



2019 PETER NYGH INTERNSHIP REPORT

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1. The Peace Palace, The Hague.
Cover: Delegates and Permanent Bureau staff during the 22nd Diplomatic Session in The Hague Academy Building.

Prepared for the Peter Nygh Hague Conference Internship Board

To be circulated to the Attorney General's Department, the Australian Institute for International Affairs, and the Australian Branch of the International Law Association.

This report is prepared to assist the Peter Nygh Hague Conference Internship Board with evaluating the success of the Peter Nygh internship in fostering Australian involvement in the work of The Hague Conference for Private International Law (**HCCH**), and in encouraging international cooperation and the harmonisation of laws.

The report provides an overview of the Nygh intern's work programme in 2019. It then evaluates the internship as a means of promoting Australian involvement in the HCCH. Ultimately, it recommends the continuation of the Nygh internship as a means to facilitate Australian involvement in the HCCH, as a worthwhile opportunity for young Australian lawyers, and a means of continuing the legacy of the late Honourable Dr Peter Nygh AM.

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INTRODUCTION

2019 was a felicitous year for the Nygh intern to work at the HCCH. Dr Nygh contributed extensively to the work of the HCCH over 25 years, including as *co-rapporteur* of the Judgments Project for the period 1996 - 2001. The Explanatory Report on Commission I of the Judgments Project, co-authored by Dr Nygh with Mr Fausto Pocar, recorded the HCCH Member States' efforts to conclude an ambitious "double treaty" on the direct and indirect jurisdiction of courts in civil and commercial matters. These efforts began in 1992, however the aspiration proved too great and in 2001 the work bifurcated. The HCCH was mandated to focus only upon a convention dealing with direct jurisdiction, with work towards a convention on indirect jurisdiction (i.e. the bases upon which a foreign judgment may be recognised or enforced domestically) postponed for future consideration. The scope of the first mandate was refined over the following years to focus upon jurisdiction agreed upon by the parties under exclusive choice of court agreements, and culminated in the *Convention of 30 June 2005 on Choice of Court Agreements*.

The second limb of the Judgments Project was revived in 2013 and culminated on 2 July 2019 in the final weeks of my internship with the adoption of the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*. The Judgments Convention built upon the ideas, aspirations and work of Commission I of the Judgments Project articulated by Dr Nygh and Mr Pocar 18 years ago.

I am grateful to the Board, the Nygh family, the Australian Institute for International Affairs, the Australian Branch of the International Law Association, the Attorney General's Department, and Resolve Litigation Lawyers for supporting this internship. I would like to thank the Permanent Bureau of the HCCH - especially Secretary General Dr Christophe Bernasconi, First Secretary Mr João Ribeiro-Bidaoui and Senior Legal Officer Ms Ning Zhao - for the opportunity to work towards this milestone in the harmonisation of private international law.



Sophie Yates

9 November 2019

A. WORK PROGRAMME

1. The internship took place from 14 January - 12 July 2019. I was assigned to the Legal Cooperation and Litigation team and reported to First Secretary Mr João Ribeiro-Bidaoui and Senior Legal Officer Ms Ning Zhao. I was assigned to three instruments: the (then to be) *HCCH Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil or commercial matters* (the **Judgments Convention**), the *HCCH Convention of 30 June 2005 on Choice of Court Agreements* (the **Choice of Court Convention**), and the *Hague Principles for Choice of Law in International Commercial Contracts* (the **HCCH Principles**). I also assisted the Council for General Affairs and Policy (5 - 6 March 2019) at the secretariat table, and I was a Recording Secretary for the 65th Council for Diplomatic Representatives (28 May 2019) and the 22nd Diplomatic Session (26 June - 2 July 2019). Given the imminence of the 22nd Diplomatic Session, most of my work concerned the Judgments Project.

THE JUDGMENTS PROJECT

2. The Judgments Project broadly refers to the various Special Commission meetings, Working Groups, Experts Groups and on-going intersessional work coordinated by the Permanent Bureau occurring over two decades. The Judgments Project culminated at the 22nd Diplomatic Session and produced the Judgments Convention. The Judgments Convention establishes a multilateral mechanism for the recognition and enforcement of civil or commercial foreign judgments in the domestic courts of contracting States.
3. The interns assigned to the Judgments Project assisted with the production of Preliminary Documents in the months preceding the 22nd Diplomatic Session. Preliminary Documents prepared by the Permanent Bureau are distributed to the participating States to stimulate discussion, or explain concepts relevant to live or unresolved issues. Working Documents are also prepared by States before and during the session to propose amendments and changes to the text, and usually refer to discrete Articles. Interns at the Permanent Bureau are involved in the production of the former.
4. My participation in the Judgments Project required familiarity with the structure and purpose of the Judgments Convention, and an appreciation of its negotiation history. It also required a similar understanding of the Choice of Court Convention, which is intended to be the “sister” Convention to the Judgments Convention. My primary tasks were to research, draft and edit Working Documents. These Working Documents addressed the way in which limitation periods, common courts, non-unified legal systems, and mechanisms for establishing treaty relations were reflected in the provisions of the Convention as it stood in its draft form in November 2018, at the conclusion of the last Special Commission on Judgments. Each of these



2. Delegates during the 22nd Diplomatic Session, Hague Academy Building.

papers also considered the domestic legal position of various civil and common law jurisdictions.

The 22nd Diplomatic Session

5. The 22nd Diplomatic Session was the first Diplomatic Session convened by the HCCH in twelve years.¹ It convened over a two week period from 26 June to 2 July 2019 in The Hague Academy Building, adjacent to the Peace Palace.
6. Each member and observer State was assigned a set number of seats on the floor for the Plenary sessions. The session proceeded according to an itemised agenda, under the

¹ Since 2007 when the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* and *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* were adopted. In principle, the HCCH convenes a Diplomatic Session every four years. However, a number of factors have meant that the regularity of sessions has waned.

chairmanship of Mr David Goddard QC.² The Chair would introduce a topic on the agenda, summarise the issue for determination (for example, a policy decision for the inclusion or exclusion of certain types of judgments; or a linguistic decision as to the appropriate expression of an agreed policy) and any relevant discussions, and invite contributions from the floor. These contributions took the form of proposals to the text, responses to earlier discussions, and expressions of support for or against proposed changes.

7. The Plenary worked from a draft version of the Convention that had been prepared at the Special Commission in May 2018. However, the text retained square brackets around some aspects of the Convention to indicate that there remained a lack of agreement (for example, as to the expression of an Article, its structure, or whether it should in fact be included as a matter of policy). Although these discrete sentences were marked for resolution at the Diplomatic Session, the notion of “nothing is decided until everything is decided” was the guiding principle for negotiations: Member States could thereby make proposals regarding the balance of the un-bracketed text, or draft new Articles to address outstanding issues.
8. Member States made proposals with reference to Working Documents, which were submitted to the Permanent Bureau in advance of the relevant discussion. To expedite negotiations, the Chair encouraged delegates to canvass informally their proposals and submit joint proposals if they enjoyed broad support. The Working Documents contained an extract of the relevant Article with proposals marked up in track changes and, on occasion, an explanatory note to assist the delegates’ consideration.
9. There were often competing preferences for the final form of the Convention. States may have submitted competing Working Documents, or there may have been a split between proposed text and the existent draft text, or there may have been disagreement as to the breadth of the Convention. The Plenary session was the final point at which Member States aligned their preferred positions. Following input from the delegates, the Chair made observations and drew conclusions as to the consensus in the room. Where no consensus was possible upon a matter that imposed obligations upon States, or broadened existent obligations, the issue was resolved on the exclusionary or narrower basis.
10. Other working groups and committees met during the Diplomatic Session to facilitate the work of the Plenary. Scheduled Plenary sessions were postponed when expedient to encourage States to share information and have focussed discussions in smaller Informal Working Groups (**IWGs**). Some IWGs continued the work of former IWGs constituted in the intersessional period (e.g. the IWG on anti-trust matters), whereas other IWGs formed as issues arose in the Plenary (e.g. the IWG on general and final clauses, and the IWG on

² As he was then; now the Honourable Justice Goddard of the New Zealand High Court and Court of Appeal.

tenancies and immovable property). A delegate was nominated to chair the particular IWG, and any interested States were invited to participate. During the Plenary session it was also possible to interpose a meeting of the Council for General Affairs and Policy (CGAP),³ in order to consider whether it would recommend certain actions to be taken at its next meeting in March 2020.

11. At the conclusion of the Plenary sessions and over the weekend, the Drafting Committee convened to review and suggest changes to the text of the draft Convention. This was an efficient way to adjust the text as discussions developed within the short two-week period allocated for the conclusion of the Convention.



3. Clockwise from left: Recording Secretaries at The Hague Academy, Recording Secretaries in the Great Hall of Justice in the Peace Palace at the formal conclusion of the Judgments Convention, the team of the Permanent Bureau outside the Peace Palace.

³ Following discussions upon whether intellectual property should be included and given special treatment, or excluded, as a “jurisdictional filter” in the Judgments Convention. Ultimately, the States decided to exclude intellectual property matters from the scope of the Convention (Article 2(1)(m)).

12. I was engaged as Recording Secretary during the Diplomatic Session. The role of the Recording Secretary is to prepare the minutes of each meeting. The minutes summarise the salient points of discussion using the language of the delegates. Along with the audio recordings, the minutes are an important record of the discussion and comprise part of the *travaux préparatoires* of the Convention. Recording Secretaries are rostered in pairs and on a rotating basis, to enable them to produce minutes in both English and French in a timely manner. I took down the English language minutes at each afternoon session,⁴ and continued working into the evening with the assistance of the audio recording.
13. I was permitted to attend the morning sessions of the Plenary and sit in on meetings of various IWGs. They provided a fascinating glimpse into the process of multilateral treaty negotiation. I observed how items for discussion were substantially threshed out in the focussed IWGs, leaving the broader policy decisions to be brought before the Plenary for an ultimate decision. Although the Plenary was technically permitted to have recourse to decision-making by voting, all decisions were made on the basis of consensus. One aspect of the session I thought notable was the spirit of good faith and compromise that characterised the sessions. Delegates shared information and exchanged preferences before the session or during coffee breaks, and this common understanding was then used to shape creative solutions which sought to reflect an acceptable middle ground between the delegates' positions. The delegates worked actively towards the broadest possible convention that could simultaneously and satisfactorily be brought before the States' domestic legislatures for possible ratification.
14. The member States adopted the Judgments Convention on 2 July 2019, and the session concluded with a formal ceremony in the Great Hall of Justice in the Peace Palace. Each State was invited to subscribe to the adoption of the Convention.⁵ Uruguay also became the first State to sign the Convention itself.⁶ Following its adoption, the Convention is now open for signature, and it will enter into force 12 months after one additional State or Regional Economic Integration Organisation accedes to it.

⁴ Unlike previous Nygh interns, I have no French language skills. English and French are the working languages of the HCCH and although it has been preferred, it is not compulsory that the Nygh intern be proficient in both.

⁵ This did not amount to signing the Convention itself, and entailed no legal obligations on the part of signing States.

⁶ Although it will now need to take steps to ratify or approve the Convention.



.4. Delegates and Permanent Bureau staff at the Council for General Affairs and Policy, Peace Palace.

GOVERNANCE

15. The Permanent Bureau administers the mandate received by Member States at the Council for General Affairs and Policy (**CGAP**), according to the Budget reviewed by the Council for Diplomatic Representatives (**CDR**).

2019 Council for General Affairs and Policy

16. CGAP is the annual meeting at which Member States discuss the work of the HCCH over the past year, revise the progress of current projects and the ongoing work concerning past conventions, pass resolutions upon the same, and agree upon the future work programme of the HCCH. The meeting occurs at The Hague Academy building over four days. The Chair invites the Permanent Bureau to present reports of its work, followed by discussions and questions from the floor.
17. The interns were involved in an administrative capacity at the meeting as either Recording Secretaries or at the Secretariat desk. The Secretariat desk provides administrative assistance to States and acts as a line of communication between the Diplomat Lawyers on the podium and the administrative staff. In these positions, the interns are able to observe the meetings and understand first-hand the conduct of consensus based diplomacy.
18. Some of the notable events of the 2019 CGAP were the approval of the final draft of the WIPO-HCCH Guide “When Private International Law meets Intellectual Property Law – A Guide for

Judges”. It also approved the HCCH 2019 – 2022 Strategic Plan, and approved a meeting of a Special Commission in 2021 to revise the operation of the Apostille Convention.

65th Council of Diplomatic Representatives

19. I was engaged as Recording Secretary at the Council of Diplomatic Representatives. I produced a condensed summary of the meeting to be distributed after its conclusion. This required basic familiarity with the documents considered during the meeting.



5. Delegates and Permanent Bureau staff at the 22nd Diplomatic Session, Peace Palace.

OTHER WORK

20. In between the meetings of CGAP, CDR and the Diplomatic Session, I also: drafted an article for the promotion of the HCCH Principles; represented the HCCH at the World Justice Forum (a trade show for global access to justice issues); edited the tripartite UNIDROIT/UNCITRAL/HCCH Guide, and drafted introductions for various publications concerning private international law issues and the work of the HCCH.
21. I was included in the daily life and affairs of the Permanent Bureau. I attended the regular legal staff meetings and all staff meetings; team meetings for the Legal Cooperation and Litigation team; and attended monthly intern lunches hosted by the Internship Committee. These were opportunities to hear of the work of the other teams, share information and suggest ideas for improvement. The meetings were egalitarian and interns were encouraged to contribute. They were also an opportunity to socialise with the legal and administrative staff, and to interact with the staff from the Regional Office for Asia and the Pacific, and the Regional Office for Latin America and the Caribbean, who attended the meetings via video link.

B. REFLECTION UPON THE NYGH INTERNSHIP

FOSTERING AUSTRALIAN INVOLVEMENT IN THE WORK OF THE HCCH

22. The Nygh internship is an established means of Australian involvement in the work of the HCCH. The inclusion of Australian lawyers in the HCCH is important because it ensures that Australian laws and its legal system are represented accurately and frequently in the work undertaken by the Permanent Bureau. This in turn informs debate amongst the States and complements Australia's membership in the HCCH. The internship also honours the tradition of engagement and cooperation between Australian practitioners and the HCCH cultivated by Dr Nygh.
23. The internship fosters Australian engagement in two ways. First, it invites young graduates to consider a career in private international law. The existence of the internship, alone, is valuable for the way it encourages young graduates to imagine working overseas in an intergovernmental context. It also highlights the work of the HCCH itself. As seems to be the case for many Nygh interns, the HCCH was mentioned only briefly in my study of the conflict of laws. Had it not been for the existence of this internship, I would not have applied to work as an intern at the HCCH.
24. Secondly, the internship supports the successful candidate at the Permanent Bureau by reserving a six-month placement for them,⁷ and by providing some financial support. I am thankful to the sponsors for the financial contribution, which alleviated some of the pressure of travelling to and living in The Hague. However prospective candidates should note that other financial support is required to fully cover the expenses of a six-month internship.
25. My experience at the Permanent Bureau was formative. It extended my academic interest in the conflict of laws through practical engagement with the laws and legal systems of member States. It also impressed upon me the diversity of legal systems that provide the backdrop for civil and commercial dealings. I am grateful for this perspective at this early stage of my career. It enhanced my understanding of the Australian legal system through contrast with other common law systems, civil law systems and public international law regimes. The length of the internship meant that I was able to integrate into the Litigation team and contribute to longer, on-going projects. The Diplomatic Session also gave me a tangible understanding of the conduct of international relations and the function of intergovernmental organisations, which built upon my study of IR at university.

⁷ There can be up to six interns at any given time at the HCCH. The Nygh Internship and the "Swiss internship" are both six month positions. Other ad hoc interns usually stay for two to three months.

26. My experience was different from my expectations in the sense that I had expected to engage in extensive comparative legal analysis. However the work understandably has a weighty public international law component, and is directed towards producing outcomes and practical solutions (as opposed to an academic consideration of the seemingly limitless issues that can arise in any given area).
27. The Nygh internship sits in the context of broader Australian involvement in the HCCH. Australian qualified lawyers are represented in the day-to-day work of the Permanent Bureau through its permanent legal staff (Attaché to the Secretary General Mr Thomas John; and Legal Officer Mr Brody Warren, also the Nygh intern in 2014); visiting scholars from Australian Universities (in 2019, Mr Michael Douglas of the University of Western Australia); and other ad-hoc Australian interns. The Australian delegation also contributes actively to the meetings and groups convened by the HCCH. At the 22nd Diplomatic Session, the Australian delegation contributed frequently to Plenary discussions and IWGs, and the head of delegation Mr Andrew Walter (First Assistant Secretary of the Integrity and Security Division at the Attorney General's Department) presided over an IWG. Mr Walter also currently serves as the elected Chair of the Council for General Affairs and Policy, a position he has held since March 2017.



6. Nygh Interns: Brody Warren (2014), Sophie Yates (2019), and Derek Bayley (2015).



.7. Australian delegation signing the instrument to adopt the Judgments Convention in the Great Hall of Justice, the Peace Palace.

PROMOTING INTERNATIONAL COOPERATION AND HARMONISATION OF LAWS

28. The key indicators of the HCCH's success are the quality of its instruments and the breadth of their ratification. Widespread ratification of HCCH instruments ensures the utility of the instruments and bolsters the HCCH's keystone mission of the progressive unification of private international law.
29. The Nygh internship supports these goals by sponsoring the Nygh intern to contribute to these projects. It also encourages the longevity of these goals, and the HCCH's work, by exposing young lawyers to the projects of the HCCH and encouraging them to network with other like-minded lawyers from across the globe, who have a shared interest in international cooperation and the harmonisation of laws. Through the HCCH I met other young interns and lawyers from France, Spain, Switzerland, Canada, the United States, the United Kingdom, China, Japan, and Germany (not to mention the other young lawyers associated with the work of intergovernmental and international organisations also based in The Hague). The opportunity to connect with like-minded young professionals has provided me with personal and professional networks through which we can share information and support one-another with global perspectives upon our work.

Cooperation

30. 83 Member States⁸ and 70 connected States are engaged with the work of the HCCH. Where it was once the case that only Member States were permitted to sign or accede to various Conventions, since 1955 the HCCH has permitted States not represented at a Diplomatic Session to nonetheless accede to the Convention. For example during the course of the internship, Nicaragua acceded to the four Conventions (the Evidence Convention,⁹ the Child Protection Convention¹⁰ the Child Support Convention,¹¹ and the Service Convention¹²) Guyana acceded to two Conventions (the Child Abduction Convention,¹³ and the Child Protection Convention), and Honduras ratified the Intercountry Adoption Convention.¹⁴ Each is a non-member State. Nonetheless, membership to the HCCH remains relevant for States's participation in consensus-based decision-making and, as such, the membership base of the HCCH continues to expand.¹⁵ The Permanent Bureau works with States who have expressed an interest in becoming members of the HCCH.
31. In addition to fostering inter-State cooperation, the HCCH itself collaborates with international and intergovernmental bodies to produce resources for the private international law community. This effectively pools the areas of expertise of each organisation, which often shares an overlap in their respective membership bases. The HCCH recently completed its work with WIPO to produce a joint guide for judges concerning the intersection of intellectual property and private international law.¹⁶ The HCCH is currently mandated to continue collaboration with UNIDROIT and UNCITRAL to produce a joint Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales), which will be considered for approval at the 2020 CGAP.

⁸ Including the European Union.

⁹ HCCH *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("Evidence Convention").

¹⁰ HCCH *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

¹¹ HCCH *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

¹² HCCH *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

¹³ HCCH *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

¹⁴ HCCH *Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption*.

¹⁵ For example, Honduras requested membership to the HCCH in March 2019.

¹⁶ "When Private International Law meets Intellectual Property Law – A Guide for Judges".

32. The work programme for the next couple of years continues the HCCH's mission towards the harmonisation of domestic private international laws. Its current projects include:

- **The Parentage / Surrogacy Project**, which will have its next Experts' Group meeting prior to CGAP 2020, to consider the possibility of a future instrument containing provisions for the recognition of judicial decisions;
- **Co-operation and Access to Justice for International Tourists** (the Tourism Project); and
- **An instrument concerning direct jurisdiction**, which will have its first meeting in February 2020.

33. The HCCH is revising the types of instruments through which it encourages the harmonisation of laws. In 2015 the HCCH produced its first soft law instrument, the HCCH Principles. While they lack international legally binding effect, the HCCH Principles are nonetheless influential as a model or guide for the harmonisation of laws. Indeed, the HCCH Principles are considered amongst the cluster of international instruments that bolster the transparency and predictability of international commercial transactions,¹⁷ and have formed the basis of domestic legislation.¹⁸ The use of a soft law instrument is currently touted as a possible vehicle for the HCCH's future work concerning direct jurisdiction.

C. RECOMMENDATION

34. The HCCH continues to undertake exciting work. In particular, the foreshadowed instrument on direct jurisdiction promises to be an important instrument in the further harmonisation of international civil and commercial law.

35. The Nygh internship was a timely and formative experience at the early stages of my career. It exposed me to international law making, diplomacy, and the public and private international legal systems that facilitate international commercial life. I recommend the ongoing support of the Nygh internship as a key means of furthering the legacy of Dr Nygh and of supporting Australia's continued involvement in the HCCH and its project of appropriately harmonising private international laws.

¹⁷ Indeed, the HCCH Principles are discussed in the current joint project of UNCITRAL, UNIDROIT and the HCCH to develop jointly a Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales).

¹⁸ Paraguay implemented the HCCH Principles in Law No 5393 on the Law Applicable to International Contracts, adopted in 2015.