

## **A N N E X E S**

### **RAPPORT RELATIF AUX COMMUNICATIONS ENTRE JUGES CONCERNANT LA PROTECTION INTERNATIONALE DE L'ENFANT**

*établi par Philippe Lortie, Premier secrétaire*

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## **A P P E N D I C E S**

### **REPORT ON JUDICIAL COMMUNICATIONS IN RELATION TO INTERNATIONAL CHILD PROTECTION**

*drawn up by Philippe Lortie, First Secretary*

*Document préliminaire No 8 d'octobre 2006  
à l'intention de la Cinquième réunion de la Commission spéciale  
sur le fonctionnement de la Convention de La Haye du 25 octobre 1980  
sur les aspects civils de l'enlèvement international d'enfants  
(La Haye, 30 octobre – 9 novembre 2006)*

*Preliminary Document No 8 of October 2006  
for the attention of the Fifth meeting of the Special Commission  
to review the operation of the Hague Convention of 25 October 1980  
on the Civil Aspects of International Child Abduction  
(The Hague, 30 October – 9 November 2006)*

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**Recommandations et conclusions  
relatives aux communications entre juges adoptées lors de  
conférences judiciaires sur la protection internationale des enfants**

**Recommendations and Conclusions  
on Judicial Communications Adopted at  
Judicial Conferences on the International Protection of Children**

**Recommendations and Conclusions  
on Judicial Communications Adopted at  
Judicial Conferences on the International Protection of Children**  
(organised, facilitated or attended by the Permanent Bureau)

**Judicial Seminar on the International Protection of Children, De Ruwenberg, 22-25 June 1998**

1. The recommendation was made that, following the example of Australia, judges attending the seminar should raise with the relevant authorities in their jurisdictions (*e.g.*, court presidents or other officials, as appropriate within the different legal cultures) the potential usefulness of designating 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 operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.
2. In accordance with the objectives of the Grotius programme of the European Union, a number of judges outlined their plans for passing on the information and experience gained during the seminar to judicial colleagues in their several jurisdictions.
3. A short newsletter would be circulated on a regular basis (perhaps twice yearly) by the Permanent Bureau of the Hague Conference on Private International Law to judges attending the Seminar, with a view to the exchange of information concerning judicial co-operation in matters of international child protection. The information would include any changes in personal contact details, notes on developments concerning relevant international instruments (*e.g.*, new ratifications and accessions), reference to significant national developments (*e.g.*, case law, procedural or organisational changes, judicial conferences/seminars, etc.), and examples of successful practice in international judicial co-operation. The network would be made available to other interested judges.
4. There was broad support for the view that efforts should be made to ensure greater judicial participation in the work of the Hague Conference on Private International Law, both in the development of new international instruments and in the periodic reviews of their practical operation.
5. There was agreement that the seminar had been of practical value in promoting mutual understanding and in forwarding the objective of more effective international judicial co-operation in matters of international child protection. It was recommended that further seminars of this kind be organised periodically (every three or four years).

**Second Judicial Seminar on the International Protection of Children, De Ruwenberg, 3-6 June 2000**

1. The Seminar has been an important event in establishing mutual understanding, respect and trust between the Judges from the different countries – factors which are essential to the effective operation of the international instruments concerned with the protection of children, and in particular the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

- 2 The format of the Seminar, involving intensive discussions among judges from four jurisdictions around a number of practical cases, has been a success and is a model for such seminars in the future. Differences of approach, where they exist, have been revealed and the way has been opened to greater consistency in interpretation and practice under the Conventions.
- 3 The Judges participating in the Seminar will endeavour to inform their colleagues in their respective jurisdictions about the seminar and its outcome, and will in particular make available information about the International Child Abduction Database (<http://www.incadat.com>) and about the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, which is to be held at The Hague in March 2001.
- 5 The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between Judges in different jurisdictions in certain cases. The idea of the appointment of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child protection to promote personal contacts and the exchange of information is also supported.

**Third United Kingdom-German Conference on Family Law, Edinburgh, Scotland, September 2000**

- 5 Before [new international instruments of legislation, including conventions, multilateral and bilateral] come into force the further education of judges who will be involved in their application should be promoted; bilateral or multilateral conferences may be amongst the ways whereby this is achieved;

**Common Law Judicial Conference on International Parental Child Abduction, Washington, D.C., 17-21 September 2000: "Best Practices" to improve operation of the Child Abduction Convention**

- 1 This Conference supports the conclusions adopted at the analogous Judicial Seminar on the International Protection of Children at the Conference Centre De Ruwenberg, 3-6 June 2000, and adopts parallel resolutions, as follows:
  - a. Such conferences are important events in emphasizing mutual understanding, respect and trust between the Judges from the different countries – factors which are essential to the effective operation of international instruments concerned with the protection of children, and in particular, the Hague Child Abduction Convention.

- e. The need for more effective methods of international judicial co-operation in the field of child abduction is emphasised, as well as the necessity for direct communication between Judges in different jurisdictions in certain cases. The idea of the appointment of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child abduction to promote personal contacts and the exchange of information is also supported.

**Francophone-Anglophone Family Law Judicial Conference, Dartington Hall, England, 4-7 June 2001**

2. This colloquium supports the international collaboration of family law judges encouraged by the Hague Permanent Bureau and particularly the extension of the network of liaison judges.

**Third Judicial Seminar on the International Protection of Children, De Ruwenberg, 20-23 October 2001**

8. Liaison Judges

The growth of the network of liaison judges is noted as a significant aid to international judicial communication, collaboration and understanding.

10. The Judges' Newsletter on International Child Protection

The establishment of the Judges' Newsletter on International Child Protection as a biannual publication is welcomed. Liaison and other recipient judges will ensure circulation to the specialist judiciary in their respective jurisdictions.

11. Consulting the judiciary on changes in the law

Legislative processes, which concern the international protection of children, including those within the European Union, should be structured in a way, which allows for timely and appropriate consultation with those elements of the judiciary with experience in the field who will have the responsibility of applying new laws or regulations.

12. International Judicial Seminars

The 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.

**United Kingdom-Pakistan Judicial Conference on Child and Family Law, London, England, 15-17 January 2003**

9. It is agreed that the UK and Pakistan shall each nominate a judge of the superior court to work in liaison with each other to advance the objects of this protocol.

**Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction - Conclusions, Noordwijk, 19-22 October 2003**

International Judicial Collaboration

11. This conference supports the continuing work of the Permanent Bureau to strengthen and extend international judicial collaboration.

**Anglo-Egyptian Congress, London, England, 19-20 January 2004**

8. The practical benefits of closer judicial collaboration should be secured by the appointment of liaison judges and by facilitating other forms of direct judicial communication.

**Judicial Conference on Cross-frontier Family Law issues involving certain "Hague Convention" and "non-Hague Convention" States from the Islamic world, St. Julian's, Malta, 14-17 March 2004**

10. Successful inter-State co-operation in child protection depends on the development of mutual trust and confidence between judicial, administrative and other competent authorities in the different States. The regular exchange of information, as well as meetings between judges (and other officials) at a bilateral or a multilateral level, are a necessary part of building this trust and confidence.<sup>1</sup>
11. Networking between judges concerned with international child protection is a growing phenomenon, ideally assisted by the appointment of liaison judges. Judicial networking facilitates the exchange of information as well as direct communications between judges, where appropriate, in specific cases.

**Latin American Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Monterrey, Nuevo Leon, Mexico, 1-4 December 2004**

International Cooperation

1. The effective functioning of the Hague Convention of 1980 in the interests of children depends on close co-operation among the Judges and among the Central Authorities of the 75 Contracting States. Regular international meetings and contacts among Judges and Central Authorities for the purpose of exchanging information, ideas and good practice are needed. These meetings and contacts help to develop and maintain the mutual understanding and trust necessary for the Convention to work well.

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<sup>1</sup> For example, in the Euromed context.

### Liaison Judges

15. The growth of the network of liaison judges is noted as a significant aid to international judicial communication, collaboration and understanding.

### **Latin American Judges' Seminar: The Hague Children's Conventions and Cross-Border Protection of Children within Latin America, The Hague, Netherlands, 28 November-3 December 2005 (English-Spanish)**

### International Co-operation

1. The effective functioning of the Hague Children's Conventions depends on close co-operation among Judges and Central Authorities on internal and international levels.
2. Particularly, within the 1980 Convention, it was recognized that when deciding on a child abduction case, the requested Judge should trust that the Judicial Authorities of the requesting State will take care of the due protection of the child, and where necessary the accompanying parent, once the child is returned.

### Judicial Communications and Liaison Judges

4. Effective and fluent communications between Judges and Central Authorities should be encouraged, as a means of speeding procedures and achieving the necessary co-operation to give effective protection to the child in both States involved.
5. Strong support was expressed for the establishment of a network of Liaison Judges to promote and facilitate international judicial communications.
6. The Judges present undertook to explore in their own jurisdictions, with the support of the Permanent Bureau, the feasibility of designating a Liaison Judge.
7. It is important that Liaison Judges act in co-operation and co-ordination with Central Authorities.

### Safe Return and Protective Measures

20. Where the proof of violence or abuse is not clear it may nevertheless be necessary, when ordering the return of the child, to ensure that the authorities in the requesting State are alerted to any risk to the child or the accompanying parent and that any necessary measures of protection are put in place in that country. This can sometimes be accomplished through the medium of the Central Authorities. A Liaison Judge may also play a co-ordinating role in such cases.

### Judicial Seminars and Training

36. Attention was drawn to the importance of convening national and regional seminars, coordinating with other actors involved in the protection of children; promoting co-ordination and communications among judiciary in the region; resources and networking among Judges and Central Authorities; development of an International Child Protection Network.

37. Regular international meetings and contacts among Judges and Central Authorities for the purpose of exchanging information, ideas and good practice are needed. These meetings and contacts help to develop and maintain the mutual understanding and trust necessary for the Conventions to work well.
38. Recognition was given to the extreme importance of judicial training in international child protection and other areas of private international law. Training courses should be provided at the national, regional and international levels.

#### Continuing Dialogue among the Judges

44. The Judges present committed themselves, with the active assistance of the Permanent Bureau, to a continuing dialogue in matters of cross-border child protection within the region, and to keeping each other and the Permanent Bureau informed concerning training initiatives in their countries.

#### **Second Judicial Conference on Cross-Frontier Family Law Issues, St. Julian's, Malta, 19-22 March 2006**

9. The further development since the first Malta Declaration of the international network of liaison judges is welcomed. New legislative provisions in respect of liaison judges in certain States are welcomed, as well as the development of specific models adapted to the needs of particular States, including Federal States.<sup>2</sup>

It is emphasised that encouragement for the appointment of liaison judges extends to States which are not Parties to the Hague Children's Conventions.

The Judges' Newsletter on International Child Protection serves as a valuable medium for the exchange of information and opinion among judges in all countries and for the promotion of judicial seminars and conferences.

#### **International Seminar on the implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Quito, Ecuador, 23-24 March 2006**

3. It is necessary to develop co-operation between Childhood and Adolescence Judges and the Ecuadorian Central Authority in order to achieve the effective operation of the Hague Convention.
4. It is necessary to create or designate a liaison judge in each province in order to facilitate the communication between Judges – both childhood and adolescence and civil – and the Central Authority.

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<sup>2</sup> Significant regional developments such as the European Union Judicial Network in Civil and Commercial Matters, are also welcomed.

**Judicial Seminar on International Co-operation and the Protection of Children in the Southern and Eastern African Region, The Hague, 3-6 September 2006**

Judicial Co-operation

2. It is of fundamental importance to develop inter-State co-operation at the judicial level through, among other measures:
  - b. developing a Judicial Network on the African continent focusing on the international protection of children;
  - c. offering opportunities for training and sensitisation of Judges and Magistrates in international child protection law;
  - d. holding regular international and regional meetings involving Judges and Magistrates concerned with cross border child protection cases; and
  - e. promoting collaboration between the judicial, social, health and education services.
4. It is affirmed that this meeting in The Hague has provided a valuable forum for the exchange of information and ideas amongst Judges, Magistrates and other child protection Experts, and for the development of the mutual trust, confidence and solidarity amongst Judges and Magistrates necessary for effective cross-border judicial co-operation.

**Réseau international de juges de liaison**  
**Liste des désignations officielles et informelles**

**International Network of Liaison Judges**  
**Formal and Informal Designations**

24 October 2006



***INTERNATIONAL NETWORK OF LIAISON JUDGES \*  
under the Hague Convention of 25 October 1980  
on the Civil Aspects of International Child Abduction***

*Formal and informal designations*

**ARGENTINA**

Judge Graciela TAGLE, Family Judge of First Instance and of Third Nomination,  
Córdoba [informal designation]

**AUSTRALIA**

The Honourable Justice Joseph KAY, Appeal Division of the Family Court of Australia,  
Melbourne

**BRAZIL**

Judge Jorge Antonio Maurique, Federal Court, Brazil

Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros, Federal Court, Brazil

**CANADA**

The Honourable Justice Jacques CHAMBERLAND, Court of Appeal of Quebec, Montreal

The Honourable Justice Robyn M. DIAMOND, Court of Queen's Bench of Manitoba, Winnipeg

**CHINA (Hong Kong, Special Administrative Region)**

The Honourable Justice Michael HARTMANN, High Court of Hong Kong, Court of Final Appeal, Hong Kong SAR [informal designation]

**CYPRUS**

The Honourable Justice George A. SERGHIDES, Doctor at law, President of the Family Court of Limassol-Paphos, Nicosia

**DENMARK**

The Honourable Justice Marianne LUND LARSEN, City Court of Copenhagen, Copenhagen

**ICELAND**

Judge Jónas JOHANNSSON, Héraósdómur Reykjaness Court, Hafnarfjordur

**MALTA**

The Honourable Justice Joseph AZZOPARDI, Court of Justice, Valletta

**THE NETHERLANDS**

Judge Robine de LANGE-TEGELAAR, Vice-President of the Family and Youth Sector, Court of The Hague, The Hague

Judge Jacques M.J. KELTJENS, Vice-President of the Family and Youth Sector, Court of The Hague, The Hague

**NEW ZEALAND**

His Honour Judge Peter BOSHIER, Principal Family Court Judge, Chief Judges Chambers, Wellington

**NORWAY**

His Honour Judge Øyvind SMUKKESTAD, Chief Judge Trondheim District Court [informal designation]

**UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND***For England and Wales*

The Right Honourable Lord Justice Mathew THORPE, Judge of the Court of Appeal, Head of International Family Law, The Royal Courts of Justice, London

*For Northern Ireland*

The Honourable Justice Sir John GILLEN, High Court, The Royal Courts of Justice, Belfast

*For Scotland*

The Honourable Lady Anne SMITH, Judge of the Supreme Court, Outer House, Court of Session, Parliament House, Edinburgh

**UNITED STATES OF AMERICA**

The Honourable Justice James GARBOLINO, Former Presiding Judge, Superior Court of California [informal designation]

**URUGUAY**

The Honourable Judge Ricardo C. PÉREZ MANRIQUE, President of the Second Session of the Court of Appeal of Family Affairs of Uruguay, Montevideo

**Loi néerlandaise de mise en œuvre  
de la protection internationale des enfants**

**Dutch International Child Protection Implementation Act**

## Dutch International Child Protection Implementation Act

Bill concerning the Application of the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, done at The Hague on 19 October 1996, and Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, Repealing Council Regulation (EC) No. 1347/2000 (OJ L 338), and amending the Civil Code, the Code of Civil Procedure and the Act concerning the Application of the EC Enforcement Regulation

*[The following is an extract from The Netherlands' Bill concerning the application of the 1996 Convention and the Brussels II bis Regulation. Readers might be interested in these provisions on international co-operation between courts.]*

### **"Chapter 7 – International co-operation between courts Section 24**

1. The Council for the Judiciary shall designate one or more children's judges, who are charged in particular with facilitating contacts between courts in the Netherlands before whom proceedings are pending under the Convention, the Regulation or this Act and courts abroad who have jurisdiction in such matters, and contacts between courts abroad before whom such proceedings are pending and courts in the Netherlands who have jurisdiction in such matters.
2. If a court in the Netherlands wishes to consult a court abroad in connection with proceedings as referred to in subsection 1, it may do so through the intermediary of the judge referred to in subsection 1.
3. If a court abroad wishes to consult a court in the Netherlands in connection with proceedings as referred to in subsection 1 which are pending before it, it may also do so through the intermediary referred to in subsection 2.
4. If documents need to be translated in connection with a consultation as referred to in subsections 2 or 3 or if the assistance of an interpreter is necessary for this purpose, the judge referred to in subsection 1 shall arrange for this.
5. Before a consultation as referred to in subsection 2 takes place, the court before which the proceedings are pending shall inform the parties of this. After the consultation has taken place, it shall report to the parties on the consultation.
6. The transfer of applications as referred to in Articles 8 and 9 of the Convention and Article 15 of the Regulation shall be arranged through the intermediary of the judge referred to in subsection 1. The court which has transferred an application shall inform the parties of this."

**Exemples de notes et mémoires  
de communications directes entre juges  
Pièces jointes A, B et C**

**Examples of Direct Judicial Communications  
Notes and Memoranda  
Appendices A, B and C**

## APPENDIX A

## Direct Judicial Communications

"Judge McElyea", this is Mr Justice Gillen, a judge of the Family Division of the High Court in Northern Ireland. I am sitting to hear a case brought before me under the Hague Convention and which it is alleged is one of child abduction. It involves three children, namely ... .., ... .. and ....

The applicant is ... and the respondent is ....

The children are currently in Northern Ireland having been removed from the USA on the 9<sup>th</sup> day of February 2001.

I understand that you have dealt with this case and have made a number of determinations in relation to the children and in particular an Order of 19 March 2001.

Counsel on each side is with me and can hear all of our conversation. I must emphasise that I do not wish to discuss the merits of the case at all and I intend to confine our communication entirely to procedural issues and the exchange of information. The parties, through their counsel and solicitors, have been notified in advance of the nature of the proposed communication and a record will be kept by a court official of our communication now.

One proposal, and one possible resolution of this case, is that the children be returned to Georgia, USA provided a number of undertakings can be given to ....

The concern that I wish to raise with you is the effect of your Order of the 19<sup>th</sup> of March 2001. The Order reads, *inter alia*:

*Therefore, based on the evidence and findings of the Court as stated above, the Court finds that the Defendant has wilfully removed the minor children of the parties: ... .., date of birth ..... 1994; ... .., date of birth ....., 1997; and ... .., date of birth ..... 1999; from the jurisdiction of this Court without written permission of the Plaintiff in violation to the above cited Standing Order. The Court finds the Defendant to be in contempt of this Court's Order cited above.*

*Therefore the Court orders as follows: **That the Sheriff of Cherokee County, Georgia, his lawful deputies or any other law enforcement officer to arrest the Defendant and incarcerate the Defendant in the common jail in Cherokee County, Georgia, until such time as the Defendant has purged herself of this contempt as provided for below.***

*The Defendant may purge herself of this contempt by returning the minor children of the parties: ... .., date of birth ..... 1994; ... .., date of birth ....., 1997; and ... .., date of birth ..... 1999; to the custody of the Plaintiff.*

- 1) Can you tell me that if this woman returns the children to the custody of Peter, subject to agreed visitation rights, pursuant to an order made by this Court, she can be assured that she will not be subject to contempt proceedings on foot of the Order which you made and in particular, on foot

of any breach that has been occasioned as a result of her taking the children out of the jurisdiction to Northern Ireland?

- 2) Can you tell me how quickly an application for variation of the Custody Order can be issued by her and heard in Georgia? Can such an application be afforded priority status given that the application has a Hague Convention context?

**Direct Judicial Communication  
Between the Honourable Mr Justice Gillen and  
the Honourable Ellen McElyea, Assistant Superior Court Judge  
Cherokee County, State of Georgia, United States of America  
on the 26th April 2001 at 3.00 Pm**

Mr Justice Gillen commenced by reading from a prepared document, a copy of which is appended to this note. Judge McElyea, answering the two queries, said:

1. The defendant would not be subject to any further civil sanction provided the children are returned in accordance with the Order.
2. The Judge could not ensure that the defendant would not be subject to criminal proceedings for interfering with custody. Interfering with custody is a felony in the State of Georgia that could be prosecuted by a Law Enforcement Agency in Georgia.
3. She could be prosecuted as a result of Mr ... seeking a Citizen's Warrant.
4. The Judge added that whilst "she did not want anyone to rely on this" she thought it only a remote possibility of prosecution by the Law Enforcement Agency without Mr ..... initiating it. However, she furnished the Court with the name of the local Sheriff, namely Roger Garrison, whose telephone number is ..... On the question of a date for hearing, Mr Justice Gillen made it clear that whilst the application contemplated by the defendant in the United States of America would not be a Hague Convention application, it did have a Hague Convention context, given these current proceedings in Northern Ireland.

Judge McElyea indicated that based on her caseload and schedule, and anticipating a lengthy hearing, the matter was unlikely to be listed before mid-June, although she would attempt to afford a measure of urgency to the case.

**Memorandum Re Hague Convention Judicial Cooperation<sup>3</sup>**

**SNJ** and **SV** are the parents of  
**AV** born 22 May 1991 and **JMJV** born 30 October 1995.

Until December 1998 the family lived together in New Zealand. It appears the wife unilaterally moved with the children to Australia in December 1998. The father visited the children in Australia in December 1999 and the mother asserts that an agreement was reached that the elder child A. should spend the April school holidays in New Zealand with her father and then be returned to Australia by 25 April 2000. That child has not been returned and remains in New Zealand with the father.

On 4 July 2000 the mother commenced proceedings in the Family Court of Australia at its Dandenong Registry seeking a residence order in her favour and an order that she have the sole responsibility for the day-to-day care, welfare and development of the children. That application was returnable on 21 August. At the same time she issued a Form 8 application seeking interim orders relating to the said children.

On 20 July 2000 orders were made by Judicial Registrar Nikakis that until further order the children reside with the wife and that she have the sole responsibility for their daily welfare, care and development. It was further ordered *inter alia* that the father make all necessary preparations for the return of the child A. from New Zealand departing no later than 3 August 2000.

On receipt of a request from the New Zealand Central Authority, the State Central Authority for Victoria, being the Department of Human Services, commenced proceedings under the Hague Convention in the Family Court of Australia at Melbourne by application issued 16 August 2000 and returnable on 21 August 2000. Those proceedings sought the return of the child J to New Zealand.

Simultaneously with his request for a return under the Hague Convention with respect to the younger child, the father commenced proceedings in the District Court of Whangarei on an ex parte basis seeking an order that he be granted custody of the elder child. Those proceeding in turn have generated proceedings in New Zealand brought at the request of the Australian Commonwealth Central Authority for the return of the elder child to Australia pursuant to the provisions of the Hague Convention.

Apparently some directions may have been made in New Zealand regarding the timetable for the conduct of those proceedings, which directions include allowing the husband some 42 days to file his material.

Given that there were pending in Australia residence proceedings concerning both children and Hague Convention proceedings concerning the youngest child, and given that there were pending in New Zealand residence proceedings concerning the oldest child and a Hague Convention application concerning the oldest child, the Central Authority thought it appropriate that the matter be listed for mention in Australia to determine whether or not some liaison ought or could take place between the two courts to provide for the orderly disposition of the proceedings.

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<sup>3</sup> Joseph Kay, *Judges' Newsletter*, Vol. III / Autumn 2001, p. 22-24.

The parties have agreed that the New Zealand proceedings should be completed prior to the Australian proceedings but it would appear from some discussions this morning that there is concern as to the timetabling of events which might lead to the matters being dragged on in both courts.

The Australian matters were fixed for mention before me this morning. Ms Treyvaud appeared on behalf of the State Central Authority and Mr Nicholson appeared on behalf of the mother. I indicated to them that I would be willing to discuss the matter with Judge Mahony, the Principal Family Court Judge of New Zealand if all the parties had no objection to me so doing. I also indicated that I would limit the discussion to matters concerning procedure and that I would not discuss any matters of substance. I further indicated that I would diarise the discussion and make copies of my notes available to all parties concerned. Finally, I indicated that I would take no steps in respect of any such discussions without the consent being forthcoming from the father or his practitioner.

The matter was then stood down and a fax was forthcoming from B. Lawyers in New Zealand addressed to the Victoria Government Solicitor. which reads as follows:

- “1. Thank you for your phone call earlier today.
2. We can confirm that we act for Mr V., and that he consents to judicial cooperation between the New Zealand and Australian Courts in respect of the cross applications.
3. Please contact us if you require any further detail, and thank you for your assistance.

[signed]

EP

Senior Associate”

I have now had the opportunity of having a discussion with Judge Mahony. As coincidence would have it, next Monday 6 November Judge Mahony is sitting in Whangarei. His Honour indicated that he would make enquiries as to the state of the proceedings and endeavour to ensure that a hearing could take place by the end of this month. His Honour is conscious of the Convention provisions that indicate that it is appropriate that proceedings move expeditiously and by implication be completed within six weeks from the time of their institution. His Honour indicated that he would contact me again next week as soon as he is in a position to report back on the likely pace of the New Zealand proceedings. I await his further advises.

**Jurisprudence traitant  
des communications directes entre autorités judiciaires**

**Case Law on Direct Judicial Communications**

## Case Law on Direct Judicial Communications

To date we know of six judicial decisions that address the issue of direct international judicial communications.

### ***D. v. B., (1996)***

*D. v. B.*, a decision of the Superior Court (Family Division) of the District of Terrebonne, Quebec,<sup>4</sup> 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 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.

### ***Panazatou v. Pantazatos, (1997)***

Direct communications were contemplated in *Panazatou v. Pantazatos*.<sup>5</sup> 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.

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<sup>4</sup> *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. McElevay, *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, at p. 168.

<sup>5</sup> *Panazatou v. Pantazatos*, No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997). The decision and a summary can be found at < <http://www.incadat.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. McElevay, *Ibid.*

### ***Re M. and J.*, (2000)**

The judicial decision that has received most attention with regard to direct communications is *Re M. and J.*<sup>6</sup> 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,<sup>7</sup> as the father was not allowed to re-enter the United States and she would be arrested upon arrival for breach of her probation.

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 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.

### ***D. v. G.*, (2001)**

*D. v. G.*<sup>8</sup> 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

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<sup>6</sup> *Re M. and J. (Abduction: International Judicial Collaboration)* [2000] 1 FLR 803. The decision and a summary can be found at < <http://www.incadat.com> > Ref. HC/E/UKe 266 [16/08/1999; High Court (England); First Instance].

<sup>7</sup> Articles 13(b) and 12 of the *1980 Hague Convention*.

<sup>8</sup> *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, at pp. 27-29.

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."*

#### **Re H. B., (1998)**

Finally, in *Re H.B.*,<sup>9</sup> Lord Justice Mathew Thorpe also advocated direct international judicial communications. However, this was mentioned in the context of future merits proceedings.

#### **Metcalfe v. Cust, (2000)**

Direct judicial communications were contemplated in *Metcalfe v Cust* with regard to conditions to be taken in relation to a return.<sup>10</sup> Judge Peter Boshier, Liaison Judge and Principal Family Court Judge, New Zealand, in making an order for return said: "In view of those comments it seems undesirable for me to endeavour to attach specific conditions to return to Australia. Nevertheless I do not believe that mandatory return required of s 12(2) should be entertained in Draconian fashion which impacts directly on the best interest of the child [...] it seems to me that [the child's] return to Australia which inevitably I must order, must be undertaken in conjunction with the Family Court of Australia. Mere return to Australia, which is one of the two disjunctive options available to me, would seem to me to be irresponsible, without careful management."<sup>11</sup>

<sup>9</sup> *Re H.B.*, [1998] 1 FLR 422 at 428. See also, P.R. Beaumont and P.E. McElevay, *supra*, note 4.

<sup>10</sup> *Metcalfe v Cust* (2000) 19 FRNZ 364 (Judge Boshier).

<sup>11</sup> Jan Doogue, Judge of the Family Court of New Zealand, described this case in an article published in the Judges' Newsletter. She indicated that "In view of the child's circumstances (particularly interruption to her schooling) and the respondent's circumstances (ill-health arising from pregnancy) the court directed the Registrar of the Family Court in New Zealand to send copies of the court's judgment and sealed orders to the Family Court of Australia in Brisbane to enable management of the child's care to be the subject of case management – for example to consider whether or not an interim custody order ought to be made in the respondent's favour on return." See, Judges Newsletter Volume VII / Spring 2004, p. 42.

**Protocole du Pakistan**

**Pakistan Protocol**

## PAKISTAN PROTOCOL

On 19 and 20 January 2004, the President of the Family Division and other judges of England and Wales, Scotland, and Northern Ireland met in London with the Chief Justice and Deputy Chief Justice of the Supreme Constitutional Court of Egypt, to discuss ways of harmonising each of their respective jurisdictions for the benefit of children and their families.

The participating judges have agreed to recommend to their respective governments that they should institute proper procedures to adopt the following agreed principles:

(1) The principles of the UN Convention on the Rights of the Child 1989 are affirmed. Accordingly:

- (a) the child's best interests are the primary consideration;
- (b) the child's personal relations and direct contact with both parents, even if the parents live in different countries, are to be maintained;
- (c) the child is entitled to know and appreciate the culture and traditions of both his parents; and
- (d) States are obliged to take measures to combat the illicit transfer of children to, and non return from, abroad.

(2) It is important to maintain the continuity of the religious upbringing of the child.

(3) The courts of the State where the child has his home should take decisions about the welfare of the child.

(4) Such decisions, as well as decisions as to the place of his home, should be respected by the courts of other States.

(5) It is important to ensure the proper implementation of court orders relating to children.

(6) Judges should be trained in international aspects of child and family disputes.

(7) Provision should be made for regular judicial exchanges between Egypt and the UK, enhancing opportunities for joint training.

(8) The practical benefits of closer judicial collaboration should be secured by the appointment of liaison judges and by facilitating other forms of direct judicial communication.

(9) In all family disputes early consideration should be given to resolution by all forms of alternative dispute resolution.

**Déclaration du Caire**

**Cairo Declaration**

**CAIRO DECLARATION RESULTING FROM THE ANGLO-EGYPTIAN MEETINGS ON  
JUDICIAL CO-OPERATION IN INTERNATIONAL CHILD ABDUCTION MATTERS  
BETWEEN EGYPT AND THE UNITED KINGDOM**

British and Egyptian judges commenced discussions in London on 19 and 20 January 2004 to effect judicial co-operation on international child abduction matters between the Arab Republic of Egypt and the United Kingdom. The British judicial delegation was led by The Right Honourable Dame Elizabeth Butler-Sloss, President of the Family Division of the High Court of England and Wales and included The Right Honourable Lord Justice Mathew Thorpe, of the Court of Appeal of England and Wales, The Honourable Mr. Justice John Gillen, of the High Court of Northern Ireland, and The Honourable Lady Anne Smith, of the Supreme Court of Scotland. The Egyptian judicial delegation was led by The Honourable Chief Justice Mamdouh Marie and included The Honourable Deputy Chief Justice Adel Omar Sherif, both of the Supreme Constitutional Court of Egypt.

On 20 January 2004, the participating judges agreed to recommend to their respective governments that they should institute proper procedures to adopt the following agreed principles [the "Agreement"]:

1. The principles of the *UN Convention on the Rights of the Child 1989* are affirmed. Accordingly:

- (a) the child's best interests are the primary consideration;
- (b) the child's personal relations and direct contact with both parents, even if the parents live in different countries, are to be maintained;
- (c) the child is entitled to know and appreciate the culture and traditions of both parents; and
- (d) States are obliged to take measures to combat the illicit transfer of children to, and non-return from, abroad.

2. It is important to maintain the continuity of the religious upbringing of the child.

3. The courts of the State where the child has his home should take decisions about the welfare of the child.

4. Such decisions, as well as decisions as to the place of his home, should be respected by the courts of other States.

5. It is important to ensure the proper implementation of court orders relating to children.

6. Judges should be trained in international aspects of child and family disputes.

7. Provision should be made for regular exchanges between Egypt and the UK, enhancing opportunities for joint training.

8. The practical benefits of closer judicial collaboration should be secured by the appointment of liaison judges and by facilitating other forms of direct judicial communication.

9. In all family disputes early consideration should be given to resolution by all forms of alternative dispute resolution.

Further to these efforts, the British judicial delegation visited Cairo to continue the discussions on this topic, where they met with the Egyptian judicial delegation for a second time. During this round of discussions, an expanded Egyptian judicial delegation included The Honourable Justice Elham Nawar, The Honourable Justice Mohamad A. El-Shenawy, The Honourable Justice Maher S. Youseef and The Honourable Justice Mahmoud M. Guname, all of the Supreme Constitutional Court of Egypt. These discussions took place at the premises of the Supreme Constitutional Court of Egypt from 15 – 17 January 2005.

Following an official opening ceremony attended by His Excellency Egyptian Minister of Justice Mahmoud Abou El Leil who praised and gave his complete support to the Anglo-Egyptian judicial efforts, and following intensive discussions that took place over three days, the participating judges agreed to supplement the following principles to the ones agreed upon in London:

1. The Agreement shall apply only to children up to the age of sixteen.
2. Reciprocal rights of access to the courts shall be available to parents of any child the subject of proceedings in either jurisdiction.
- 3A. Emergency or provisional orders shall be made by the jurisdiction in which the child is currently present.
- 3B. For the avoidance of doubt, in paragraph 3 of the Agreement, the reference to the “home” of the child is to the child’s home immediately preceding the child’s removal.
4. Each state shall ensure reciprocal enforcement of orders relating to child proceedings to the full extent of its own laws and procedures and in a manner not contrary to public order or public policy in its own jurisdiction.
5. The Family Court in Egypt and the Family Division of the High Court of England and Wales shall establish and maintain a register of children the subject of proceedings in Egypt and United Kingdom respectively. The register shall record the nationality of each parent, the age of the child, copies of any orders made in relation to the child and reports on the child’s health, education and social circumstances. The data recorded in either register shall be made available to the other expeditiously upon request.
6. The parties welcome the nomination made by the Honourable Mamdouh Marie, Chief Justice of the Supreme Constitutional Court of Egypt, in agreement with His Excellency Minister of Justice Mahmoud Abou El Leil, of the Honourable Justice Adel Omar Sherif, Deputy Chief Justice of the Supreme Constitutional Court of Egypt, as Liaison Judge for Egypt and the nomination of the Right Honourable Lord Justice Mathew Thorpe, Head of International Family Law for England and Wales, as Liaison Judge for United Kingdom with regard to this agreement.

The heads of the two judicial delegations have signed this agreement in two Arabic and two English originals at the premises of the Supreme Constitutional Court in Egypt on Monday, January 17, 2005. Each delegation is in possession of the originals in Arabic and English and shall present them to its government and recommend their adoption or implementation as required.

**Illinois State No. 750 Ilcs 35**

**Illinois State No. 750 Ilcs 35**

**Illinois State No. 750 ILCS 35***Section 7. Simultaneous Proceedings in Other States*

(a) A court of this state shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Section 10 and shall consult the child custody registry established under Section 17 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 20 through 23 of this Act. If a court of this state has made a custody judgment before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the most appropriate forum.

*Section 8. Inconvenient Forum*

(a) A court which has jurisdiction under this Act to make an initial or modification judgment may decline to exercise its jurisdiction any time before making a judgment if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

[...]

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the most appropriate court and that a forum will be available to the parties.

*Section 24. International Application*

The general policies of this Act extend to the international area [...].

**Uniform Child Custody Jurisdiction and Enforcement Act  
(UCCJEA)**

**Uniform Child Custody Jurisdiction and Enforcement Act  
(UCCJEA)**

## Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Following are some relevant extracts from the draft Bill and prefatory notes and comments by the National Conference of Commissioners on Uniform State Laws (NCCUSL).

### *Section 110. Communication between Courts*<sup>12</sup>

(a) A court of this State may communicate with a court in another State concerning a proceeding arising under this [Act].

(b) Communications between courts that affect the substantive rights of a party must be made in a manner that allows the parties to participate, or allows the parties to present jurisdictional facts and legal arguments to the courts, before a final determination is made as to which forum is appropriate. A record must be made of those communications between courts. The record may consist of notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum of other electronic communications between the courts, or a memorandum made by one of more courts after the communication.

(c) Communications between courts on schedules, calendars, court records, and other matters that do not affect the substantive rights of the parties may occur without informing the parties. A record need not be made of those communications.

### *Section 204. Temporary Emergency Jurisdiction*<sup>13</sup>

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

[...]

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<sup>12</sup> Comment by NCCUSL: "This section emphasizes the role of judicial communications under the Act. It contains the authorization for a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication and recognizes that there will be increasing use of modern communication techniques. Language has been added to emphasize the role of the parties in the communication process. If the communication between the court involves relatively inconsequential concerns such as scheduling, calendars or consultation on other minor matters, the communication can occur without the parties being informed or participating. Included within this type of communication would be matters of cooperation between courts under Section 112.

However, on all matters which could affect the parties' substantive rights, a court must communicate with another court in a manner which allows the parties to participate or to present jurisdictional facts and arguments. In particular this includes communications that are required under Section 204 (Emergency Jurisdiction), Section 206 (Simultaneous Proceedings), Section 207 (Forum Non Conveniens), and Section 305 (Simultaneous Proceedings). In any event, a record of the communication must be made. No particular form of communication is required to inform the parties that a communication between courts is scheduled. An informal communication is sufficient.

The purpose of this section is to regularize the communication process between courts. It preserves the flexibility necessary to accommodate busy judicial schedules while including protection for the parties against unauthorized *ex parte* communications. A full discussion of the problem can be found in *State ex rel Grape v. Zach*, 524 N.W.2d 788 (Neb. 1994)."

<sup>13</sup> Comment by NCCUSL: "The communication between courts is to be accomplished in accordance with Section 110. The communication under this section affects the substantive rights of the parties and therefore the provisions of that section on participation of parties and making of the record are applicable."

(d) A court of this state that has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced, or a child-custody determination has been made, by a court of a state having jurisdiction under Sections 201 through 203, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to Sections 201 through 203, upon being informed that a child-custody proceeding has been commenced, or a child-custody determination has been made by a court of another state under a statute similar to this section shall immediately communicate with the court of that state. The purpose of the communication is to resolve the emergency and protect the safety of the parties and the child.

*Section 206. Simultaneous Proceedings*<sup>14</sup>

(a) Except as otherwise provided in Section 204, a court of this state may not exercise its jurisdiction under this [section] if at that time of the commencement of the proceedings a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this [Act], unless the proceeding is stayed by the court of the other State because a court of this State is a more convenient forum under Section 207.

(b) Except as otherwise provided in Section 204, a court of this state, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this [Act], the court of this state shall stay its proceedings and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this [Act] does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) Proceed with the modification under conditions it considers appropriate.

*Section 306. Simultaneous Proceedings*

If a proceeding for enforcement under this [section] has been or is commenced in this State and a court of this State determines that a proceeding to modify the determination has been commenced in another State having jurisdiction to modify the determination under [section] 2, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

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<sup>14</sup> Comment by NCCUSL: "Under this Act, the simultaneous proceedings problem will arise only when there is no home state and more than one significant connection state. For those cases this section retains the "first in time" rule of the UCCJA. Subsection (b) retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another state. The communication is governed by Section 110. It is a communication that affects the substantive rights of the parties."

**Principes de base d'une communication judiciaire transfrontière**

**Ground Rules for Cross-Frontier Judicial Communication**

**Ground Rules for Cross-Frontier Judicial Communication**  
(Justice Nicholas Wall)\*

1. The judge instigating the communication must hold the view that the communication is necessary and may prove to be the speediest and most efficient way of resolving a particular point in the case.
2. Communication between judges should not be about the merits of a case. Communications should be restricted to what we in England call "case management". Obvious examples are arrangements for listing and ensuring that cases are expedited.
3. Any judge initiating a communication with a colleague in another Member State should make it clear to that colleague that the communication is not about the merits of the case, nor is it in any way an attempt to influence or interfere with any decision which that colleague may make on the merits of the case.
4. Communication should preferably only take place if the parties to the proceedings agree. However, 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.
5. If judges intend to communicate about the case with colleagues in other Member States, they should invite the views of the parties on that course, and should hear and rule on any objections which are put forward.
6. Where communication takes place in writing, all documents passing between the judges should be disclosed to the parties.
7. Where the communication is over the telephone, both judges should convey the gist of the conversation to the parties. It would also be good practice for the judge initiating the process (1) to make a note of all relevant conversations; (2) to place a copy of that note on the court file and (3) to send it to the judge in the other Contracting State for approval.
8. 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.

"Although 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. Mr Justice Singer took a very broad view of the concept of co-operation identified in Article 7 of the Hague Convention. In my judgment he was entirely right to do so.

If the basic rules I have set out as suggestions are followed, it seems to me that there is no risk that either justice or judicial independence will be compromised. To the contrary, as I said at the outset, such communications assist the proper and speedy administration of justice, and so further the best interests of the children concerned."\*\*

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\* Nicholas Wall, "Judicial Co-operation in Cases under the Hague and Luxembourg Conventions", Judges Newsletter, Vol IV / Summer, 2002, p. 19-24.

\*\* *Ibid.*

**Directives applicables aux communications de tribunal à tribunal  
dans les cas transfrontaliers**

**Guidelines Applicable to Court-to-Court Communications  
in Cross-Border Cases**

THE AMERICAN LAW INSTITUTE

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TRANSNATIONAL INSOLVENCY:  
COOPERATION AMONG  
THE NAFTA COUNTRIES

PRINCIPLES OF  
COOPERATION AMONG  
THE  
NAFTA COUNTRIES

**Guidelines Applicable to Court-to-Court Communications in  
Cross-Border Cases**

*As Adopted and Promulgated*  
BY  
THE AMERICAN LAW INSTITUTE  
AT WASHINGTON, D.C.

May 16, 2000

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**Guidelines**  
**Applicable to Court-to-Court Communications**  
**in Cross-Border Cases**

***Introduction:***

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States because of the very different rules governing communications with and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a *sindico* with foreign administrators or courts.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed, including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the Rules of Procedure in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

### **Guideline 1**

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

### **Guideline 2**

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

### **Guideline 3**

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

### **Guideline 4**

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

### **Guideline 5**

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

### **Guideline 6**

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

### **Guideline 7**

In the event of communications between the Courts in accordance with Guidelines 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 Procedure 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 the 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; and

(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 with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

### **Guideline 8**

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(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 Procedure applicable in each Court;

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

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the 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 the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

### **Guideline 9**

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or non-substantive matters relating to the joint hearing.

#### **Guideline 10**

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

#### **Guideline 11**

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

#### **Guideline 12**

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction (“Non-Resident Parties”). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

### **Guideline 13**

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

### **Guideline 14**

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

### **Guideline 15**

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

### **Guideline 16**

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

### **Guideline 17**

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.