

**ONGOING WORK IN THE FIELD OF LEGAL AND ADMINISTRATIVE  
CO-OPERATION FOLLOWING THE 2012 (APOSTILLE) AND 2014 (SERVICE,  
EVIDENCE AND ACCESS TO JUSTICE) SPECIAL COMMISSION MEETINGS**

*drawn up by the Permanent Bureau*

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**TRAVAIL EN COURS DANS LE DOMAINE DE L'ENTRAIDE JUDICIAIRE ET  
ADMINISTRATIVE SUITE AUX RÉUNIONS DE LA COMMISSION SPÉCIALE  
DE 2012 (APOSTILLE) ET DE 2014 (NOTIFICATION, PREUVES ET  
ACCÈS À LA JUSTICE)**

*établi par le Bureau Permanent*

*Preliminary Document No 9 of January 2015 for the attention  
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du Conseil de mars 2015 sur les affaires générales et la politique de la Conférence*

## **I. Introduction**

1. The Special Commission on the Practical Operation of the Service, Evidence and Access to Justice Conventions held another successful meeting in The Hague from 20 to 23 May 2014. The Conclusions and Recommendations (C&R) of this meeting of the Special Commission make reference to two principal areas of further work, namely:

- i) the finalisation of the **Practical Handbooks** on the Operation of both the Service and Evidence Conventions;<sup>1</sup> and
- ii) the possible establishment of an **Experts' Group** to consider how best to address the issues relating to the use of video-links and other modern technologies in the taking of evidence abroad.<sup>2</sup>

2. These two major projects should also be considered in the context of the overall work programme of the Legal and Administrative Co-operation Team (consisting of one Principal Legal Officer and one Legal Officer), responsible for servicing the Service, Evidence, Access to Justice and Apostille Conventions (hereafter the "Legal Co-operation Team"). As such, consideration should also be given to the commencement of preliminary preparations for the **next meeting of the Special Commission on the Practical Operation of the Apostille Convention**, which is expected to be held in 2016 together with the 10th International Forum on the e-APP (electronic Apostille Program). This timing would be pursuant to both the C&R of the 2012 meeting of the Apostille Special Commission and the C&R of the 9th International Forum on the e-APP.<sup>3</sup>

3. The Permanent Bureau nevertheless invites the Council on General Affairs and Policy (the Council) to consider the above items i) and ii) as matters for this meeting, with the Apostille Special Commission Meeting dates to be revisited by the Council at its 2016 meeting.

## **II. Resource implications**

4. Pending the approval of the Council, priority will be given to the finalisation of the Service and Evidence Practical Handbooks, respectively, with the final publication expected to take place shortly after the northern hemisphere summer of 2015.

5. Other work by the Permanent Bureau in this area that is not reflected in this document includes: implementing other C&R of meetings of the Special Commission, responding to enquiries from States and international organisations on the operation of the Conventions concerned (including the e-APP), follow-up with States on the designation of authorities and other operational matters, monitoring relevant developments at the national, regional and global level, and general promotional activities in relation to the Conventions (see the Organisation's 2014 Annual Report for more information on these activities).

6. Should Members wish for a future Experts' Group on video-links and other modern technologies to be established, decisions may need to be made relating to the prioritisation of organisational resources. Subject to the overall work programme of the Conference and the Permanent Bureau, it may be possible, with the current resources, to hold the aforementioned Experts' Group meeting in late 2015 or early 2016, and to hold the Apostille Special Commission Meeting and 10th Forum on the e-APP in 2016 (possibly in October or November).

7. In any case, the Permanent Bureau should continue to monitor the developments related to the use of modern technologies under the Evidence Convention, as well as under the other legal co-operation Conventions.

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<sup>1</sup> Both of these Handbooks are presented to the Council on General Affairs and Policy for approval, as Prel. Docs Nos 8A and 8B. The relevant C&R of the 2014 SC are reproduced in Annex 1.

<sup>2</sup> See the relevant C&R of the 2014 SC, reproduced in Annex I.

<sup>3</sup> See Annex I.

### **III. Recommendation for a future Experts' Group**

#### *a) Background*

8. The 2014 meeting of the Special Commission discussed the use of video-links and other modern technologies in the context of the Evidence Convention, following a proposal from the delegation of Australia to "consider an optional protocol to facilitate the taking of evidence, without compulsion, by video-link under the Evidence Convention, and with a view to promoting the further use of modern technologies". It subsequently recommended "that the Council [on General Affairs and Policy] establish an Experts' Group at its next meeting to investigate the issues that may arise with the use of video-link and other modern technologies in the taking of evidence abroad. The [Special Commission] further recommends that the Experts' Group study existing instruments and current practice, and explore potential ways to address these issues, including the desirability and feasibility of an optional protocol or any other instrument".<sup>4</sup>

9. The Special Commission has on several occasions reaffirmed that although the Evidence Convention was concluded at a time when the modern technologies of today were not contemplated, the spirit and letter of the Convention (like the other legal co-operation Conventions) do not constitute obstacles to the use of such technologies.<sup>5</sup>

10. In particular, the use of video-link technology has been expressly mentioned in the C&R of the Special Commission, noting the specific Articles of the Convention under which video-links may be used and encouraging States to share information regarding the use of such technology.<sup>6</sup>

11. At its 2009 meeting, the Special Commission also noted that it expected the existing framework of the Convention to be able to solve any new issues that might arise with the use of video-links.<sup>7</sup> This being said, the discussions at the most recent meeting of the Special Commission indicate that there is support for further discussion of the best way in which such issues can be addressed more directly.

#### *b) Proposal by Australia*

12. A proposal was tabled by the delegation of Australia at the 2014 meeting of the Special Commission, noting the increasing frequency with which evidence is required to be taken abroad, coupled with the proliferation of the use of global communications platforms (in particular video-link technologies).<sup>8</sup> Against this background, the document put forward the possibility of developing a clear, streamlined and efficient procedure for the consensual taking of evidence via video-link.

13. Specifically, the document made reference to the idea of an Optional Protocol as one way of addressing the identified need. The stated advantage of such an approach was that it would "clearly and firmly establish a simple and efficient mechanism for taking evidence via videoconference that is consistent with, yet independent from, other procedures [under] the Convention".<sup>9</sup>

#### *c) Discussion by the Special Commission and other developments*

14. In the discussions that followed, the experts of the Special Commission acknowledged that while video-link technology is already being used both under the Convention and otherwise, it would appear that the technology is presently being under-utilised. Experts recalled the considerable effort expended in promoting the use of video-link technology, but observed that this had perhaps not had the desired impact, with only limited use of video-links under the

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<sup>4</sup> C&R No 21 of the 2014 SC, reproduced in Annex I.

<sup>5</sup> C&R No 4 of the 2003 SC. See also C&R No 3 of the 2009 SC and C&R No 42 of the 2003 SC, reproduced in Annex I.

<sup>6</sup> See C&R No 20 of the 2014 SC and C&R Nos 55-57 of the 2009 SC, reproduced in Annex I.

<sup>7</sup> C&R No 56 of the 2009 SC, reproduced in Annex I.

<sup>8</sup> Work. Doc. No 1 of the 2014 SC, reproduced in Annex II.

<sup>9</sup> *Ibid.*

Convention being reported by States in their responses to the Questionnaires prior to the Special Commission meeting.<sup>10</sup>

15. Experts noted with interest the utility in providing a framework that reflects more what the current practice is. In the view of some experts, the development of a framework would be a decisive action to ensure that States are able to realise the potential of the new technologies available, both encouraging experimentation with these methods and increasing their use. Other experts also emphasised the importance of not limiting any further investigation solely to video-links, with other modern technologies also warranting consideration in the context of the Evidence Convention.

16. It was also stressed that any future protocol or other instrument should not be seen to discourage or restrict those States that are presently using video-link technologies under the Convention from continuing to do so. Instead, the principal focus of any possible Experts' Group should remain the improvement of current practice, building upon the Convention to better facilitate the taking of evidence abroad.

17. The experts of the Special Commission also made reference to the recent developments in different regions that are particularly concerned with the use of video-link technologies. These include the European Union Evidence Regulation (*Council Regulation (EC) No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters*), the 2010 *Ibero-American Convention on the Use of Video-conferencing* (and subsequent 2014 *Ibero-American Protocol on International Judicial Co-operation* endorsing its implementation in Latin America), as well as the 2008 *Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement* between Australia and New Zealand. Such instruments have proven effective in practice for the States concerned, but when States outside of these agreements send requests for the taking of evidence by video-link under the Evidence Convention, the procedure is often less clear. It is in these latter cases that clarification under the Evidence Convention would prove beneficial.

#### d) *Planning*

18. Should the Council wish to establish an Experts' Group on the use of video-links and other modern technologies in the taking of evidence abroad, in the view of the Permanent Bureau, the first major task of the Experts' Group would be to investigate and discuss the developments in this area. A useful starting point in such an investigation could be the new Practical Handbook on the Operation of the Evidence Convention, in particular Annex 6, entitled "Guide to the Use of Video-Links". The Experts' Group would thus be able to assess whether there is in fact a need to address the use of these developing technologies in a more structured way than their current use under the Evidence Convention, such as a protocol, instrument or set of guidelines.

19. If necessary, the Experts' Group would then examine the various approaches available to better manage the use of these technologies, before taking a decision on the best way forward, such as the drafting of a possible optional protocol, instrument or other document. Only once the Experts' Group has identified a desirable approach and taken such a decision, can the next steps be presented to a future meeting of the Council for discussion, subject to the resources available at that point in time.

20. In relation to the composition of the Experts' Group, it is considered that the core participants should be experts designated by Members and non-Member Contracting States. Moreover, the Members and non-Member Contracting States participating in the Group should be both geographically representative, as well as representative of both civil and common law States, in particular those that have experience in the use of video-link and other modern technologies in the taking of evidence.

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<sup>10</sup> See, e.g. Question Nos 16 & 17 of the "Synopsis of Responses to the Questionnaire of November 2013 relating to the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention)", Info. Doc. No 2 of May 2014, available on the Hague Conference website < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "Judicial & Administrative Co-operation".

#### IV. Conclusion

21. In summary, the Permanent Bureau invites the Council to endorse the main work programme of the Legal Co-operation Team as encompassing the following projects (in addition to the day-to-day work on the operation of all four Conventions):

- a) **Finalisation and publication of the Practical Handbooks on the Operation of the Service and Evidence Convention** respectively (subject to the approval of the Council with respect to Prel. Docs. Nos 8A and 8B), estimated to take place in mid-2015.
- b) **Organisation of a meeting of a future Experts' Group on the use of video-links and other modern technologies in the taking of evidence abroad** (and associated preparatory work), scheduled for either late 2015 or early 2016.
- c) **Commencement of preparations for the next meeting of the Special Commission on the Practical Operation of the Apostille Convention and the 10th International Forum on the e-APP**, proposed to be held in late 2016, subject to the overall work programme of the Conference and the Permanent Bureau. The Permanent Bureau will report on such preparations to the Council at its 2016 meeting.

## ANNEX I

### Relevant Conclusions and Recommendations (C&R)

#### **A. Practical Handbooks on the Operation of the Service and Evidence Conventions**

##### *C&R of the 2014 SC*

5. The SC acknowledges the importance of the Practical Handbooks on the operation of both the Service and Evidence Conventions. The SC invites the Permanent Bureau to finalise the text of the draft versions presented at the meeting, incorporating the outcome of the discussions and case law and practice reported by States in response to the Questionnaires, in co-operation with the Drafting Committee. The SC notes that once finalised, these texts will be circulated to the SC for comment and endorsement before being submitted to the Council on General Affairs and Policy of the Hague Conference ("the Council") for final approval.
6. Acknowledging the general invitation of the Council of Diplomatic Representatives that the Permanent Bureau attempt to increase revenue from the sale of its publications, the SC recommends that the Permanent Bureau identify ways in which the Service and Evidence Handbooks may be disseminated, and to whom, free of charge.
7. The SC encourages States to arrange for the translation of the Service and Evidence Handbooks into their languages, and expresses its gratitude to the People's Republic of China and the American Association of Private International Law (ASADIP) for their offers to translate the Handbooks into Chinese (simplified and traditional) and Spanish, respectively.

#### **B. Possible Experts' Group under the Evidence Convention**

##### *C&R of the 2014 SC*

20. The SC recalls that the use of video-links to assist the taking of evidence abroad is consistent with the framework of the Evidence Convention (*cf.* C&R No 55 of the 2009 SC). The SC acknowledges that Article 17 does not preclude a member of judicial personnel of the court of origin (or other duly appointed person), who is located in one Contracting State, from examining a person located in another Contracting State by video link.
21. Further to a proposal by the delegation of Australia to consider an optional protocol to facilitate the taking of evidence, without compulsion, by video-link under the Evidence Convention, and with a view to promoting the further use of modern technologies, the SC recommends that the Council establish an Experts' Group at its next meeting to investigate the issues that may arise with the use of video-link and other modern technologies in the taking of evidence abroad. The SC further recommends that the Experts' Group study existing instruments and current practice, and explore potential ways to address these issues, including the desirability and feasibility of an optional protocol or any other instrument.

##### *C&R of the 2009 SC*

55. The SC recalls the Conclusions and Recommendations Nos 42 to 44 of the 2003 Special Commission and notes that the use of video-links and similar technologies to assist the taking of evidence abroad is consistent with the current framework of the Convention. In particular, the SC notes that:
  - (a) The Convention permits parties and their representatives to be present (Art. 7), and does not preclude judicial personnel of the requesting authority from being present (Art. 8), by video-link at the execution of the Letter of Request by the requested State, to the same extent as these persons could be physically present.
  - (b) The Convention permits a video-link to be used to assist in the execution of a Letter of Request where the law of the requested State permits such use (Art. 9(1)).
  - (c) A video-link may be used to assist in the execution of a Letter of Request in accordance with Article 9(2).

- (d) The Convention permits a video-link to be used to assist in the taking of evidence by a diplomatic official, consular agent or commissioner, provided that the practice is not forbidden by the State in which the evidence is to be taken, and provided that the relevant permission has been granted (Arts 15, 16, 17 and 21).
56. The SC notes that the use of a video-link to assist in the taking of evidence abroad under the Evidence Convention appears to raise a small number of new questions that arise from the interaction of the law of the requesting State and the law of the requested State. The SC expects that these issues can be solved within the existing framework of the Convention.
57. The SC encourages States to exchange information about their experience with use of video-link and other modern technologies to assist the taking of evidence abroad and to communicate this information to the Permanent Bureau for publication on the Hague Conference website as appropriate.

*C&R of the 2003 SC*

3. In light of the value of the continued monitoring of the Conventions' practical operation, the need to promote uniform interpretation, foster mutual confidence and enhance the mutual benefits for States party to the Convention to exchange their respective experiences in operating the Conventions, as well as to promote the benefits of the Conventions to non-party States, the SC recommended to have more frequent meetings to review the practical operation of the Apostille, Evidence and Service Conventions. The Special Commission recommended that review meetings on the practical operation of these three Conventions be held every five years, subject to the availability of the additional resources needed. Also, consideration should be given to the possibility of reviewing the practical operation of the Hague Convention of 25 October 1980 on International Access to Justice.
4. The SC emphasised that the Apostille, Evidence and Service Conventions operate in an environment which is subject to important technical developments. Although this evolution could not be foreseen at the time of the adoption of the three Conventions, the SC underlined that modern technologies are an integral part of today's society and their usage a matter of fact. In this respect, the SC noted that the spirit and letter of the Conventions do not constitute an obstacle to the usage of modern technology and that their application and operation can be further improved by relying on such technologies. The Workshop held prior to the SC (i.e., on 27 October 2003) clearly revealed the means, possibilities and advantages of using modern technologies in subject matters falling within the scope of the Conventions.
42. The SC expressed general support for the use of modern technologies to further facilitate the efficient operation of the Convention. The SC noted that there seems to be no legal obstacle to the usage of modern technologies under the Convention. However, the use of some techniques may be subject to different legal requirements in different States (e.g., obtaining the consent of all parties involved in the execution). In this respect, the SC recommended that States party make relevant information on legal requirements relating to specific techniques available to the Permanent Bureau.
43. The SC stressed where a special method or procedure is requested for the taking of evidence (Art. 9(2)), the exception for methods that are "incompatible with the internal law of the State of execution or [...] impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties" should be interpreted narrowly to permit, to the greatest possible extent, the use of modern information technology.
44. The SC stressed that early informal contact among appropriate authorities to coordinate the presentation and execution of Letters of request might be facilitated by the use of modern information technology such as e-mail.

**C. 2016 Meeting of the Special Commission on the Practical Operation of the Apostille Convention and 10th International Forum on the e-APP**

*C&R of the 2012 SC*

30. The SC recommends to the Council on General Affairs and Policy of the Conference that the next meeting of this SC be held within the next three to five years, depending on the overall work programme of Conference and the Permanent Bureau. In light of the very positive experience of the present meeting, the SC also recommends that the next meeting again be dedicated exclusively to the practical operation of the Apostille Convention and not be paired with the analysis of the practical operation of another Hague Convention.

*C&R of the 9th Forum (2014)*

17. The Permanent Bureau announced that the 10th International Forum on the e-APP is tentatively envisaged for 2016 in The Hague, the Netherlands, in conjunction with the next Special Commission meeting on the Practical Operation of the Apostille Convention. By combining both meetings, the Permanent Bureau intends to facilitate the participation of experts in both events and to further promote the e-APP among the participating States.

## ANNEX II

### **Proposal of the delegation of Australia**

*Working Document No 1 of the 2014 Special Commission (as distributed 20 May 2014)*

### **Consideration of an Optional Protocol to facilitate the remote taking of consensual evidence via video-link under the Hague Evidence Convention**

#### **1. Introduction**

Due to the continued growth in international travel and trade, it is increasingly common for disputes to require evidence located in another country. This trend, coupled with the development of easily accessible global communications platforms – such as Skype and other similar video-chat programs – invites discussion about how to best take advantage of opportunities for the efficient taking of evidence abroad.

Past Special Commissions have noted that nothing in the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (the Convention) precludes the use of technology in the taking of evidence under Chapter II, and that the use of video-link in taking evidence is consistent with the framework of the Convention.<sup>1</sup> However, as noted on page 10 of the annotated agenda for the 2014 Special Commission:

The Permanent Bureau is aware that several States regularly receive enquiries concerning the direct taking of evidence abroad by video-link (e.g. where a witness located in one State gives testimony to a judge or examiner located in another State), and that doubts remain regarding the applicability of the Convention.

To ensure the Convention maintains its importance and relevance in this period of technological change, it would be desirable to directly address this issue.

The purpose of this working paper is to raise for discussion among Member States of the Hague Conference the possible development of an Optional Protocol to allow for the better accommodation of taking of evidence via video-link.

#### **2. Evidence taking under the Hague Convention**

The Convention is the principal instrument governing international evidence taking. As of May 2014, there are 58 State Parties to the Evidence Convention.

The Convention comprises two separate and independent systems for the taking of evidence abroad:<sup>2</sup>

- 1) Chapter I sets out provisions for the taking of evidence by means of Letter of Request. This process involves the court of the Requesting State (the State where a legal proceeding is on foot) issuing a letter to the Requested State (the State where the evidence is located) to take the required actions for the evidence to be obtained.
- 2) Chapter II sets out provisions for the taking of evidence by Consuls and Commissioners. This process does not require the participation of the courts of the Requested State, but often requires the permission of the Central Authority of the Requested State.

The Hague Convention does not explicitly provide for any form of electronic evidence taking. This has the potential to be particularly problematic for countries who consider the Convention to be mandatory in application, as the lack of clarity restricts their ability to fully utilise evidence taking by video-link.

Australia welcomes the view of the Permanent Bureau, as expressed on page 10 of the annotated agenda:

The Permanent Bureau considers that the operation of the Convention would benefit from a conclusion of the Special Commission regarding the direct taking of evidence abroad by video-link. In particular, it invites experts to endorse the view, as expressed in Annex 7 of the Draft Evidence Handbook that a judge located in the State of Origin may examine, as a “Commissioner”, a witness located in the State of Execution by

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<sup>1</sup> Draft Evidence Handbook (2014), 102.

<sup>2</sup> Draft Evidence Handbook (2014), 6.

video-link pursuant to Art. 17 (without prejudice to any reservation made by the State of Execution concerning the application of Chapter II of the Convention).

Australia considers this measure to be a step in the right direction, as it clarifies the most efficient method of obtaining evidence via video-link under the current practices in the Convention. However, it may be possible to go further, as consistent with emerging practice in the consensual taking of evidence via video-link.

As such, Australia invites the Special Commission to consider the possible development of an additional Optional Protocol to the Convention that provides a clear, streamlined and efficient procedure for the consensual taking of evidence via video-link.

### **3. Proposal of an Optional Protocol**

An Optional Protocol could be created to accommodate the consensual taking of evidence via video-link, and other electronic communication methods, from a person in one Convention country by a court in another Convention country. As consistent with the current Convention, this process would be separate and independent from the other available systems for taking evidence abroad under Chapters I and II.

The Optional Protocol could:

- *Be limited in its application – providing that in a civil or commercial matter, a judicial authority may, from a court in a Contracting State, take evidence without compulsion from a person located in any other Contracting State, by method of videoconference, teleconference, or other appropriate electronic communication method.*
- *Provide that the judicial authority does not need to obtain the consent of the Contracting State in which the person from whom the evidence to be obtained is located, unless the Contracting State makes a declaration to this effect under the Convention.*
- *Be capable of application to all persons and not just nationals of the Contracting State.*

The advantages of this approach is that it would clearly and firmly establish a simple and efficient mechanism for taking evidence via videoconference, that is consistent with yet independent from other procedures in the Convention. This approach would modernise practice under the Convention and in doing so, may make the Convention a more attractive prospect for those countries who have not yet become a party. It would also ensure that Contracting States who view the Convention as mandatory are able to utilise the new procedure.

### **4. Conclusion**

Australia is aware that the development of an Optional Protocol is a substantial undertaking. However, Australia is of the view that the advantages of creating such an instrument would be significant. Australia invites the 2014 Special Commission to discuss the issue, with a view to making a recommendation to the General Affairs Council in 2015, regarding possible further work on the potential development of an Optional Protocol.