002, *supra*, note 3, at pp. 8-11.

was regarding the anonymity of direct cross-border telephone conversations. "How can one be certain that the interlocutor is indeed a colleague?" To a judge of the Supreme Court in London "that fear seems fanciful" responded Lord Justice Mathew Thorpe in his article in the same issue of the Judges' Newsletter.²⁸ He explained that judges in most common law jurisdictions are inaccessible to any caller who has not passed through the protective barrier of the judge's dedicated clerk or secretary. Justice Celeyron-Bouillot additionally raises the issue of the timing of the discussion. Should it take place before giving a decision on the return? "Would that not appear as a prejudgment?" She queried: "How can a communication take place after a decision ordering the return is made since the judge is no longer seized of the matter?"²⁹ In her article Justice Celeyron-Bouillot also discussed the risk of misunderstandings between the two judges because of language barriers and differences in legal terminology. But first and foremost, her preoccupation is whether the parties will understand the procedure and its results. Will justice be perceived as being just and fair? In its response to the Questionnaire, France had indicated that communications could take place, but they would have to respect the French and the European legal frameworks.

B. Administrative aspects

B.1. If a judge or authority has been nominated, please respond to 1 (a), (b), (c), (d), (e) and (f), or B.2. If a judge or authority has not been nominated, please give any views you have on how the matters referred to in 1 (a), (b), (c) and (d) below might be addressed in your country.

B.1. & 2. (a) What procedure was used in making the appointment?

17 The appointments that have been made were formal appointments except for one. In this latter case a judge had volunteered to serve as a liaison judge.³⁰ The procedures for the formal appointments differ but all appointments involved the judiciary either in a consultation or in an appointing capacity. In one case, the appointment was made at the discretion of the chief judge of the Family Court.³¹ In two cases, the Central Authority was involved in the appointments. In the first case, the Central Authority consulted the chief judge of the jurisdiction before making the appointment.³² In the second case, the chief judge of the jurisdiction endorsed the proposal of the Central Authority.³³ Finally, as for the jurisdictions of civil law tradition, in one instance the judiciary board made the appointment after consulting the National Association of Judges³⁴ and in the other instance the Judges Assembly made the appointment after consulting the concerned judge.³⁵

²⁸ *Ibid.* "International Liaison Judges" by Lord Justice Mathew Thorpe, Judge of the Court of Appeal (England and Wales), at pp. 5-7.

²⁹ *See, supra*, note 27.

³⁰ China (Hong Kong Special Administrative Region).

³¹ United Kingdom (England and Wales).

³² United Kingdom (Scotland).

³³ United Kingdom (Northern Ireland).

³⁴ Denmark.

³⁵ Iceland.

Views of the jurisdictions that have not made an appointment

18 The jurisdictions that have not made an appointment contemplate similar procedures. In one jurisdiction, the Supreme Court has authority to make the appointment.³⁶ In another jurisdiction the judicial council would make the appointment.³⁷ Finally, a jurisdiction has indicated that its Central Authority would make the appointment after consulting the National Association of Judges and the different national courts.³⁸ While France has not made an appointment, a recent law passed on 4 March 2002³⁹ has attributed exclusive jurisdiction to the Courts of Appeal to hear cases in relation to international instruments dealing with the international removal of Children. The objective of this law is to allow for a better coordination, to facilitate communications with the Central Authority and to establish progressive contacts with other States' judicial authorities. It is therefore expected that, if France were to designate one or more liaison judge, that should belong to the courts of appeal. As mentioned earlier, in the case of Germany the appointment of a liaison authority may require the creation of a "liaison officer" position.⁴⁰

B.1. & 2. (b) What role and functions have been attributed to the judge or authority?

19 Out of the six jurisdictions that have made appointments, two have not strictly defined the formal role or functions of their liaison judges.⁴¹ One of the two has done so intentionally,⁴² the assumption being that a measure of fluidity confers a greater opportunity to explore and develop methods of communication and co-operation that facilitate the achievement of the objectives underpinning the Convention.⁴³ Accordingly, the liaison judge of the jurisdiction operates within the limits of his own discretion and judgment. A third jurisdiction indicates that "the liaison judge is to act as a channel of communication and liaison with judges of other Contracting States and territories" leaving thereto some discretion to the judge.⁴⁴ The other three jurisdictions are more specific as to the role and functions attributed to their liaison judge.⁴⁵ The attributions are different, but all three jurisdictions include at least one or more of the following:

- (i.) The liaison judge will be advising his or her colleagues in the jurisdiction on the Convention in general and about its application in practice.
- (ii.) The liaison judge will be able to answer enquiries from foreign judges and Central Authorities about general matters concerning legislation on child abduction and authorities in its jurisdiction.
- (iii.) The liaison judge will participate and represent the jurisdiction in international judicial family law conferences in so far as it is relevant and possible.
- (iv.) The liaison judge will receive and channel all international judicial incoming communications and initiate or facilitate such outgoing judicial communications.
- (v.) The liaison judge will promote international family law collaboration generally.

³⁶ Chile.

³⁷ Netherlands.

³⁸ Switzerland.

³⁹ *La Loi du 4 mars 2002*.

⁴⁰ *See, par. 11, supra*.

⁴¹ United Kingdom (Scotland) and United Kingdom (Northern Ireland).

⁴² Northern Ireland.

⁴³ *See Article 1 of the Convention*.

⁴⁴ China (Hong Kong Special Administrative Region).

⁴⁵ United Kingdom (England and Wales), Denmark and Iceland.

20 In his contribution to the Autumn 2001 Issue of the Judges' Newsletter,⁴⁶ Lord Justice Mathew Thorpe highlighted the following additional roles and functions that an international liaison judge may assume:

- (i.) The liaison judge will hold responsibility for the collection of information and news relevant to the *1980 Hague Convention*.
- (ii.) The liaison judge will be responsible for ensuring that important judgments are posted on the International Child Abduction Database (INCADAT), accessible at: <<http://www.incadat.com>>.
- (iii.) The liaison judge will equally be responsible for contribution to the Permanent Bureau's Judges' Newsletter.
- (iv.) The liaison judge will be responsible for the reverse-flow, ensuring that other judges within his jurisdiction who take Hague cases receive their copy of the Judicial Newsletter and any other information that might contribute to the development of the expertise of the individual judge.

Views of the jurisdictions that have not made an appointment

21 Two of the jurisdictions that have not made an appointment contemplate very formal roles for their liaison judges.⁴⁷ One jurisdiction contemplates a role and functions tailored to the *1996 Hague Child Protection Convention*.⁴⁸ The judge or authority would liaise in cases involving the transfer of jurisdiction on the basis of Articles 8 or 9 of that Convention, as well as cases where a court within the jurisdiction would require information, evidence or follow-up on a local decision by a foreign court.⁴⁹ The other formal role contemplated would consist in taking over the Central Authority's role when the treatment of a request, in a requested State, would not be optimal or complete if done by that Central Authority.⁵⁰ This would be the case when:

- (i.) it is required to have the same level of authorities in both States discussing the matter;
- (ii.) the question to deal with is one within the jurisdiction of a court and not within that of a Central Authority; and
- (iii.) the protection of the child requires an exchange of views or simultaneous seizure of the court of the requesting and requested States in order to make mirror orders or other similar measures.

22 On the other hand, two jurisdictions contemplate less defined formal roles and functions.⁵¹ One jurisdiction sees the liaison judge's role as a facilitator between the jurisdictions seized of a matter in the respective States.⁵² In that same jurisdiction, the general function of the liaison judge would be to improve the operating capacity of its national courts with regard to *1980 Hague Convention*. The other jurisdiction in this group favours a very clear division of roles between the Central Authority and the liaison judge.⁵³ In that respect, this jurisdiction views the liaison judge as one who will participate in international judicial meetings and seminars to learn about other judicial systems and to relay this information to national colleagues and vice versa to transmit to foreign colleagues information about its national judicial system.

⁴⁶ Lord Justice Mathew Thorpe, "International Liaison Judges for Family Proceedings", Judges' Newsletter, Vol. III / Autumn 2001, *supra*, note 3, at p. 20.

⁴⁷ Netherlands and Switzerland.

⁴⁸ Netherlands.

⁴⁹ See, par. 41, *infra*, for further discussion of the *1996 Hague Child Protection Convention*.

⁵⁰ Switzerland.

⁵¹ Chile and Finland.

⁵² Chile.

⁵³ Finland.

B.1. & 2. (c) How does the judge or authority (if it is not the Central Authority) relate to the Central Authority in carrying out his/her functions?

23 In four of the six jurisdictions that have made an appointment, the judiciary and the Central Authority maintain very close communications and co-operation.⁵⁴ Answers from three of those jurisdictions mentioned that the liaison judges have the full support of their Central Authority.⁵⁵ They can contact the Central Authority directly by phone, e-mail or mail services. The communications in these cases are described as being mutually beneficial. In the two other cases, the description of the relationship between the liaison judge and the Central Authority appears to assume a different form.⁵⁶ One jurisdiction indicates that the liaison judge should in no way impinge on the work of the Central Authority.⁵⁷ Therefore, the liaison judge will do no more than provide an informal channel of communication to judges in other jurisdictions concerning the working of their system. The other jurisdiction indicated that the liaison judge and the Central Authority will be in contact only in so far as it is necessary, and that the Central Authority might inform other judges to contact the liaison judge for information and advice.⁵⁸

Views of the jurisdictions that have not made an appointment

24 The responses from jurisdictions that have not made an appointment show that a clear division of tasks done in advance between the Central Authority and the liaison judge will be important to enable them to carry out their respective functions. In this respect, one jurisdiction pointed out that the most practical way of regulating the relationship between the liaison judge and the Central Authority would be to instruct the liaison judge to liaise with judicial authorities, and the Central Authority to liaise with administrative authorities abroad.⁵⁹ It also appears from a number of responses that the Central Authority may be at the disposal of the liaison judge for different purposes. For example, on some occasions the liaison judge may need the Central Authority's intervention in order to contact a foreign judicial authority. Therefore, the Central Authority would have to maintain an up-to-date list of liaison judges and authorities in States Parties to the Convention and help establish contacts, if necessary.⁶⁰ Another example offered would be for the Central Authority to co-ordinate with its counterparts abroad and domestically, if necessary, common measures decided by the competent judges to be taken or to be put in place.⁶¹ The Central Authority could also disseminate useful information to the liaison judge coming from the Permanent Bureau or from other sources.⁶²

B.1. & 2. (d) Have any arrangements been made with respect to possible language difficulties?

25 The jurisdictions that have made an appointment have not encountered language difficulties as most of their contacts are done in English. If they were to have language difficulties the jurisdictions indicated that interpretation services could be arranged without problems. One jurisdiction has indicated that its judiciary maintains a list of certified interpreters for different purposes.⁶³ One jurisdiction pointed out that its contact judge and Central Authority agreed that international communications should take place in English.⁶⁴

⁵⁴ United Kingdom (England and Wales), United Kingdom (Northern Ireland) and United Kingdom (Scotland).

⁵⁵ As the Iceland appointment is very recent, specific arrangements in this regard are not in place yet.

⁵⁶ China (Hong Kong Special Administrative Region) and Denmark.

⁵⁷ China (Hong Kong Special Administrative Region).

⁵⁸ Denmark.

⁵⁹ Netherlands.

⁶⁰ Netherlands and Switzerland.

⁶¹ Switzerland.

⁶² *Ibid.*

⁶³ China (Hong Kong Special Administrative Region).

⁶⁴ Iceland.

Furthermore, that jurisdiction indicated that communications between Scandinavian judges could take place in the Nordic languages.

26 In his contribution to the Summer 2002 Issue of the Judges' Newsletter,⁶⁵ Justice Nicholas Wall, Judge of the Family Division of the High Court (England and Wales) recounts useful written communications he had with a Spanish colleague and adds "if I thought it important for there to be written communications between myself and a judicial colleague whose language I did not speak, I would have no hesitation in asking the English Central Authority to facilitate the translation of any letter I might wish to write".⁶⁶

Views of the jurisdictions that have not made an appointment

27 Some of the jurisdictions that have not made an appointment have indicated that they could have recourse to interpretation facilities if necessary either from their Department of Foreign Affairs or from private service providers. One jurisdiction hopes to favour the nomination of multilingual liaison judges, with capacity to communicate in French and English.⁶⁷

B.1. (e) Has the appointment been communicated to the Permanent Bureau?

28 The formal and informal appointments made by the six jurisdictions that have answered the Questionnaire affirmatively were communicated to the Permanent Bureau.

B.1. (f) Has the appointment been communicated to other States?

29 The appointments were not communicated formally to other States. In some cases, however, they were communicated informally.

B.3. In the case of Federal States or States with more than one system of law, are there any particular difficulties in establishing a liaison structure and how might these be addressed?

30 One State with a federal structure⁶⁸ and one State with more than one system of law⁶⁹ have provided answers to this question. In the latter case, it was mentioned that even though the Convention does not apply between different jurisdictions within the State there are no particular difficulties for liaison judges from national jurisdictions to conduct informal consultations between their national jurisdictions.⁷⁰ In the case of the State with a federal structure, it appears that there would be no difficulties as there are no difficulties with regard to the Central Authorities established at the territorial unit level.⁷¹

⁶⁵ Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3, at p. 23.

⁶⁶ *Ibid.*

⁶⁷ Switzerland.

⁶⁸ Switzerland.

⁶⁹ China (Hong Kong Special Administrative Region).

⁷⁰ *Ibid.*

⁷¹ Switzerland.

C. Practical and legal aspects

C.1. To what extent are communications at the international level at present practiced in your country? Please provide examples.

Communications in relation to specific cases regarding child protection

Under the 1961 Hague Convention on the Protection of Minors

31 Communications between authorities (e.g. courts) was foreseen in a Hague Convention long before the current practice that has emerged from the *1980 Hague Convention*. Article 10 of the *1961 Hague Convention on the Protection of Minors* provides that:

"In order to ensure the continuity of the measures applied to the infant, the authorities of a Contracting State shall, as far as possible, not take measures with respect to him save after an exchange of views with the authorities of the other Contracting States whose decisions are still in force."

32 In its response to the Questionnaire the Swiss Central Authority made reference to the *1961 Convention*. It mentioned that direct judicial communications are sometimes necessary in order to resolve matters that cannot normally be dealt with between Central Authorities. According to the Swiss Central Authority, the *1961 Convention* complements the *1980 Convention* as to direct judicial communications. Swiss judges have been applying Article 10 by analogy vis-à-vis non-Contracting States such as Brazil and the United States. In this latter case, further to undertakings offered by the Swiss court to the United States court, a child was returned safely to the United States. In the case with Brazil, direct communications were used to locate children of French nationality in Brazil.

33 Unfortunately, the system of communication and co-operation set under the *1961 Convention* has never fully matured. "The reason is no doubt that international collaboration between courts and authorities which only rarely have occasion to deal with each other, can hardly be expected to work. Only a coordinated system of co-operation, such as those provided for under the Service⁷² and Evidence⁷³ Conventions, can provide the infrastructure, and the incentive, which permit a lasting form of co-operation".⁷⁴

Under the 1980 Hague Convention on International Child Abduction

34 In its response to the Questionnaire, the Netherlands has indicated that communications are already practised at the level of Central Authorities appointed under the *1980 Hague Convention*. Such communications are practised at all stages of a case (the administrative phase preceding return proceedings; the proceedings themselves and the phase of enforcement of return orders). If necessary, following a request by the Netherlands Central Authority, the foreign Central Authority liaises with judicial authorities within its State. Finland adds that in cross-frontier family cases communication is mostly practised by way of written

⁷² *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.*

⁷³ *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*

⁷⁴ J.H.A. van Loon, "The Increasing Significance of International Co-operation for the Unification of Private Law", *In Forty Years on: The Evolution of Postwar Private International Law in Europe*, Centrum voor Buitenlands Recht en International Privaatrecht Universiteit van Amsterdam, Kluwer, 1990, pp. 101-122, at p. 117. See also, Peter Schlosser, "Jurisdiction and International Judicial and Administrative co-operation", R.C.A.D.I. Tome 284, Martinus Nijhoff Publishers, The Hague, 2000, 428 p., at pp. 303-307.

requests for judicial assistance (taking of evidence, information on foreign law, etc.). Furthermore, in family proceedings between the Nordic countries, consultations concerning the other country's family law have been made by phone and/or email with the help of judges belonging to the Nordic family law group.⁷⁵ In its answer to the Questionnaire, Finland reported a rare example of a direct international judicial communication:

"In one child abduction case hearing of witnesses was arranged in the form of a telephone conference between a court in the United States and a court in Finland. The communication between the judges was limited only to the practical details of the hearing. The Central Authority assisted in the arrangements on the hearing."

35 The instances where communications at the international level arise in Northern Ireland are also rare. Only the High Court of Justice in Northern Ireland deals with the 1980 Hague Convention cases. However, the Court is ready to participate in such communications and has done so on at least one occasion. The circumstances were as follows:

"On 26 April 2001, a Hague Convention application came before the Court regarding three children who had allegedly been abducted from the United States and taken to Northern Ireland by their mother. The application was mounted on behalf of the father, who was then residing in America. The mother expressed concerns as to what would happen if she returned to the United States with the children. Having discussed the case with Counsel for each party, Mr Justice Gillen contacted, by telephone, Assistant Superior Judge McElyea in Georgia, United States. At Appendix A,⁷⁶ there is a precise note (headed "Direct Judicial Communications") of what Mr Justice Gillen revealed to the Assistant Superior Judge. Before making contact, Mr Justice Gillen discussed, and agreed, with Counsel precisely what would be revealed to the Assistant Superior Judge. Needless to say, the communications were conducted in the presence of Counsel who could hear both what Mr Justice Gillen was saying and what the Assistant Superior Judge was saying. At appendix B⁷⁷ there is a copy of the Assistant Superior Judge's responses (headed "Direct Judicial Communication between The Honourable Mr Justice Gillen and The Honourable Ellen McElyea etc.>"). Both documents were circulated to Counsel."

36 Several examples of international direct judicial communications were also reported in Volumes III and IV of the Judges' Newsletter⁷⁸ and case law that discusses this matter is reported under Question C.2.⁷⁹

37 In one article Justice Joseph Kay, Judge of the Appeal Division of the Family Law Court of Australia, reports on three communications he had with Judge Patrick Mahony, Liaison Judge and Principal Judge of the Family Law Court of New Zealand.⁸⁰ The first case dealt with a family where one child was being retained in Australia and the other in New Zealand. Convention proceedings had been brought in each country and issues of timing and sequence were important. After obtaining the permission of both parents to make contact with Judge Mahony, Judge Kay prepared a memorandum to the parties setting out the particulars of their discussion, which clearly set out the facts and procedures as they occurred in both States.⁸¹ On a second occasion, Judge Kay had cause to rule upon some conditions that had been imposed by a Judge of New Zealand for the return of a child to Australia. After having made the orders the New Zealand Judge had thought appropriate, Judge Kay wrote to Judge Mahony to draw his attention to some issues of jurisdiction he had identified in his reasons. These were indicative of the New Zealand Judge having possibly infringed upon aspects of the

⁷⁵ See, *infra*, par. 67.

⁷⁶ See "Appendix A" to this Report.

⁷⁷ See "Appendix B" to this Report.

⁷⁸ *Supra*, note 3.

⁷⁹ *Infra*, par. 50 and following.

⁸⁰ Justice Joseph Kay, "Memoirs of a Liaison Judge", Judges' Newsletter, Vol. III / Autumn 2001, *supra*, note 3, at pp. 20-24.

⁸¹ A copy of this Memorandum can be consulted in "Appendix C" to this Report.

Australian court's jurisdiction. On the third occasion, Judge Kay, at the request of Judge Mahony, enquired about some proceedings being carried at a slow pace. After receiving the information, Judge Kay reported back to Judge Mahony briefly explaining the reasons behind the long process.

38 On 21 February 2002, Justice James Garbolino, Presiding judge of the Superior Court of California, settled a Hague Convention case between New Zealand and the United States.⁸² In this case, a mother in New Zealand had filed an application for the return of four children retained by the father in breach of a custody agreement. In the course of the proceedings the parties indicated that settlement was possible. On a set date, the New Zealand court, with the mother, her counsel and the father's solicitor before it, called the California court where the father, the mother's counsel and the District Attorney were present. On the record, via a speakerphone the parties arrived at a mutually acceptable resolution of issues.

39 Early in 2002, Lord Justice Mathew Thorpe received a request for communication from Justice James Garbolino.⁸³ After setting a convenient time for a telephone call through the clerk, Lord Justice Thorpe answered a series of questions that had been sent to him in advance. The questions sought expert opinion as to the law and practice in England and Wales. Justice Nicholas Wall also reported on direct communications between England and Wales and the United States.⁸⁴ Justice Wall described these communications as case management. In his view it would be wrong to discuss the merits of a case with a foreign colleague. The case dealt with a young child who had been wrongfully removed by his English mother from his home in Minnesota. After ordering the prompt return of the child to the United States, Justice Wall was told by the parties' lawyers that there could be substantial delay in having the case heard in the United States. In response to a fax sent to Judge Charles Porter in Minnesota, Justice Wall was told that a preliminary hearing could take place within seven days.

40 Justice Carl Eberhard, in his article on international communications between judges, recounts two cases of direct communications he had in Germany with two fathers who had initiated return proceedings in the United States.⁸⁵ A first case arose in 1984, before the *1980 Hague Convention* entered into force for Germany. The second case took place in 1996. In the two cases, Justice Carl Eberhard managed to persuade the fathers to come to Germany to participate in the hearing. In both cases, both parents agreed to rights of access.

Under the 1996 Hague Convention on Child Protection

41 The *1996 Hague Convention on Child Protection* marks a new phase in the development of co-operation mechanisms within Hague Conventions. "What is new in the Convention, in juridical terms, is the way in which the private international law rules themselves, particularly those dealing with jurisdiction, have begun to embody co-operation mechanisms. In particular Articles 8 and 9⁸⁶ contain procedures whereby jurisdiction may be transferred from one Contracting State to another in circumstances where the judge normally exercises jurisdiction (*i.e.* in the country of the child's habitual residence) [...]"⁸⁷ For example, under Article 8 of the *1996 Convention*, by way of exception, an authority having jurisdiction under Article 5 or

⁸² Justice James Garbolino, "International Communications", Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3, at pp. 12-13.

⁸³ *Supra* note 28.

⁸⁴ Justice Nicholas Wall, Judge of the Family Division, "Judicial Co-operation in cases under the Hague and Luxembourg Conventions", Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3.

⁸⁵ Justice Carl Eberhard, Judge at the First Family Senate, Regional Court of Appeal Frankfurt/Main, Mediator (BAFM), "International Communications between Judges – Two cases of cross-border communications", Judges' Newsletter, *supra*, note 3, at pp. 14-16.

⁸⁶ *Supra*, par. 12.

⁸⁷ W. Duncan, "Administrative and judicial Co-operation with regard to the International Protection of Children", In *International Law and The Hague's 750th Anniversary*, Edited by W.P. Heere, T.M.C. Asser Press, The Hague, 1999, pp. 199-208, at p. 206.

6, if it considers that the authority of another Contracting State would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the *1996 Convention* sets a mirror scheme for the counterpart authorities identified in Article 8(2). The judicial co-operation system necessary to support these communications is laid-out in Articles 31 and following of the Convention. As the *1996 Convention* came into force only recently,⁸⁸ there is not yet any example of direct communications or case law on this matter under the Convention.

The French System of *Magistrats* abroad

42 The French Ministry of Justice has at its disposal a network of French Liaison *Magistrats* abroad located in Canada, Czech Republic, Germany, Italy, Morocco, Netherlands, Russia, Spain, the United Kingdom and the United States. Furthermore, France is hosting six foreign *Magistrats* in France from Germany, Italy, Netherlands, Spain, United Kingdom and the United States. The main role and functions of these *Magistrats* is to reinforce judicial co-operation and to facilitate the dissemination of the "legal culture" through privileged contacts abroad. In this respect, they come to learn and know about specific cases of child abduction and others in relation to rights of access and visitation. In its response to the Questionnaire, France indicates that in these situations, the communications between the *Magistrats* and the Central Authorities as well as the communications between the Central Authorities are not to be transmitted to the parties, their counsel or third parties without the prior consent of all the authorities involved.

United States legislation dealing with direct judicial communications

43 The states in the United States are, to our knowledge, the only jurisdictions that have specifically provided for direct judicial communications. The United States *Uniform Child Custody Jurisdiction Act* (UCCJA) provides for direct judicial communications both at the national and international levels. In this respect, judges of different jurisdictions can communicate with each other in respect of a matter which may be pending in both jurisdictions or which may need to be transferred from one jurisdiction to another.⁸⁹

44 The successor to the UCCJA, the *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA) makes more extensive provisions for judicial communication.⁹⁰ Examples of these provisions are found in Section 110. The Act allows a court of one state to communicate with a court in another state with regard to any proceeding arising under the UCCJEA.⁹¹ Parties to the proceedings will be allowed to participate in the proceedings, but the participation of the parties is not required. If the parties are not available when the communication occurs, they must be given the opportunity to present facts and legal arguments before a decision is made. The provision requires that a record of the communication must be made, unless the communication deals with minor issues such as schedules, calendars, court records and other

⁸⁸ The Convention came into force between Monaco, Czech Republic and Slovakia on 1 January 2002. The Convention will come into force for Morocco on 1 December 2002 and for Estonia on 1 June 2003.

⁸⁹ See, e.g. the relevant Sections of Illinois State No. 750 ILCS 35 reproduced in "Appendix D" to this Report.

⁹⁰ The relevant Sections of the UCCJEA in this regard can be consulted in "Appendix E".

⁹¹ R.G. Spector, "International child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act", (2000) 33:1 N.Y.U. J. Int'l L. Pol., pp. 251-283, at p. 281.

similar matters. The parties must be informed promptly of the communication and granted access to the record. Direct communications are also allowed with regard to temporary emergency jurisdiction issues⁹² and in the case of simultaneous proceedings.⁹³

General non-case specific communications – London Convention of 7 June 1968

45 Many States Parties to the *1980 Hague Convention* are Contracting States⁹⁴ to the *European Convention of 7 June 1968 on information on foreign law*.⁹⁵ Under this Convention, mechanisms are put in place in order to help States inform each other on their respective laws. Requests for information are formal and must always emanate from a judicial authority. Outside the scope of the Convention, communications are carried through diplomatic channels.

General non-case specific communications - Seminars and conferences

46 In recent years, an increasing number of international judicial seminars and conferences have occurred throughout the world. On several occasions, the Permanent Bureau has attended and/or provided support for the preparation of such seminars and conferences. The Permanent Bureau is aware of the following:

- ✍ May 1997 Dartington First Anglo-German Judicial Conference on Family Law, (United Kingdom, Germany);
- ✍ June 1998 De Ruwenberg International Judicial Seminar on the 1980 Hague Convention⁹⁶;
- ✍ September 1999 Wustrau Second Anglo-German Judicial Conference on Family Law (United Kingdom, Germany);
- ✍ June 2000 De Ruwenberg International Judicial Seminar on the 1980 Hague Convention (France, Germany, Italy and the Netherlands);
- ✍ September 2000 Edinburgh Third Anglo-German Judicial Conference on Family Law (United Kingdom, Germany);
- ✍ November 2000 Conference on the European Judicial Cooperation held at the Sorbonne University (all European Union Member States);
- ✍ September 2000 Washington Common Law Judicial Conference on International Parental Child Abduction (Australia, Canada, Ireland, New Zealand, the United Kingdom and the United States);
- ✍ June 2001 Dartington Anglo-French Conference (Belgium, France, Ireland, Switzerland and the United Kingdom);

⁹² Section 204 of the UCCJEA can be consulted in "Appendix E".

⁹³ Sections 206 and 306 of the UCCJEA can be consulted in "Appendix E".

⁹⁴ States Parties to the *European Convention of 7 June 1968 on information on foreign law* are: Albania, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and Yugoslavia.

⁹⁵ *European Convention of 7 June 1968 on information on foreign law*, U.N.T.S. 1970, 148.

⁹⁶ The following States participated at the first De Ruwenberg seminar: Australia, Austria, Canada, China (Hong Kong Special Administrative Region), Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Mexico, Norway, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

October 2001 De Ruwenberg International Judicial Seminar on the 1980 Hague Convention (France, Germany, Sweden, the Netherlands, the United Kingdom and the United States)⁹⁷.

47 There are several international associations that provide a forum for judges to regularly meet and exchange views. The International Association of Judges and the International Association of Women Judges are examples of such organisations. The International Appellate Judges Conference and the Commonwealth Chief Justices Conference are other examples of venues where judges meet from time to time.⁹⁸

General non-case specific communications – The Judges’ Newsletter⁹⁹

48 The Judges’ Newsletter, now published bi-annually by the Permanent Bureau of the Hague Conference on Private International Law, has the objective of promoting co-operation, communication and the exchange of ideas between judges and others who deal with international child protection cases. The Newsletter is now distributed to more than 300 judges and Central Authorities appointed under the *1980 Hague Convention* around the world. Volume IV of the Judges’ Newsletter focuses particularly on direct international communications between judges.

General non-case specific communications – Co-operation projects

49 The Children Order Advisory Committee in Northern Ireland is currently examining the issue of delay in cases involving children in both public and private law. As a result of communications made at the recent Fourth Special Commission Meeting, direct judicial communication has ensued on how this problem has been approached in Australia and New Zealand. Northern Ireland has indicated that the result has been extremely enlightening and, without doubt, will benefit its family law system. The lesson learned from this exercise is that developments in this area simply would not have happened at this level without the benefit of the Fourth Special Commission Meeting where judges from different jurisdictions met.

C.2. Have there been any judicial decisions in your country in which judicial communications at the international level have been discussed?

50 To date five judicial decisions address the issue of direct international judicial communications. *D. v. B.*, a decision of the Superior Court (Family Division) of the District of Terrebonne, Quebec,¹⁰⁰ is the first case under the *1980 Hague Convention* to discuss such communications. Two children for which the married parents had joint rights of custody were taken by their mother on 18 January 1996 from the United States to Canada, the mother’s State of origin. An escalation of legal proceedings followed and on 22 January the mother initiated custody proceedings in Quebec. On 7 February a Court in California ordered the mother to return the children to Canada by 7 March. On 22 February the Quebec Court

⁹⁷ The Permanent Bureau publishes the conclusions and recommendations from the international judicial seminars and conferences on its website < http://www.hcch.net/e/conv_28.html >. To facilitate the distribution of this information, the Permanent Bureau appreciates receiving information on the conferences that take place.

⁹⁸ The Seventh International Appellate Judges Conference and the Sixth Commonwealth Chief Justices Conference met jointly in Ottawa, Canada, on 24-29 September 1995. Judges representing 115 countries attended the Joint Conference. The Program of the Joint Conference included a presentation by Louise Lussier, Department of Justice of Canada, on International Child Abduction and Adoption.

⁹⁹ See, *supra*, note 3.

¹⁰⁰ *D. v. B.*, 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. A summary of the decision can be found at < <http://www.incadat.com> > Ref. HC/E/CA 369 [17/05/1996; Superior Court of Quebec; Terrebonne, Family Division (Canada); First Instance]. See also, P.R. Beaumont and P.E. McElevy, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, at p. 168.

awarded the mother provisional custody. The father contested the jurisdiction of the court. On 7 March the California Court awarded interim custody to the father. Finally, the father applied to the Superior Court of Quebec for the return of the children. Further to direct communications, the return was ordered. The trial judge in Quebec made contact with the responsible judge in California to ascertain whether the mother would be at a disadvantage for having refused to comply with the California order to return with the children. Judge Stewart of the California Supreme Court stated this would not be the case were a return ordered and offered to sign an additional order clarifying his 7 March 1996 order that would ensure the custody order was interim only. The 17 May 1996 California order was subsequently set out in full in the Canadian judgment.

51 Direct communications were contemplated in *Panazatou v. Pantazatos*.¹⁰¹ On 11 September 1996, a mother travelled with her 2½ year old child to the United States without the consent of the father. The child had lived in both Greece and the United States, although the majority of her life had been spent in the former State. The parents were married and had joint rights of custody. In October 1996 the mother was granted an *ex parte* order for custody in the United States. The father brought a *habeas corpus* action to prevent the child's removal from the state of Connecticut pending a hearing on his return application. The court in Connecticut ordered the return subject to undertakings. The court had received undertakings from each party as well as from counsel for the child. The United States court affirmed that attempts would be made to arrange a conference call to the judge in Greece to ensure that the undertakings would be honoured there. The court noted that such an arrangement between judges could obviate the need of a bond to insure the fulfilment of any undertaking set by the court in Connecticut. The court stated that this type of procedure, while not common, was consistent with the purpose of the 1980 *Hague Convention* to set an appropriate forum yet still protect the child.

52 The judicial decision that has received most attention with regard to direct communications is *Re M. and J.*¹⁰² Two children were 7 and 1 at the date of the alleged wrongful removal and had lived exclusively in the United States. The parents were married and had joint rights of custody. However, the children had spent much of their lives in the care of their maternal great-grandmother, as the parents, and in particular the father, spent time in prison for drugs and other offences. In September 1998 the father, who was English, was deported from the United States and had his resident alien status revoked. On 2 January 1999, the mother, on her release on probation, removed the two boys from the home of the maternal great-grandmother and took them to England to be with the father. On 1 April 1999, the maternal great-grandmother initiated proceedings for the return of the children. In September 1995 she, along with the maternal grandmother, had been appointed co-guardians of the older child by the Los Angeles Superior Court. The effect of this order was that the grandmothers took over parental responsibility for the child. The mother opposed the return on the basis that it would break up the family,¹⁰³ as the father was not allowed the re-enter the United States and she would be arrested upon arrival for breach of her probation.

53 The decision on the merits of whether or not the children should be with their mother or great-grandmother was a decision to be eventually taken by the court in California. On the other hand, Justice Singer was concerned that, if he sent the children back, the mother might be incarcerated and not be able to look after her children until the matter could be heard by the court in California. Thus, with the agreement of the parties and their lawyers, Justice

¹⁰¹ *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997). The decision and a summary can be found at < <http://www.incatat.com> > Ref. HC/E/USs 97 [24/09/1997; Superior Court of Connecticut, Judicial District of Hartford (United States); First Instance]. See also, P.R. Beaumont and P.E. McEleavy, *Ibid*.

¹⁰² *Re M. and J. (Abduction: International Judicial Collaboration)* [2000] 1 FLR 803. The decision and a summary can be found at < <http://www.incatat.com> > Ref. HC/E/UKe 266 [16/08/1999; High Court (England); First Instance]. See also, Justice Nicholas Wall, *supra*, note 84.

¹⁰³ Articles 13(b) and 12 of the 1980 *Hague Convention*.

Singer spoke to Judge Gary Ferrari who had issued the warrant for the mother's arrest, a supervising judge exercising criminal jurisdiction in California. Being fully seized of the facts, Judge Ferrari agreed to rescind the warrant for the arrest and to suspend action on it until the issues relating to the children had been resolved. Judge Ferrari then put Justice Singer in contact with Judge Paul Gutman, the supervising judge of the Los Angeles Superior Court Family Law Department. Judge Gutman subsequently agreed to ensure that the child custody proceedings would be dealt with as soon as possible. Consequently, the mother abandoned her opposition and agreed to the return of the children. However, in the interim, prior to the return of the children, the great-grandmother withdrew her agreement to the effect that the children could remain living with their mother in California until the matter be heard by the court in California. Further communications between Judge Gutman and Justice Singer ensued. As a result, on short notice, Judge Gutman agreed to hear representations on interim and immediate arrangements for the children, prior to their arrival in California.

54 *D. v. G.*¹⁰⁴ is a recent case in which the safeguards concerning direct communications were examined. The abducting father, from Hong Kong, opposed an application for return under Article 13(b) of the *1980 Hague Convention* on the basis that his daughter complained to him of being sexually abused by the mother's boyfriend in Switzerland. In the course of the proceedings, the Hong Kong Judge phoned the Swiss Central Authority on a practical matter. After receiving the requested information, he ordered the child's return "conditional upon the Swiss Central Authority ensuring that, immediately upon the child arriving in Switzerland, an investigation takes place into the allegations of sexual abuse made by the father on behalf of the child". The decision was appealed. In its decision, the Court of Appeal criticised the judge for making factual inquiries himself in the absence of the parties. The Court of Appeal stated that:

"[T]he making of enquiries by the court itself is something which is alien to the procedure of Hong Kong courts. [...] The procedure there may be different. [...] [In Hong Kong], it is most undesirable that a judge should take an active role in the investigation of facts, whatever they be. [...] It would also seem highly unusual and undesirable that a judge should communicate with an executive authority for the purposes of obtaining information in order to enable him to reach a decision, even if the authority be in Hong Kong. It would be still more undesirable if that executive authority be overseas. [...] Even if most unusual circumstances prevailed and the judge found it necessary to communicate with another court or agency, that should only be done in the presence, and with the consent, of all parties and their representatives. To do otherwise would be to give the appearance of receiving evidence without the knowledge of the parties and reaching a decision without communicating the same to the parties. [...] It is difficult, in my view, to imagine circumstances which would justify the communication with outside agencies, whether they be authorities or courts, or other persons, without giving prior warning to the parties and without having the minimum safeguard of a recording and transcript of what took place [...] the need for a prompt and speedy resolution cannot be grounds for permitting the court to alter the fundamental approach to the rules of evidence."

55 Finally, in *Re H.B.*,¹⁰⁵ Lord Justice Mathew Thorpe also advocated direct international judicial communications. However, this was mentioned in the context of future merits proceedings.

¹⁰⁴ *D. v. G.* (4 December 2001, CACV003646/2001). See also, James Ding, Counsel, Department of Justice, Hong Kong Special Administrative Region of the People's Republic of China, "Notes on a Recent Hong Kong Decision concerning Judicial Communications", Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3, at pp. 27-29.

¹⁰⁵ *Re H.B.*, [1998] 1 FLR 422 at 428. See also, P.R. Beaumont and P.E. McElevy, *supra*, note 100.

C.3. What procedural and legal safeguards should surround communications at the international level between judges or between a judge and another authority in the context of cases involving child abduction or access/contact?

56 All jurisdictions that have responded to the Questionnaire, except three,¹⁰⁶ agree that there should be safeguards regarding direct judicial communications. Under Austrian law the involvement of the parties is unnecessary because child abduction cases are dealt with in informal ex-officio proceedings (so-called “*ausserstreitiges Verfahren*”) without formal hearings. Under this procedure, the national judge should record the main concern of the discussion with the foreign counterpart. Therefore, there are no limitations for international communications in this process. In addition, Chile is of the view that procedural safeguards, should only be necessary in exceptional cases. In the same vein, without being opposed to safeguards, Switzerland is of the view that their application should not be too rigorous. The response from England and Wales indicates that they share this vision; a measure of discretion must be afforded, provided that rules of natural justice are always regarded as paramount. In Switzerland, in order to engage in direct communications the judge should exercise both *ratione materiae* and *ratione personae* jurisdictions. In the light of Articles 1, 7(1), 11 and 12(1) of the 1980 Hague Convention, the Central Authority of Switzerland described the discretionary application of the safeguards as follows:

- (a.) The prior notice to the parties, their presence or the one of their counsel during the direct communication should be left to the discretion of the judge;
- (b.) The right of the parents to be heard after the exchange between the judges should be reserved;
- (c.) The procedure should not be too rigid and the possibility to cross-examine should not be absolute in order to maintain the high interest of the child;
- (d.) Both judges should remain above the parents and be able to look after the best interest of the child even in the bigger crises; Judges should then be able to agree on mirror orders.¹⁰⁷

57 Most jurisdictions confirm their agreement with paragraph 5.6 of the Recommendations and Conclusions of the Fourth Special Commission Meeting.¹⁰⁸ However, some jurisdictions indicate that the limits of the discussions have to be clearly defined¹⁰⁹ and depend on the subject matter and the purpose of the communication.¹¹⁰ Furthermore, the safeguards must depend on the law in the particular country.¹¹¹

C.3. (a) Please comment in particular on any limits on the subject-matter of communications

58 In responding to the Questionnaire, Northern Ireland indicated that the procedure of direct communications should be used sparingly and resorted to a fairly limited number of instances. For example:

¹⁰⁶ Austria, Chile and Switzerland.

¹⁰⁷ On this point, Finland remarks that agreements between judges are unknown in Finland and therefore it is difficult to comment on the safeguards surrounding such communication.

¹⁰⁸ *Supra*, par. 1.

¹⁰⁹ Netherlands.

¹¹⁰ Finland.

¹¹¹ Denmark.

- (a.) to ascertain reassurances concerning potential or outstanding criminal charges, which may be a stumbling block in negotiations between the parties;
- (b.) to clarify the nature of any undertakings which may have been given in the past or which are now being given and, if necessary, to establish the effect of such undertakings;
- (c.) to ensure that jurisdictional conflict is, if possible, removed or at least the risks minimised;¹¹² and,
- (d.) in some cases, to reassure the abducting parent that, upon return to the country from where the child was abducted, there will be the opportunity for a prompt hearing to deal with matters of concern,¹¹³ such as protection for her or the abducted child, provision of legal representation, contact, custody and, perhaps, the involvement of social services etc.

C.3. (b) Please comment in particular on requirements concerning advance notification to parties, the presence of parties or their legal representatives (e.g. by use of conference call facilities), record keeping and confirmation in writing of the substance of the communication

59 Northern Ireland proposed some requirements in order to safeguard natural justice principles.¹¹⁴ For example:

- (a.) it is crucial that steps are taken to ensure that the procedures in EU countries comply with Article 6 of the European Convention on Human Rights and that, in countries outside the EU, fair procedures are adopted. The subject matter of communications should not, therefore, include any discussion on the merits of the case which may well be heard in the country to which the child is being returned or even in the country to which the child has been taken. It must also be made clear to all the parties that the purpose of the communication is to afford an opportunity to clarify matters of procedure in both countries and to exchange information on defined issues, as undertakings, the possibility of criminal prosecution on foot of the abduction etc. The issues to be raised should, therefore, be narrowly confined and carefully agreed before the communication takes place;¹¹⁵
- (b.) in no circumstances should there be judicial communication or judicial liaison in the context of a specific case, unless all the parties have been advised in advance of the precise nature of the proposed communication and their views carefully canvassed;¹¹⁶
- (c.) the parties or their representatives should be present to hear all of the communications (for example, by means of a conference call facility). The judge should have the discretion to raise, again in the presence of the

¹¹² On this point, Finland is of the view that courts' jurisdiction is quite strictly defined by the law and that there is rarely a need for international communications on the conflict of jurisdictions.

¹¹³ See the first ground rule with a similar objective proposed by Justice Nicholas Wall, *supra*, note 84, at p. 23. The author concludes his article indicating that "[a]lthough I have sought to reduce the 'ground rules' to writing, nothing in my view should be written in stone. Judges must be free to use their judicial discretion creatively, and must be trusted to do so. Most Hague Convention law and procedure is judge made. Judicial initiatives which facilitate the proper implementation of the Hague and Luxembourg Conventions are in my judgment to be encouraged".

¹¹⁴ Justice Nicholas Wall, *Ibid.* adds one more rule that reads: "where, at the end of a case in which there has been communication with a judge in another Member State, the judge initiating the communication gives a reasoned judgment, the judgment should contain details of the communication which has taken place".

¹¹⁵ Rules No. (2) and (3) proposed by Justice Nicholas Wall, *Ibid.*, are to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See also, Lord Justice Mathew Thorpe, *supra*, note 46, at pp. 18-20.

¹¹⁶ Rule No. (5) proposed by Justice Nicholas Wall, *Ibid.*, is to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See also, Lord Justice Mathew Thorpe, *Ibid.* at pp. 18-20.

parties, with his opposite number any further issue which the parties wish to have clarified, provided he deems it appropriate;¹¹⁷

- (d.) it is imperative that a record be kept of these communications, not only for the purposes of any appeal that may be instituted, but also for the removal of ambiguity or doubt as to what has been said. That record should be forwarded to the judge in the receiving country, with whom the communication has been carried on, as well as the representatives of the parties;¹¹⁸
- (e.) there should be confirmation in writing of any agreement which is made on foot of the communications and the record of the communications should be appended to the agreement;
- (f.) if the child is to be returned, s/he should not be returned until the record/confirmation mentioned above has been circulated to all the parties and to the judge of the receiving country, so as to remove any uncertainty or ambiguity. This is particularly important where the parties or judges communicating do not share a common language and translation is being relied upon. All the records and agreements should be drawn up in the language of both judges and parties; and
- (g.) such communications should only be embarked on with the consent of the parties and should not be executed by a judge in the absence of such agreement.¹¹⁹

D. General

D.1. Have you any general comments or suggestions concerning the development of the international judicial liaison network?

60 The answers to this question identify mainly two types of support with regard to the development of the international judicial liaison network. The first is general: the development of an international network of judges where general information (*i.e.* non case specific) with regard to the implementation of, application of and practice under the Convention in the different jurisdictions will be shared among the judges. The second is case specific: a list of judges from the different jurisdictions that can be directly contacted in order to obtain answers on questions of procedures and related issues with regard to specific cases.

Development of an international network of judges

61 All jurisdictions that have replied to the Questionnaire are of the view that the creation of an international communication network among judges and, in some cases between judges and Central Authorities or other bodies, is highly useful and of great importance. They regard such a network as possibly having in the long run a significant influence on the safe and prompt return of children to their habitual residence and therefore the network may curtail the adversarial and unnecessary elaborate judicial process by simplifying the application of the Convention. By disseminating through the network knowledge of and information concerning

¹¹⁷ Scotland in its response to the Questionnaire made a similar proposal. See also, Lord Justice Mathew Thorpe, *Ibid.* at pp. 18-20.

¹¹⁸ Rules No. (6) and (7) proposed by Justice Nicholas Wall, *supra*, note 84, are to the same effect. Scotland in its response to the Questionnaire made a similar proposal. See also, Lord Justice Mathew Thorpe, *Ibid.* at pp. 18-20.

¹¹⁹ In his proposed rule No. (4) Justice Nicholas Wall goes further by indicating that "[h]owever, judges must retain a discretion to communicate with colleagues in other Member States if they take the view that it is necessary for the proper resolution of a particular case for them to do so", *Ibid.*

the law and practice of other States, judicial confidence in ordering returns to requesting States will thereby be encouraged. The French delegation to the De Ruwenberg Seminar has proposed the creation of an international discussion list to which all judges who need to understand the application of the Convention could take part.¹²⁰

Development of international judicial liaison network

62 Most jurisdictions consider that direct communications between the competent judges in individual cases should be encouraged. The possibility of direct and rapid contacts, as well as the opportunity to obtain the required information, may significantly influence the pace of proceedings. International judicial liaison can be crucial to the resolution of particular problems that may present a stumbling block in the absence of early judicial liaison. Often, the abducting parent has real and genuine fears of a return, which can be speedily resolved without resorting to a lengthy and acrimonious hearing, which may only be likely to inflame raw wounds. Direct judicial contact is especially beneficial between jurisdictions that share a common border or a common legal tradition. The role and function of a judge may differ, and therefore there should be more discussions on the interface between different legal traditions at an international judicial communication level. One jurisdiction remarked that direct judicial communications in the application of the *1980 Hague Convention* should be considered and provided for in the context of Articles 8, 9, 31 and following of the *1996 Hague Child Protection Convention*.

63 Finally, one non-governmental international organisation (ICMEC) has provided comments in relation to this question. That organisation invites each Contracting State to analyse their laws in relation to direct judicial communications and to review them, as necessary, in order to allow protocols to that effect between parties, as it is done in insolvency cases.¹²¹ Thereafter, a model protocol for direct communication in individual cases could be encouraged by liaison judges for use by judges handling individual cases.

D.2. Is your country involved in international judicial networks, including at regional level, in other areas of civil law?¹²²

European Community Network

64 At the European Community level a European Judicial Network in civil and commercial matters is being put in place, as it was done earlier in criminal matters, in order to improve, simplify and expedite effective judicial cooperation between the Member States. The members of the Network will be: (a) contact points designated by the Member States; (b) central bodies and Central Authorities provided for in Community instruments, instruments of international law to which the Member States are parties or rules of domestic law in the area of judicial cooperation in civil and commercial matters; (c) the liaison magistrates to whom the Joint Action concerning a framework for the exchange of liaison magistrates applies;¹²³ and, (d) any other appropriate judicial or administrative authority with responsibilities for judicial cooperation in civil and commercial matters whose membership of the Network is considered to be useful by the Member State to which it belongs.¹²⁴ The Network will be supported in

¹²⁰ See "Extract from the French Report on the De Ruwenberg Judicial Seminar" by C. Gaudet (Conseiller à la Cour d'appel de Bourges) and D. Martin Saint Léon (V.P. Tribunal de Grande Instance de Mulhouse), with the collaboration of M.-C. Celeyron-Bouillot (Juge aux affaires familiales du Tribunal de Grande Instance de Lyon) (France), *Judges' Newsletter* Vol. IV / Summer 2002, *supra*, note 3, at p. 13-14.

¹²¹ See, *infra*, paragraphs 83-90.

¹²² See, *supra*, paragraphs 46-47, for examples of international judicial associations and conferences.

¹²³ Joint Action 96/277/JAI of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (OJ L 105, 27.4.1996, p. 1).

¹²⁴ Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).

each State by a point of contact whose responsibility will be to supply to the network, and update, information in relation to their national legal system.

65 A first set of information¹²⁵ concerning the members of the Network such as their names, full addresses of the authorities, specifying their communication facilities and knowledge of other languages will be made available to all members of the Network.¹²⁶ This information will be used in order to ensure, without prejudice to other Community or international instruments, the smooth operation of procedures having a cross border impact and the facilitation of requests for judicial co-operation.¹²⁷ It could thus encompass direct judicial communications in relation to the *1980 Hague Convention*.

66 A second set of information gathered by the Network will be made available to the public. The public information system will include information on subjects such as: (a) principles of the legal system and judicial organisation of the Member States; (b) procedures for bringing cases to court [...]; (c) conditions and procedures for obtaining legal aid [...]; (d) national rules governing the service of documents; (e) rules and procedures for the enforcement of judgments given in other Member States; (f) possibilities and procedures for obtaining interim relief measures [...]; etc.

Other Networks in Europe

67 Austria has indicated that in different areas of civil law there is a close co-operation in general on an informal basis (*i.e.* seminars and conferences) with the judiciary of neighbouring jurisdictions (*e.g.* Bavaria (Germany), Switzerland, Czech Republic, Hungary, etc.).

68 In the Nordic States there is a Group of family law judges that was established three years ago. The Group is made up of three judges from each country (Norway, Denmark, Sweden and Finland). The Group has an informal structure and has so far concentrated on providing information on the family law system in each State by way of seminars and study visits. The Iceland Judges Assembly cooperates with the Associations of Judges in the other Nordic Countries.

D.3. Would your country support the holding of more judicial and other seminars, both national and international, on issues concerning the 1980 Hague Convention?

69 All jurisdictions that have responded to the Questionnaire support the holding of more judicial and other seminars, both national and international, on issues concerning the *1980 Hague Convention*. Suggestions were made for specific seminars such as seminars focusing on the different aspects of cross-frontier access cases. Seminars for the new States Parties to the *1980 Hague Convention* were also suggested.

70 This unanimous response is in the same spirit as one of the Conclusions and Recommendations from the 2001 De Ruwenberg (Netherlands) International Judicial Seminar

¹²⁵ *Ibid.* Article 2(5).

¹²⁶ *Ibid.* Article 13(1)(a).

¹²⁷ *Ibid.* Article 3(2)(a).

on the 1980 Hague Convention which was agreed to unanimously by thirty-one judges.¹²⁸ Conclusion and Recommendation No. 12 provides:

*"[T]he De Ruwenberg seminar has offered an opportunity for judges and experts from seven jurisdictions to explain and compare the operation of the 1980 Hague Convention in their countries, to share experiences and to develop the mutual confidence necessary for the operation of international instruments of this kind. The Hague Conference is invited to facilitate more international judicial conferences of this nature. States Parties are asked to recognise the importance of such events in reinforcing the international protection of their children, and to make available the necessary funding."*¹²⁹

¹²⁸ The seminar was attended by thirty-one judges from seven jurisdictions (England and Wales (2), France (3), Germany (15), Netherlands (2), Scotland (1), Sweden (3), United States of America (5)).

¹²⁹ The full Conclusions and Recommendations from this Seminar can be read in The Judges' Newsletter, Vol. IV / Summer 2002, *supra*, note 3, at pp. 34-38 and are available on the website of the Hague Conference at < http://www.hcch.net/e/convention_28e.html >.

IV. DIRECT JUDICIAL COMMUNICATIONS IN CONTEXTS OTHER THAN CHILD PROTECTION

71 In its effort to explore the practical mechanisms for facilitating direct international judicial communications, the Permanent Bureau has drawn from its experience and work done in the area dealing with the taking of evidence abroad in civil and commercial law matters and from the experience and the work of the United Nations Commission on International Trade Law (UNCITRAL), the International Association of Insolvency Practitioners (INSOL) and Comity J of the International Bar Association (IBA) in the area of cross-border insolvency.

Direct communications in the taking of evidence abroad in civil or commercial matters

72 The *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* replaces the cumbersome diplomatic channels with a system of direct communication between requesting courts and a receiving Central Authority. The *1970 Hague Convention on Evidence* allows a judicial authority in a Contracting State, in accordance with the provision of the law of that State, to request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.¹³⁰ It is therefore a perfect example of direct international communication in writing between a judge and another authority. Furthermore, as nothing in the Convention forbids States to designate a court as a Central Authority, the direct international communication could be one between judges.¹³¹ Finally, a Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request.¹³² In this respect, prior authorisation by the competent authority designated by the declaring State may be required.¹³³ It is not reported whether the judicial personnel of the requesting authority may have an active role during the execution of a Letter of Request.

Direct cross-border communications in cross-border insolvency

73 The concept of direct cross-border communications has been developed in cross-border insolvency matters. This Report provides details of several cases, laws and other practical tools that may be of interest when examining the feasibility of direct international judicial communications in the context of the *1980 Convention*.¹³⁴ The first example of cross-border arrangements in insolvency matters between courts of different States involved proceedings between the United Kingdom (UK) and United States (US), known as the "*Maxwell Communication*" case.

The Maxwell case

74 After Robert Maxwell's death his economic empire collapsed. It consisted of an English holding company called Maxwell Communication Corp. plc. (MCC) with more than 400 media-related subsidiaries worldwide. Among these subsidiaries, the two most important were both located in the United States and comprising, with other American subsidiaries, approximately eighty percent of the value of the MCC corporate group.

¹³⁰ Article 1.

¹³¹ In this respect, it is interesting to note that Belarus has designated both the Supreme Court and the Supreme Economic Court of the Republic of Belarus; Israel has designated the Director of the Courts; Switzerland has designated the tribunals in the Cantons of Fribourg, Lausanne and Sion; and, Barbados has designated the Registrar of the Supreme Court of Barbados.

¹³² The following States have made such a declaration: Australia, Belarus, Bulgaria, Denmark, Estonia, Finland, Israel, Italy, Lithuania, Netherlands, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States and Ukraine.

¹³³ Prior authorisation is not necessary for all the States listed in the previous footnote except Israel, Sweden and United Kingdom of Great Britain and Northern Ireland.

¹³⁴ The author would like to thank Lidia Sandrini, intern at the Permanent Bureau from Italy, for her assistance with regard to this part of the Report dealing with cross-border communications in the area of cross-border insolvency.

75 The structure of the group, with its central administration in England and billions of US dollars in liabilities towards English creditors and, on the other hand, most of its assets in the US but virtually no US creditors, gave rise to two primary insolvency proceedings. On 16 December 1991, MCC's board filed a voluntary petition for reorganisation with the US Bankruptcy Court for the Southern District of New York, under chapter 11 of the US Bankruptcy code. On 20 December 1991, MCC was placed into administration by the High Court in London under the 1986 U.K. Insolvency Act, in order to protect the corporation from creditors in the United Kingdom. The same day Justice Hoffman of the English High Court appointed a set of joint administrators for the Maxwell estate.¹³⁵

76 At that point, the potential for conflict was obvious, since two primary insolvency proceedings were pending under the laws of the respective nations.¹³⁶ To minimise such problems, Judge Brozman of the US Court appointed an examiner in order "to harmonise the two proceedings so as to permit a reorganisation under US law that would maximise the return to creditors".¹³⁷ Judge Brozman and Justice Hoffman subsequently authorised the examiner and the joint administrators to co-ordinate their efforts pursuant to a so-called Protocol. In that document the examiner, together with the administrators, enumerated their respective powers and duties and provided a "blueprint" for the co-ordination and harmonisation of the US and UK proceedings.¹³⁸

77 The *Maxwell* Protocol was the first example of formalised co-operation between foreign courts in cross-border insolvency proceedings, providing a framework to co-ordinate the function of the English administrators and the American examiner, expressly without affecting in any way the jurisdiction of the two courts under the respective laws.¹³⁹

78 In approving the Protocol, Judge Brozman recognised the English administrators as the corporate governance of the debtor-in-possession while Justice Hoffman granted the examiner leave to appear before his court. According to Judge Cardamone, who had before him another proceeding, which was part of this legal controversy:

"This joint effort resulted in what has been described as a 'remarkable sequence of events leading to perhaps the first world-wide plan of orderly liquidation ever achieved.' The administrators, the examiner and other interested parties worked together to produce a common system for reorganising Maxwell [...]. The mechanism for accomplishing this is embodied in a plan of reorganisation and a scheme of arrangement, which are interdependent documents and were filed by the administrators in the United States and English courts respectively".¹⁴⁰

79 The dialogue between the two courts continued when the issue of preferential transfers to certain creditors was raised. To prevent the administrators from instituting litigation in the bankruptcy court in New York, Barclays Bank, one of MCC's major creditors, obtained an *ex parte* order in the High Court barring the commencement of such an action. Barclays was concerned that a transfer in the amount of 30 million US dollars it had received from MCC

¹³⁵ In *Re Maxwell Communication Corp.*, 170 B.R. 800, at pp. 801-802.

¹³⁶ See Evan D. Flaschen and Ronald J Silverman, Cross-border insolvency cooperation protocols, 33 TXLJ, 1998, 587, at p. 591.

¹³⁷ In *Re Maxwell Communication Corp.*, *supra*, note 135, at p. 802.

¹³⁸ See Lore Unt, International relations and international insolvency cooperation: liberalism, institutionalism, and transnational legal dialogue, 28 Law & Pol'y Int'l Bus. 1037, at pp. 1075-1076.

¹³⁹ See Evan D. Flaschen and Ronald J Silverman, *supra*, note 136, at p. 591.

¹⁴⁰ 93 F.3d 1036, at p. 1042, quoting Jay Lawrence Westbrook, The lesson of Maxwell Communication, 64 Fordham L.Rev. 2531, at p. 2535 (1996).

could be regarded as preferential under the US law, while it probably would not be so regarded under UK law.¹⁴¹

80 Discharging the anti-suit injunction, Justice Hoffman stated: "the normal assumption is that the foreign judge is the best person to decide whether an action in its own court should proceed".¹⁴² He continued: "an injunction [...] could serve no purpose except to antagonise the US court and prejudice the co-operation which has thus far prevailed".¹⁴³

81 Judge Brozman reciprocated by refusing to apply the US avoidance rules extraterritorially and declaring the English court the appropriate forum to settle the dispute. She achieved this result by applying the usual choice of law rules and the doctrine of comity.¹⁴⁴

82 The decision was upheld by the Circuit Court, almost entirely on the basis of the Bankruptcy Court opinion.¹⁴⁵ The Circuit Court emphasised that the two insolvency proceedings had resulted in a high level of international co-operation. According to the Court, in the absence of a multi-lateral treaty allowing centralised administration of each insolvency under one country's law, bankruptcy courts may best be able to effectuate the purposes of the bankruptcy law by co-operating with foreign courts on a case-by-case basis.¹⁴⁶

Further developments in the use of protocols

83 After the *Maxwell* case, protocols have been used in many cases of insolvency to co-ordinate multinational proceedings pending simultaneously in the US and in other countries.¹⁴⁷

84 In recognition of the importance of the matter in 1996 the J Committee of the Section on Business Law of the International Bar Association adopted the "Cross-Border Insolvency Concordat".¹⁴⁸ It consists of guidelines intended to help practitioners and courts involved in cross-border proceedings in drawing up a protocol suitable for any actual situation, and provides a mechanism to control how the parties will communicate, take actions, and apply both procedural and substantive elements of law.¹⁴⁹

85 On the basis of the concordat, the parties have been able in most of the cases to provide a corpus of rules which, expressly without affecting in any way the courts' independence and integrity, promotes co-operation between foreign courts, sometimes by providing for the use of technological facilities.¹⁵⁰

¹⁴¹ See Lore Unt, *supra*, note 138, at p. 1078.

¹⁴² *Barclays Bank v. Homan*, 1993 BCLC, 680, at p. 693.

¹⁴³ *Ibid.*

¹⁴⁴ *In Re Maxwell Communication Corp.*, *supra*, note 135.

¹⁴⁵ 93 F.3d 1036.

¹⁴⁶ *Ibid.* at p. 1053. For a different opinion on the *Maxwell* Case see Mark Homan, *An Insolvency Practitioner's Perspective*, in *Cross-Border Security and Insolvency*, Michael Bride and Robert Stevens ed., Oxford, 2001.

¹⁴⁷ For a list of recent cross-border insolvency protocols see E. Brice Leonard, *The way ahead: protocols in international insolvency cases*, 17-Jan AMBKRIJ 12, 1999, 38, at p. 39.

¹⁴⁸ Comm. J., Sec. on Bus. L., Int'l Bar Ass'n, *Cross-Border Insolvency Concordat*, adopted on 31 May 1996. The draft approved by the IBA on 17 September 1995 can be seen in Mike Sigal et al., *The law and practice of international insolvencies*, including a draft *Cross-Border Insolvency Concordat*, in *Annual Survey of Bankruptcy Law*, 1 (William L. Norton, Jr., ed., 1994-95 ed.).

¹⁴⁹ See Evan D. Flaschen and Ronald J. Silverman, *supra*, note 136, at p. 589.

¹⁵⁰ See Tina L. Brozman, *Concurrent*, same entity, cross-border insolvency proceedings, 804 PLI, 2000, 889, at pp. 891-893.

86 For example, in the cross-border reorganisation proceedings of *Solv-Ex* the US Bankruptcy Court and the Canadian Court of Queen's Bench of Alberta were able to communicate via telephone conference call.¹⁵¹ Another example is the protocol drafted in the *Nakash* case, its fourth paragraph providing that “[the courts] should endeavour to consult with each other [...] and/or via telephonic conference in order to attempt to co-ordinate their efforts and avoid (if possible) potentially conflicting rulings”.¹⁵²

87 What is remarkable in the *Nakash* case is that for the first time a court in a country where civil law is practiced, in this case Israel, found itself able to co-operate with a US court through the mechanism of the protocol, and did it to the maximum extent possible. The communication between the two courts, which started as usual with a letter of request, developed in a more informal way, the Israeli Court having accepted to communicate directly with the foreign judge. Another example of the use of the mechanism of protocol between a civil law country and US can be found in *re AIOC*, a case of insolvency in which Switzerland and US proceedings were pending simultaneously.¹⁵³ It can be noted that, where the courts involved share the same legal tradition, such as those among the Commonwealth countries, protocols can be more specific on substantive rules, without detailing procedural issues. In contrast, where it is necessary to co-ordinate proceedings pending in both civil law and common law countries, protocols must first of all provide a general framework for communication and co-operation, leaving the solution of other issues to corollary instruments or further agreements between the relevant parties.¹⁵⁴

88 The trend increasing the possibilities for judges to communicate directly with foreign colleagues dealing with the same or a related claim characterises the most recent protocols. To avoid the problems that can arise when such direct communications are not conducted by transparent and proper procedures, the American Law Institute approved the “Guidelines Applicable to Court-to-Court Communications in Cross-border Cases”,¹⁵⁵ drafted in the context of the Transnational Insolvency Project.¹⁵⁶

89 As is explained in the introduction, at this time the Guidelines contemplate application only between Canada and the United States, and they are to apply only in a manner that is consistent with local procedures and local ethical requirements. The main principles adopted may be summarised as follows: prior to a communication with another court, the court should be satisfied that such a communication is consistent with all the applicable rules of procedure in its country.¹⁵⁷ Communications are allowed only if they are related to the proceeding before the court and only with the purpose of co-ordinating and to harmonising such a proceeding with that in the other jurisdiction.¹⁵⁸ In addition, administrators or other authorised representatives of the courts, who belong to different jurisdictions, may be authorised to communicate directly between themselves or with foreign courts.¹⁵⁹ Furthermore, courts may communicate by means of the exchange of documents, either directly or through the

¹⁵¹ In *Re Solv-Ex Corp.*, No. 11-97-14361-MA (Bankr. D.N.M. 1997) and *In re Solv-Ex Canada Ltd*, No 9701-10022 (Q.B. Alta. 1997). The order of the United States’ Court approving and bringing into effect the protocol is also available on the web site of the International Insolvency Institute < <http://www.iliglobal.org> > (visited on 18 July 2002).

¹⁵² In *Re Nakash*, 190 B.R., 763. The *Nakash* protocol is reproduced in appendix in Evan D. Flaschen and Ronald J Silverman, *supra*, note 136. The protocol together with the order approving it is also available on the web site of the International Insolvency Institute < <http://www.iliglobal.org> > (visited on 18 July 2002).

¹⁵³ A summary of the course of this proceeding can be read in Tina L. Brozman, *supra*, note 150, at pp. 892-893.

¹⁵⁴ See Evan D. Flaschen and Ronald J. Silverman, *supra*, note 136, at p. 589.

¹⁵⁵ Recently amended on 12 February 2001. A copy of the Guidelines can be consulted in “Appendix D” to this Report.

¹⁵⁶ The project provides “Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement”.

¹⁵⁷ Guideline No. 1.

¹⁵⁸ Guideline No. 2.

¹⁵⁹ Guidelines Nos. 3, 4 and 5.

administrators, providing advance notice to counsel for the affected parties.¹⁶⁰ Finally, a court may participate in two-way communications by telephone or video conference call or other electronic means.¹⁶¹ In these cases Guideline No. 7 supplies some more rules to observe in order to safeguard the fairness of the process. It reads:

"In the event of communications between the Courts in accordance with Guidelines Nos. 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedures applicable in each court;

b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

c) Copies of any recording of the communication, of any transcript of any communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate;

d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than judges in each Court may communicate fully to each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts."

90 The same safeguarding measures are to be respected where there are communications between courts and foreign authorised representatives.¹⁶² Besides direct communications between judges, the Guidelines make available joint hearings, which have already proven to be very useful devices in some US-Canadian cases.¹⁶³ After their adoption by some courts in the United States and Canada, the Guidelines have been adopted by reference by many protocols to complete the part dealing with procedural matters and co-operation, in order to achieve both the quickness and the fairness of the proceedings.

The UNCITRAL Model Law on Cross-Border Insolvency

91 In 1994, shortly after the *Maxwell* case, the United Nations Commission on International Trade Law (UNCITRAL), in co-operation with the International Association of Insolvency Practitioners (INSOL), initiated a project on Cross-Border Insolvency. The project took the form of a model law, *i.e.* a legislative text that is recommended to States for incorporation into their national law. The model law was adopted on 30 May 1997.¹⁶⁴

92 According to its preamble, the proposal of the model law is to provide an effective mechanism for dealing with cases of cross-border insolvency and, to achieve this goal, one of

¹⁶⁰ Guideline No. 6.

¹⁶¹ *Ibid.*

¹⁶² Guideline No. 8.

¹⁶³ Guideline No. 9.

¹⁶⁴ See UNCITRAL Model Law on Cross-Border Insolvency, 30 May 1997, 36 I.L.M. 1386 (1997). See also Guide to enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 XXVIII UNCITRAL Y.B. pt. 3, par. 2, U.N. Doc. A/CN. 9/422.

the issues regulated is the co-operation between the courts and other competent authorities of the States involved in cross-border cases. Chapter IV, entitled "Cooperation with foreign courts and foreign representatives", provides the following rules:

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]*.
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives.

1. In matters referred to in article 1, a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives.
2. The *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- a) Appointment of a person or body to act at the direction of the court;
- b) Communication of information by any means considered appropriate by the court;
- c) Coordination of the administration and supervision of the debtor's assets and affairs;
- d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- e) Coordination of concurrent proceedings regarding the same debtor;
- f) *[The enacting State may wish to list additional forms or examples of cooperation]*.

93 According to the Article-by-Article remarks provided by UNCITRAL, the model law not only authorises cross-border co-operation, but also mandates it by using “shall” instead of “may”.¹⁶⁵ Co-operation and direct communication are in fact the only means by which to avoid traditional and time-consuming procedures such as letters of request. Since civil law judges cannot appeal to their “general equitable or inherent powers”, an express statutory basis needs to be found to allow courts to contact and deal with foreign courts. The forms of co-operation listed in Article 27 are clearly only indicative, being provided as suggestions for countries which have little experience in cross-border co-operation and direct communications.

94 Finally, not a single rule deals with safeguarding measures that might be taken to protect the parties’ rights and the fairness of the process when direct judicial communications take place.¹⁶⁶ Instead, the article-by-article remarks explain that, “the implementation of co-operation would be subject to any mandatory rules applicable in the enacting states”.¹⁶⁷ In these are obviously included the procedural rules of the forum preserving a proper and transparent process.

Direct communications in national laws

95 Thus far, legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in Eritrea, Mexico, South Africa and in Yugoslavia and Montenegro.¹⁶⁸ Canada has also adopted legislation inspired by the same principles of co-operation. United States is going to incorporate the model law into the US Bankruptcy Code as Chapter 15.¹⁶⁹

96 South Africa enacted the model law with the Cross-Border Insolvency Act 2000 to strengthen co-operation between the courts and other competent authorities of the Republic of South Africa and those of foreign States involved in cases of cross-border insolvency.¹⁷⁰ With regard to co-operation and direct communication between courts, articles 25, 26 and 27 of the Cross-Border Insolvency Act 2000 reproduce with no variations the corresponding articles in the model law.

97 In a different way, the Canadian Bankruptcy and Insolvency Act¹⁷¹ allows direct communications with foreign courts by using general expression and without detailing what means may be used. So, Section 268, par. 3, contained in Part XIII dedicated to “International Insolvencies”, provides:

(3) The court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

¹⁶⁵ See Articles 25 and 26 of the Model Law.

¹⁶⁶ See in contrast Section 110 of UCCJEA, *supra*, par. 44 and, *infra*, “Appendix E”.

¹⁶⁷ See the “Article-by-article remarks” published in the Guide to enactment of the UNCITRAL Model Law on Cross-Border Insolvency, 1997 XXVIII UNCITRAL Y.B. pt. 3, par. 2, UN Doc. A/CN. 9/422.

¹⁶⁸ See < <http://www.uncitral.org/en-index.htm> > (visited on 19 July 2002).

¹⁶⁹ See Samuel L. Bufford, Louise De Carl Adler, Sidney B. Brooks and Marcia S. Krieger, *International Insolvency*, published by the Federal Judicial Center in 2001 and available at <<http://www.abiworld.org/international/intlInso.pdf>> (visited on 19 July 2002).

¹⁷⁰ See the preamble of the Cross-Border Insolvency Act 2000, at < http://www.doj.gov.za/bills/bills_feb.htm > (visited on 19 July 2002). The Act only applies on a reciprocity basis with other States that will have implemented similar law measures.

¹⁷¹ See the Bankruptcy and Insolvency Act (L.C. c. B-3) at < <http://www.laws.justice.gc.ca/en/B-3/index.html> > (visited on 19 July 2002).

98 Furthermore, Section 271 paragraph 1, adds:

(1) The court may seek the aid and assistance of a court, tribunal or other authority in a foreign proceeding by order or written request or otherwise as the court considers appropriate.

99 Direct communications between foreign courts in matters of insolvency have continued to increase since the Maxwell case opened the door. Co-operation is no longer left to the goodwill and creativity of single judges, but has been recognised and regulated through models and non-mandatory bodies of rules created in the international arena.

100 Although this practice has produced good results in the United States and in other common law countries, it is not clear how it may be applied in civil law countries, because of the lower level of discretion given to judges by civil law systems. It must be noted that the recent EC Regulation on insolvency proceedings¹⁷² does not mention direct communication between judges. Instead, it provides for a duty to co-operate, by means of the exchange of information, only with regard to the liquidator in the main proceedings and the liquidators in the secondary proceedings.¹⁷³ The reason could be that in the aim of the regulation is to avoid duplication of proceedings in different *fora*.

¹⁷² Council regulation (EC) No 1346/2000, of 29 May 2000, on insolvency proceedings, European Union Official Journal L 160, 30 June 2000, 1.

¹⁷³ However, the EU Network in civil and commercial matters could eventually find an application in this regard. See paragraphs 93-95, for a presentation of the EU Network.

V. POLICY ISSUES

101 In essence, this Preliminary Report offers an inventory of the different mechanisms in place to facilitate direct international judicial communications. It also identifies the difficulties and constraints States and judges may have with regard to these mechanisms. The Report provides valuable information to enable continued exploration of the practical mechanisms for facilitating direct international judicial communications. At this stage this Preliminary Report does not attempt to draw any policy conclusions. However, the Preliminary Report offers foundations for future work.

VI. FUTURE WORK

102 The Permanent Bureau would like to suggest the following possible Work Programme:

- (a) Continue the formal consultation with Member States of the Hague Conference as well as other States Parties to the *1980 Hague Convention*, based on this Preliminary Report together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.
- (b) Continue informal consultations with interested judges based on this Preliminary Report together with the Report that will be drawn up by the Permanent Bureau on the Conclusions and Recommendations of the Special Commission of September / October 2002.
- (c) Continue to examine the practical mechanisms and structures of a network of contact points to facilitate at the international level communications between judges or between a judge and another authority.
- (d) Complete the Final Report that will include further analysis of policy issues and tentative conclusions.
- (e) Start to develop non-binding guidelines on international direct judicial communications for the purposes of the *1980 Hague Convention* and Articles 8, 9 and 31 and following of the *1996 Hague Child Protection Convention*.
- (f) Convene a Special Commission in about 12-18 months time where the issue of international direct judicial communications will be discussed.