

# **ACCESSION TO AND IMPLEMENTATION OF HCCH CONVENTIONS: THE PHILIPPINE EXPERIENCE**

HCCH Asia Pacific Week  
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**by**

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Excellencies, Your Honors, friends, ladies and gentlemen

Magandang hapon, good afternoon:

I wish to thank the organizers for this opportunity to deliver the Philippine perspectives on the benefits of HCCH membership and the key HCCH Conventions. I am most pleased to do so as I was also present at the first time the Philippines hosted the Asia Pacific regional conference, on October 26-28, 2011, together with some who are with us this afternoon.

The Hague, the Netherlands, my current diplomatic station and the reputed legal capital of the world, is the headquarters of important intergovernmental legal organizations, notably the International Court of Justice, International Criminal Court, the Permanent Court of Arbitration, and the **Hague Conference on Private International Law - Conférence de La Haye de droit international privé (HCCH)**. Though the first three – ICJ, ICC and PCA – are better known, the HCCH – in my view – has the most beneficial impact on individuals – including the millions of overseas Filipinos -- and companies. In the course of this 3-day conference, I hope you will feel the same way as I do.

For this brief presentation, I will take up four aspects: first, the Philippines' and the Asia Pacific's records of accessions to HCCH Conventions; second, the benefits from entry into the Conventions, particularly the economic impact of two selected conventions; third, the challenges faced when considering accession to and implementation of the Conventions; and finally, recommended additional Conventions that may be considered for accession.

I.

Established in 1893, the HCCH is the international organisation whose mandate is the progressive unification of the rules of private international law. In today's world where individuals and businesses are constantly engaged in cross-border interactions, with work, commerce, study, shopping, travel, relationships and more increasingly taking place across multiple countries, there is the need to address gaps in the legal framework, resulting in uncertainty as to which authority has jurisdiction, which law is applicable, how decisions are recognised and enforced and what cooperation mechanisms are available to overcome challenges of cross-border judicial or administrative procedures. The HCCH has remarkably addressed many of these gaps by providing internationally agreed solutions, developed through the negotiation, adoption, and operation of international treaties, particularly in three main

areas, namely International Family and Child Protection Law,<sup>1</sup> Transnational Litigation and Apostille,<sup>2</sup> and International Commercial, Digital, and Financial Law.<sup>3,4</sup>

The Philippines is relatively a newcomer to the century-old HCCH, the country becoming a State Party only in 2010.<sup>5</sup> But even before it became a member, the country had seen its merits and acceded to the Intercountry Adoption Convention<sup>6</sup> which ensures that adoptions by foreign adopters are made in the best interests of the child. The country has since made up for lost time. Under the leadership of the Department of Foreign Affairs and in partnership with the Supreme Court of the Philippines and other government agencies, the country acceded to four more conventions, namely the Convention on the Civil Aspects of International Child Abduction<sup>7</sup> in 2016, Apostille Convention<sup>8</sup> in 2019 which abolished the requirement of legalisation for foreign public documents (so-called consular “red-ribbon”), Service Convention<sup>9</sup> in 2020 which has streamlined the transmission of judicial and extrajudicial documents on party litigants based overseas, and most recently, the Child Support Convention<sup>10</sup> which entered into force for the Philippines last October 1. With this latest development, the collection of maintenance support for Filipino and other children from neglectful parents residing in other countries has become easier.

The Philippine record of accessions mirrors the trend in the Asia Pacific region, with a few differences. The most popular HCCH conventions in the region are those relating to judicial assistance, namely Apostille Convention, Service Convention and the Evidence Convention, which have attracted 17, 10 and seven Contracting Parties respectively in the Asia-Pacific. These instruments establish an effective co-operation in support of judicial and administrative functions of the Contracting States through the exemption of legalization requirement, or the authorization and assistance of service of documents and taking of evidence. Because these instruments solely build bridges for cooperation between the Contracting States without intervening in their domestic legal system, the threshold for ratification has been relatively low both for civil law and common law jurisdictions.<sup>11</sup> With further advancements in regional economic

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<sup>1</sup> Covering the following Conventions: 1961 Forms of Wills, 1970 Divorce, 1980 Child Abduction, 1993 Adoption, 1996 Child Protection, 2000 Protection of Adults, 2007 Child Support, and 2007 Maintenance Protocol.

<sup>2</sup> Covering the following Conventions: 1961 Apostille, 1965 Service, 1970 Evidence, 1980 Access to Justice, 2005 Choice of Court and 2019 Judgments.

<sup>3</sup> Covering the following Conventions: 1985 Trusts, 2006 Securities and 2015 Choice of Law Principles

<sup>4</sup> There are other international or regional organizations involved in the harmonization of the internal rules or law of various nations, notably the U.N. Commission on International Trade Law (UNCITRAL), Institute for the Unification of Private Law (UNDRUIT), and the Organisation of American States and European Union (the latter two for their member states).

<sup>5</sup> See J. Eduardo Malaya and Jillian Joyce de Dumo-Cornista, “The HCCH and Their Practical Effects to Private International Law in the Philippines,” *Integrated Bar of the Philippines Journal*, Vol. 45, Issue No. 2, 2020, 41 - 84.

<sup>6</sup> Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption.

<sup>7</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

<sup>8</sup> Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

<sup>9</sup> Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

<sup>10</sup> Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

<sup>11</sup> Yuko Nishitani, “The Presence of the HCCH in the Asia Pacific Region,” in Thomas John, Rishi Gulati and Ben Koehler, eds, *The Elgar Companion to the Hague Conference on Private International Law*, 2020, 63.

integration in the Asia-Pacific, these instruments will presumably gain more Contracting States.

The other set of popular HCCH instruments in the region are those in the field of child protection, the leading ones being the Intercountry Adoption Convention and the Child Abduction Convention. The Intercountry Adoption Convention installs for intercountry adoption an effective collaboration between States of origin and receiving States to further control and deter illicit practices including sale of children. To combat cross-border parental child abduction, the Child Abduction Convention establishes a mechanism of promptly returning the child to their State of habitual residence and ensures that the rights of custody and access under the law of the State of origin are effectively respected in the other Contracting States. Both instruments rely on effective administrative and judicial cooperation between Contracting States for the sake of the children's best interests and fundamental rights to maintaining personal relations with both parents and appropriate care and protection pursuant to the 1989 UN Convention on the Rights of the Child. The two Conventions have gained 11 Contracting States in the Asia-Pacific respectively.

Though interest on the Conventions pertaining to International Commercial, Digital, and Financial Law, namely the 1985 Trusts, 2006 Securities and 2015 Choice of Law Principles, has grown in the Asia Pacific region, this has yet to materialize into significant number of accessions.

As can be noticed, the Intercountry and Child Abduction Conventions rate high in the Asia-Pacific with 11 accessions for each. These underscore the high priority the region accords to the protection of children. The recent entry into force for the Philippines of the Child Support Convention reinforces the country's commitment to safeguarding children's welfare, making it the only Contracting Party after Japan. The flipside is that the rest of the Asia Pacific can perhaps follow suit in acceding to the Child Support Convention, which complements the Child Abduction Convention, of which many of them are already Contracting Parties.

Popular also are the Apostille and Service Conventions. However, while seven Asia-Pacific countries are already Contracting Parties to the Evidence Convention, the Philippines is not.

## II.

When we at the DFA Office of Treaties and Legal Affairs advocated in 2010 for the Philippine HCCH membership, the original motivation was to reform and streamline two functions that were being undertaken by the DFA, specifically the consular authentication of documents and the transmission of judicial and extrajudicial documents which were being coursed through diplomatic channels. Both are traditional consular functions embodied in the Vienna Convention on Consular Relations. However, with the passage of time and availability of advanced technologies, these services could be made more efficient.

With the adoption of the Apostille system,<sup>12</sup> the steps in the authentication of documents were trimmed down from four to only two with the issuance of the Apostille certificate, thus decreasing the workload of the DFA, adding security to the documents, and more importantly, bringing cost savings and convenience to the public, specially the overseas Filipino workers and the business community. In an 8-month period right after the entry into force of the Convention for the Philippines, from mid-May 2019 to January 2020, some 520,000 apostillized documents were issued by the DFA.

The Service Convention set-up of central authorities has allowed for the direct transmission of documents to a competent judicial authority that is to execute the service. Thus the channel for the transmission of documents was transferred from the DFA to the Supreme Court's Office of the Court Administrator. With the shift away from the cumbersome diplomatic channels, the turnaround time for the service of documents was trimmed from four to six months to one-and-a-half month on average. This has helped address court delays and contributed to enhanced administration of justice.

The beneficial impact of streamlined processes is easily grasped, as it results to higher efficiencies and tangible cost savings, which are quantifiable. A recent in-house study undertaken for the HCCH examined the economic impact of four HCCH Conventions, and found that the impacts were significant.

For the Apostille Convention, an annual cost savings for all apostilles issued were estimated at EUR 62 million per year for all Contracting Parties, through less processing time, less staff requirements and decreased staff workload. Furthermore, the Convention saves Apostille users some EUR 300M annually on costs, which is based on an average of EUR 6.50 per user, and an additional EUR 150M on avoiding travel and waiting time (when monetized).

Saudi Arabia recently acceded to the Apostille Convention, which will enter into force for that country on 7 December 2022. It will greatly facilitate the submission of documents by Filipinos who wish to work in said country.<sup>13</sup>

The economic impact of the operation of the Child Support Convention is more perhaps consequential as each child maintenance collected can be often life-changing for children. The annual cost savings through the avoidance of lengthy legal procedures is estimated at EUR 4,000 per case, or a total of EUR 9.1 Million for all cases. Considering the average 55% recovery rate for child support, the total amount of extra child support recovered because of the Convention is estimated at over EUR 11M annually. The Convention certainly significantly reduces application costs for individuals and in turn their reliance on government support.

### III.

HCCH Conventions are the products of exhaustive studies and prolonged negotiations among Member States, yet despite their clear benefits, accession to the Conventions, even the core ones, can be slow. This phenomenon can be attributed to

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<sup>12</sup> See Aileen Charisse P. Cruz, *The Hague Service Convention: A Practical Step Towards Greater International Legal Cooperation*, 66 *Ateneo Law Journal* 266 (2021).

<sup>13</sup> "Saudi Arabia accedes to the Apostille Convention," <https://www.hcch.net/en/news-archive/details/?varevent=857>

a number of factors, notably the relative unfamiliarity with the HCCH and its Conventions in developing countries, the often arduous adjustments needed in domestic laws and procedures, the tedious domestic process involved in treaty ratification, and capacity issues in prospective Contracting Parties in implementing the Conventions.

Like the Philippines, the Asia Pacific region is relatively newcomer to the HCCH. Its oldest member, Japan, became a HCCH member only in 1957, and followed by Australia (1973), China (1989), Korea (1997), Sri Lanka (2001), New Zealand (2002), Malaysia (2002), India (2008), the Philippines (2010), Viet Nam (2013) and Singapore (2014). The 21 Member States from the region make up only 23 percent of the total membership of 90 states (plus the EU). Only five of the ten ASEAN countries are Member States of the HCCH.

The HCCH is aware of its relative unfamiliarity in certain regions, notably Asia Pacific and Africa. The Informal Group of Ambassadors convened in The Hague in 2021 by the HCCH Secretary General underscored as a key strategic principle that the HCCH and its work have to be promoted particularly in under-represented regions, and that in addition to the operations of the HCCH Regional Offices, including one in Hongkong, the HCCH should foster relationships with external stakeholders, including the academia and practitioners, in order to raise the profile and effectiveness of the HCCH.<sup>14</sup>

The Philippines has assisted in raising awareness of the HCCH in the Asia Pacific region by having hosted in Manila the Asia Pacific Conference on October 26 to 28, 2011 and this year the Asia Pacific Week 2022. As these regional conferences helped spread awareness and understanding of these conventions to the region, Filipinos can more deeply understand and appreciate their operations and usefulness.

Accession to the treaties and conventions often require revision and amendment of domestic laws and longstanding administrative regulations.<sup>15</sup> Accession to the Intercountry Adoption was preceded by the passage of the Intercountry Adoption Act of 1995 (Republic Act No. 8043), while the Child Abduction Convention necessitated the issuance of Department of Justice Circular No. 10-2022. Accessions often provide the opportunity to make update laws and regulations in line with international standards.

Ratification of and accession to treaties and conventions often involve lengthy processes, requiring in many countries actions by Congress or Parliament. It is the same way for the Philippines. Nonetheless, for the HCCH Conventions that merely involve streamlining of procedures and do not change substantive laws, these may be ratified as executive agreements (as distinguished from treaties which require Senate concurrence). Accessions to the Apostille and Service Conventions were treated as executive agreements, and also implemented and carried out through the issuance of circulars and guidelines by the Supreme Court in view of the rule-making power

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<sup>14</sup> "Key Strategic Principles Identified by the Informal Group of Ambassadors," 27 October 2021 (A paper to support discussion at the HCCH Council on General Affairs and Policy, 1-4 March 2022); See also HCCH Strategic Plan 2019-2022.

<sup>15</sup> See Yuko Nishitani, "The Presence of the HCCH in the Asia Pacific Region," on amendments made to domestic law when Japan acceded to the Child Abduction Convention, 63, 66-67.

granted the latter under the Constitution (Article VIII, Sec. 5 (5)).<sup>16</sup> The Supreme Court paved the way for the country's accession to the Child Support Convention by its issuance of the Rules on Action for Support and Petition for Recognition and Enforcement of Foreign Decision or Judgment on Support.<sup>17</sup>

On the other hand, Conventions that would entail substantive changes to domestic law will require the concurrence of the Senate. The Intercountry Adoption and Child Abduction Conventions underwent Senate concurrence.<sup>18</sup>

Finally, HCCH Conventions require the designation of a Central Authority that will assume the undertakings under it. The challenge is often the identification of a national government agency that has both the mandate over the subject matter and the staff and resources to implement the responsibilities under the Convention. The DFA had long undertaken the consular authentication of documents, so it readily assumed as Central Authority for the Apostille Convention. On the other hand, accession to the Child Support Convention could proceed only after the DSWD stated that it was ready to serve as such Central Authority.

#### IV.

In the course of the Asia Pacific Week, prominent HCCH Conventions and instruments, as well as normative projects and future work, will be taken up. These will include the five Conventions where the Philippines is a Contracting Party as well as others which the country may consider accession in the future.

In our view, accession to two can be prioritized, namely the Evidence Convention and the Child Protection Convention.

The Evidence Convention provides effective means for the taking of evidence in cross-border circumstances in civil or commercial matters, via (i) Letters of Request, and (ii) the traditional diplomatic or consular agents and Commissioners. By enabling a variety of mechanisms for the taking of evidence abroad, it provides an effective solution to overcoming differences between civil and common law systems in the taking of evidence. Its streamlined process of taking evidence is frequently used in practice in numerous countries and play a fundamental role in effective cross border litigation. It also reduces party litigants' expenses and help address court delays. It already covers 60 countries, including the U.S., most EU countries, China, Singapore and most recently, Vietnam. In the case of the Philippines, it will complement the hearing via videoconferencing instituted by the Supreme Court in 2021.

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<sup>16</sup> J. Eduardo Malaya and Jillian Joyce de Dumo-Cornista, "Implementation of International Agreements and the Self-Executing and Non-Self-Executing Dichotomy: The Case of Three HCCH Conventions," *Philippine Yearbook of International Law*, Vol. 20 (2020) 56-92.

<sup>17</sup> Effective May 31, 2021. In the 3<sup>rd</sup> Whereas clause of its Resolution, the Supreme Court stated that "the National Government is considering the Philippines' possible accession to the HCCH Convention of 23 November 2007 on International Recovery of Child Support and Other Forms of Family Maintenance (Child Support Convention), which will benefit many Filipinos seeking cross-border child and, to a limited extent, spousal support and facilitate the efficient recognition and enforcement of support decisions or judgments rendered by a foreign body or court."

<sup>18</sup> J. Eduardo Malaya and Gale Dampil-Mandigma, *Philippine Treaties in Force 2020* (University of the Philippines, 2021), xxx.

The Convention on parental responsibility and protection of children covers civil measures of protection ranging from parental responsibility, child custody and access, to measures of protection or care, and protection of children's property. The Convention determines which country's laws are to be applied, and provides for the recognition and enforcement of measures taken in one Contracting State in all other Contracting States. The cooperation provisions of the Convention already provide the basic framework for the exchange of information and the necessary degree of collaboration between administrative authorities in 53 Contracting States. It will complement the Adoption and Child Abduction Conventions where the Philippines is a Contracting Party, thus underscoring further the country's commitment to children's welfare and elevate the country as fully supportive of the emerging international regime of child protection.

## V.

I also urge the legal community in the Philippines to take a good look at another groundbreaking initiative of the HCCH – the Choice of Law Principles.<sup>19</sup> Designed as the first “soft law” instrument of the HCCH, the principles promote party autonomy in international commercial contracts. By acknowledging that parties to a contract are best positioned to determine the set of legal norms governing their transactions, the Principles offer legal certainty and predictability necessary for effective cross-border trade and commerce. Rather than a country acceding to the principles, arbitration institutions around the world are encouraged to incorporate or adopt it into their own institutional rules.

In the case of the Philippines, arbitration has long been recognized as one of the most effective mechanisms in resolving disputes. Since the passage of the Arbitration Law (Republic Act No. 876) in 1953, the field of arbitration and proliferation of arbitral institutions have grown exponentially over the years. I urge Filipino arbitrators to join in the discussion, and consider the Choice of Law Principles and its potential in dispute resolution.

## VI.

The increased mobility of peoples and companies, rapid economic developments and gradual advancement of regional integration in the Asia Pacific require synchronized legal frameworks and arrangements. Efforts to provide legal clarity, certainty and predictability in civil and commercial cases, as well as family relations promote the welfare of children, who are the most vulnerable, in the same manner that such clarity in civil and commercial dealings contributes to economic development. Movements toward enhanced legal cooperation and coordination can thus be expected in private international law in the region. When adopting the best practices embodied in the HCCH Conventions, the Philippines and other Contracting Parties can promote their rule of law domestically and internationally and also enhance economic development.

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<sup>19</sup> Principles on Choice of Law in International Commercial Contracts