

Determining the applicable law in a world of globalization

**International Conference of Data Protection and
Privacy Commissioners
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The Hague Conference throughout its more than 115 years of experience



First Session ("Conference")

- Statute – Hague Conference becomes permanent intergovernmental organisation
- Establishment of the Permanent Bureau (Secretariat)

1893

Seventh Session

1951

1955

- 38 Conventions since 1950s
- 69 Members (States & EC)

2009



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Since 1893, the Hague Conference on Private International Law, a melting pot of different legal traditions, has developed and serviced Conventions which respond to global needs in the following areas:



International protection of children, family and property relations:

- International protection of children
 - Child Abduction Section INCADAT
 - Intercountry Adoption Section
- International child support and other forms of family maintenance
- International protection of adults
- Relations between (former) spouses
- Wills, trusts, estates

International legal co-operation and litigation:

- International legal and administrative co-operation
 - Apostille Section (incl. e-APP)
 - Service Section
- Jurisdiction and enforcement of judgments

International commercial and finance law:

- Contracts
 - Choice of law in international contracts **NEW**
- Torts
- Securities
- Trusts
- Recognition of companies

Latest developments



Annual Report of 2008 published [\[more\]](#)



Conclusions & Recommendations of the Francophone Seminar on Intercountry Adoption [\[more\]](#)



e-APP: already 10 Jurisdictions participating: Georgia and Andorra each launch their e-Register [\[more\]](#)



The Permanent Bureau seeks Legal Officers [\[more\]](#)

[Latest updates on this site →](#)

KEY CONVENTIONS – 3 MAJOR AREAS

- **Judicial & Administrative Co-operation & Litigation**
 - 1961 Apostille – 97 Contracting States [CS]
 - 1965 Service of Process Abroad – 59 CS
 - 1970 Taking of Evidence – 48 CS
 - 1980 Access to Justice – 24 CS
 - 2005 Choice of Court – 1 accession by Mexico; signed by USA and EC
- **Family Law & Protection of Children**
 - 1980 Child Abduction – 81 CS
 - 1993 Adoption – 78 CS
 - 1996 Child Protection Convention – 16 CS
 - 2007 Child Support Convention; Protocol on Applicable Law – Conv signed by USA and Burkina Faso
- **Commercial & Finance Law**
 - 2006 Securities Convention – ratified by Switzerland; signed by USA and Mauritius

HCCH and international transfer of data?

- HCCH Conventions and implementing instruments seek to ensure respect of data protection obligations:

1993 Adoption Convention, Art. 30:

- (1) The competent authorities of a Contracting State shall ensure that ***information*** held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.
- (2) They shall ensure that the child or his or her representative has access to such ***information***, under appropriate guidance, in so far as is permitted by the law of that State.

2000 Adults Protection Convention, Art. 39:

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

1996 Child Protection Convention, Art. 37:

An authority shall not request or transmit any ***information*** under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

2007 Recovery of Child Support, Art. 40:

1. An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.
2. A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.
3. Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.

HCCH and international transfer of data? (cont.)

- Challenging questions in some areas, *e.g.*, cross-border transfer of data to be used as evidence in foreign litigation.
- Working Document No 1/2009 of Data Protection Working Party on pre-trial discovery for cross-border civil litigation
- Conclusion is in line with HCCH's Special Commission in 2009: the effective operation of the Convention provides a legal basis for a transfer of personal data. Difficulties may arise where a request for cross-border evidence is filed beyond the Convention.

Data in international waters: *quid?*

- Diverging views on data protection, e.g.:
 - European Community
 - USA
 - Canada
 - China
- Diverging views (if any) on the territorial reach of national data protection laws
 - Unilateral approach
 - Problematic?



EU Data Protection Directive

- High standards of data protection
- Article 25 of the EU Data Protection Directive: other jurisdictions with different but ‘adequate level of data protection’
- No clear cut answer on the reach of EU regime:
 - For regulatory purposes: *who controls?*
 - In civil and commercial cases: *which data transfers are controlled?*
 - Article 4 of the EU Data Protection Directive:
 - Different implementation in national law of Member States



Data protection in the US

- No explicit mention of information privacy in the U.S. Constitution (may even run counter to the First Amendment's protection of free information flows).
- Self-regulatory, market-based approach (the privacy of personal data is an economic issue rather than a fundamental right).
- The US does not have a “horizontal” protection law : pragmatic approach and sectorial approach wich creates a system in which the overall standards emerge from a complex interplay of state and federal regulations, as well as industry practices.



Personal Information Protection and Electronic Documents Act (PIPEDA)

- The law regulates how private sector organizations collect, use or disclose identifiable individuals' personal information.
- Organization: “an association, a partnership, a person and a trade union” (s. 2 (1) of PIPEDA).
- PIPEDA is not applicable to the provinces with substantially similar privacy laws.
- Recognized by the European Commission as providing adequate data protection legislation.



Can PIPEDA be enforced on a foreign organization?

- PIPEDA is silent on whether or not the individual and/or organization must be Canadian.
- PIPEDA does not embrace conflict of law rules and does not have extraterritorial effect. (*Lawson v. Accusearch Inc.*, [2007] 4 F.C.R. 314)
- However: “organizations operating in and connected in a substantial way to Canada are subject to the Act.”
(*Privacy Commissioner of Canada v. SWIFT*, April 2, 2007, para. 54)



Transfer of data outside of Canada to a third-party

- An organization remains responsible for the personal information that it transfers to a third party located outside of Canada (s. 4.1.3. Schedule I of PIPEDA)
- Unlike European data protection laws, it is the organization's responsibility to ensure that the data receives a comparable level of protection when in the hands of the third party, and not whether or not the country of the third party has adequate data protection laws.
- Once the information is received in another country, the data is subjected to laws of that country, and this cannot be overridden by contractual means.



Data protection in China

- Very different approach to data protection
- Protection of individual data only in criminal and administrative law

Development of international standards: a must?

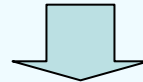
- A desirable goal in order to reduce the conflict of laws
- Feasible? Current efforts to draft a global legal instrument on data protection.
- Prospects from HCCH:
 - Specialized input on private international law (one aspect of multi-faceted data protection law)
 - The HCCH “toolbox”: use of techniques in Hague judicial and administrative cooperation Conventions

First model: an administrative network

- The “Central Authority” (CA) is a unique feature of all Hague Conventions
- The Central Authority is an administrative position or office created to carry out the obligations and functions of the Convention
- It serves as a focal point for inter-State cooperation
- Per analogy ... a similar administrative network could be developed to interlink the relevant authorities responsible for data protection
- An administrative network without an underlying international convention should be possible.

Second model: development of a judicial network in matters of international child protection

- Starting point: Recommendations and Conclusions adopted by the Fourth Special Commission Meeting to review the 1980 Child Abduction Convention (March 2001)
- Value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications.
- Still developing: currently 46 judges from 33 jurisdictions (the current list is available on the Hague Conference website at <www.hcch.net> under the “Child Abduction Section”)
- Communicating tools in development: Draft General Principles on Direct Judicial Communications



- Possible to explore whether these modern techniques could be adapted to data protection area.

Questions or remarks?

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