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David McClean – a view from THE HAGUE

Hans Van Loon*

For more than thirty years, Professor David McClean participated in nearly thirty meetings of the Hague Conference on Private International Law (HCCH), primarily as an observer representing the Commonwealth Secretariat and its Member States. During treaty negotiations, he successfully encouraged the HCCH to consider the specific needs of developing Commonwealth States, usefully clarified common law positions on certain issues, and at times even acted as the "conscience of the common law". He drafted highly useful "accession kits" – educational guides designed to facilitate the accession of Commonwealth (developing) countries to various Hague Conventions. He was fully immersed in, and made an outstanding contribution to, the negotiations on the 2007 Hague Convention on Maintenance Obligations. Thanks to his diplomatic skills and scholarly authority, he was held in very high esteem at the Hague Conference on Private International Law, which owes him immense gratitude for his exceptional commitment to its mission and contribution to its work.

Keywords: Role of observers in HCCH negotiations; relationship HCCH-Commonwealth Secretariat; opening of the HCCH to non-members; 1985 Hague Trusts Convention; 1986 Hague Sales Convention; 1993 Hague Adoption Convention; 2007 Hague Maintenance Convention; reciprocal maintenance enforcement among Commonwealth states; diplomatic and pedagogical skills; "Accession Kits"; 1965, 1970, 1980 Hague conventions on civil procedure; 1980 Hague Child Abduction Convention; the "Judgments Project"; forum non conveniens; a future Hague convention on environmental damage

A. Introduction

For more than three decades – between 1978 and 2009 – David McClean regularly visited The Hague to attend various meetings of the Hague Conference on Private International Law (see the list in the appendix). Looking at the list of these nearly 30 meetings, some of which lasted two or even three weeks, you could almost say that The Hague had become David's second home during this period. Especially, if you count the weeks David spent in The Hague during

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the summer giving lectures and seminars at The Hague Academy of International Law, where he taught in 1992 and 1997 and gave the general course in 2000.

When I look back, inevitably in brief, on David's contributions to the work of the Hague Conference ("the Conference", "HCCH"), I am well aware that his activities extend far beyond these contributions, and even beyond private international law. They also include international criminal law, air law, contract law, company law and insolvency law, not to mention his work for the Church of England. I will therefore only touch on a small part of David's activities. That said, I am convinced that the breadth and depth of David's interests and studies have had a major influence on the breadth and depth, indeed the wisdom, of his Hague work.

At the Hague Conference meetings, his wisdom did not translate into abstract considerations but into very concrete, perceptive interventions. David most of the time attended our meetings in an observing capacity on behalf of the Commonwealth Secretariat. As such, he naturally conveyed the interests of that Organisation which essentially consists of common law countries.

But when he spoke, what you heard above all else were the words of an independent mind, a true academic, a brilliant scholar. He intervened at carefully chosen moments – not too early in the discussion, not too late. Not to impress the audience with his knowledge of the law, but to advance the projects. This gave him such undisputed authority that we invited him to act as an advisor to the Permanent Bureau for the last preparatory meeting of the diplomatic session on the 2007 Child Support Convention. During the final Diplomatic Session, he switched roles smoothly and participated as usual as an observer from the Commonwealth Secretariat.

So, let me start with David's contribution to the work of the Conference on behalf of the Commonwealth Secretariat. That will almost naturally lead me to take a higher vantage point and to say a few words about David's contributions more generally to the work of the Conference. All of which leads me to conclude that David McClean truly served and embodied the spirit of the Hague Conference.

B. David's contributions on behalf of the commonwealth countries

After attending the first Special Commission meeting dedicated to the practical operation of the 1970 Hague Evidence Convention in June 1978, David came back to the Hague Conference in October 1980. That was during the second week of the XIVth Diplomatic Session – his, and also my, first Diplomatic Session – where he took over from John Eekelaar as observer for the Commonwealth Secretariat, both for the discussions on general affairs and policy of the Organisation and for those on the Child Abduction Convention which was adopted at that Diplomatic Session.

Traditionally, observers at Hague Conference meetings play an important role, also as experts, to inform its work, and ample room is given to them to

speak and make proposals. As David himself noted in a contribution to Peter North's Festschrift, "an Observer from the Commonwealth Secretariat enjoys a genuine freedom to make points, usually from a general common law perspective, which some delegations are inhibited from making".[1]

David's first intervention, during the debate on general affairs and policy, is recorded in the minutes:

> Mr McClean (Commonwealth Secretariat) thanked the Conference for affording an opportunity to a non-Member of the club to state its views. The Commonwealth Secretariat welcomed the possibility of an opening of the Hague Conference. It recalled with pleasure the mutual experience of exchanging observers and participation at other levels. He pointed out that at the present time there were 41 Commonwealth countries which were not Members of the Hague Conference. All were English-speaking countries so that their participation would cause no problems on that score. As to the problem of accommodating viewpoints advanced from countries at differing levels of development, it was true that the Commonwealth contained a wide spectrum of development levels. Reference could be made to, for example, New Zealand, on the one hand, and to Fiji and Tonga, as representative of third world countries, on the other. It should not be forgotten, however, that those very small countries were already Parties to one or two Hague Conventions.
>
> Amongst those countries considerable interest existed and was being expressed in the work done and being done at the Hague Conference. It was of importance not to underestimate that fact. Nevertheless, due to the size of the countries and to their limited resources it was difficult for them to address themselves to the work of the Hague Conference. To that end, the Commonwealth Secretariat had been given a mandate by the Meeting of the Commonwealth Law Ministers to take on the function of preparing explanatory documents on the work of the Hague Conference and of drafting model laws and recommendations based upon the conventions. Consequently, the work being done at The Hague was already being supplemented and furthered at a wider world level. Clearly, there was here a fruitful area for mutual participation. If it was decided to open some of the sessions of the Conference to non-Member States, the Commonwealth Secretariat would be fully prepared to act, for example, as a channel for the distribution of documents, which could be supplemented by explanatory notes focussing on the particular problems of the smaller States. In such manner, it could operate as an effective companion to the future work of the Hague Conference if such a role were acceptable to the Member States.[2,3]

[1] David McClean, "The Hague Conference's Judgments Project", in J Fawcett (ed), *Reform and Development of Private International Law – Essays in Honour of Sir Peter North*, (Oxford University Press, 2002) 255–271 (at 261, n 12).

[2] Hague Conference on Private International Law, *Actes et Documents de la Quatorzième Session*, *Tome I, Miscellaneous matters,* Procès-verbal No 3, (The Hague, 1982) I-208.

[3] Currently, the Commonwealth comprises 56 Member States, only 15 of which are also Members of the HCCH. But many of the remaining 41 Commonwealth States have acceded to one or more Hague Conventions. Thus, there is still room for the Commonwealth Secretariat to act as an intermediary between its Members and the HCCH, as described by David McClean.

The debate that afternoon revolved around the compatibility of the need to open up the Hague Conference to other States of the world, on the one hand, and to preserve its essential character and independence, on the other. After several representatives from Member States had spoken, David took the floor and thanked the Conference for giving "a non-Member of the club the opportunity to express his opinion". His use of the word "club" is not entirely without irony. Of course, according to popular belief, an Englishman has his club and feels at home there. But here David is alluding to the fact that the Hague Conference at the time had a reputation for being a somewhat closed organisation, a club of wealthy Western and even predominantly Western European countries, and he makes three points.

First, he reminds "the club" – which at that time had 29 Member States only – that there is a whole world out there, outside its traditional membership circle, of countries which are developing – developing yes, but nonetheless demonstrably interested in private international law.

Second, he makes a strong case for the Commonwealth Secretariat as an intermediary between the non-Member English speaking Commonwealth countries and the Hague Conference. That plea obviously stands even if the Member States were to oppose a wider opening.

But finally, he diplomatically – after all, he does not represent a Member State of the organisation, he is an observer for another international organisation – encourages the Conference to open to the larger world. This opening would not be long in coming,[4] but its practical application did not go off without a hitch, as we shall see.

Before that happened, though, some traditional private international craftmanship had to be accomplished at the next, XVth Diplomatic Session in October 1984, where David participated in the debate on general affairs and policy, and on the Convention on the Law Applicable to Trusts and on their Recognition, the *pièce de resistance* of that Session (see also C. below).

During the discussion of general matters, he warned against an overly ambitious French/Swiss proposal to supplement the 1980 Convention on the Civil Aspects of International Child Abduction, which had just entered into force (1 December 1983), with complex judicial and administrative procedures. He warned that that would put off less sophisticated Commonwealth States preparing to join the Convention. With the needs of those countries very much in mind, David continued to follow the periodic HCCH meetings on the practical operation of the Child Abduction Convention in 1997, 2001 and 2006.

The following year, 1985, the Hague Conference held an Extraordinary Session, open to all States, on what became the Convention on the Law applicable

[4]The XIVth Session adopted several historic formal "Decisions on the wider opening of the Conference", See *Actes et Documents* (n 2), Final Act, D, I-63, which have subsequently been implemented to this day.

to Contracts for the International Sale of Goods. This time, David represented the Commonwealth Secretariat together with Campbell McLachlan.

This Diplomatic Session was the first to put the Decisions on the opening of the Hague Conference to the test. Unfortunately, it took place under a bad star sign. The cold war was still in full swing. A proposal by the invited non-member country Algeria, supported by the Soviet Union and its allies, that was unpalatable to Western countries, was nevertheless adopted. This is the rule in article 8 that if, in the absence of a choice of law by the parties, the sales contract provides expressly that the seller must perform his obligation to deliver the goods in the buyers' State, the law of the buyer's place of business shall apply.

The Convention never entered into force, and because of the success of the 1980 UNCITRAL Vienna Sales Convention the need for uniform choice of law rules on sales has since diminished. Yet, precisely because of that rule favouring the buyer's law, the Convention might still have some attraction to developing, including Commonwealth, countries.

In contrast to the unfortunate outcome of the 1985 Session on international sales, the broader opening of the Conference marked an initial success in the field of family law at the Centennial Session of the Hague Conference in 1993. It was during this Session that the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption was negotiated, which quickly became an essential part of the global legal order relating to children and families. David took part in the second preparatory meeting in 1991, and again in the 2005 meeting on the Convention's practical operation but could not attend the Diplomatic Conference itself.

By contrast, he was very much involved in the subsequent projects on *judgments* and, most particularly, on *child support*/*maintenance* where he was invaluable to the negotiations in general, with special attention to the needs of the Commonwealth countries.

Indeed, in the negotiations on what would eventually become the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, David saved the Conference from what could have been a major omission. What was the problem?

Between Commonwealth States, a decision on maintenance can be the combined work of courts in two States. David gave an example: based on the submissions of the wife in Jamaica, the Jamaican court issues a preliminary maintenance judgment in her favour. This judgment is then forwarded to the local court in England, which hears the arguments of the husband residing there and, building on the Jamaican decision, issues its ruling. Sometimes, like in a badminton match, the case goes back and forth between the courts of the two States.

Given this widespread practice, David tabled a proposal to include this "Shuttle cock procedure" in the Chapter on Recognition and Enforcement of the Convention. Initially, the proposal met with some incomprehension from the civil law side, which was unfamiliar with this system. David explained the

system again, stressed the procedural guarantees in his proposal, and concluded simply that "it would be unfortunate if the reciprocal system, which is the most widespread system in the world, were to be disrupted by the system it was hoped would eventually replace it".[5] Of course, he won the battle, and so ensured that the Convention took the widely practiced shuttle cock procedure on board.[6]

Before turning to David's contributions *more generally* to the work of the Conference, I should point out his pedagogical activities for the benefit of Commonwealth Member States.

David wrote several very helpful Explanatory Memoranda, "Accession Kits", on Hague Conventions for the Commonwealth Secretariat. Let me just mention his work on the Child Abduction Convention. As early as 1981, John Eekelaar had written a first version of this practical guide. In 1990, David took on the task of rewriting the Accession kit and in 1997 he revised it again.[7]

Like a good lawyer's plea, the guide hits the nail on the head by outlining the unsatisfactory legal position in Common Law countries regarding child abduction/custody issues, both in terms of legislation and case law. Then follow chapters on the substantive principles of the Convention, the administrative machinery and procedure, and finally on accession and implementation. Like the other Accession Kits David has written – on the 1980 Access to Justice Convention, on the 1961 Apostille, 1965 Service and 1970 Evidence Conventions, and, again, together with Campbell McLachlan, on the 1970 Evidence Convention – this is an extremely useful practical guide and tangible evidence of the intermediary role that the Commonwealth Secretariat, to which David referred in his speech at the XIVth session, can play.[8]

[5]Hague Conference on Private International Law, *Proceedings of the XXIst Session, Tome I (Part 2)* (The Hague, 2020), Minutes No 11, II-197 – II-198. For a comprehensive record of David McClean's public contributions to the negotiation of the 2007 Hague Child Support Convention see the article by Paul Beaumont in this issue (323).

[6]See Art 31 Decisions produced by the combined effect of provisional and confirmation orders: "Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order – (a) each of those States shall be deemed for the purposes of this Chapter to be a State of origin; (b) the requirements of Article 22 e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order; c) the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State; and d) Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.'

[7]See https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/view/260/257/1947.

[8]Undoubtedly, this Accession Kit has facilitated the accession to the Child Abduction Convention by many Members of the Commonwealth/non-Members of the HCCH, including: Bahamas, Barbados, Belize, Botswana, Fiji, Gabon, Guyana, Jamaica, Lesotho, Pakistan, St Kitts and Nevis, Seychelles, Trinidad and Tobago.

C. David's contributions more generally to the work of The Hague Conference

But David's contributions to the work of the Conference were not limited to his role as an advocate for the Commonwealth Secretariat, far from it. A constant in his interventions is the clarification of common law positions in general, as well as his concern for clear, coherent and unambiguous texts.

During the negotiations on the Trusts Convention, for example, he proposed wording to clarify that the Convention rule on tracing of trust assets if the trustee acts in breach of trust, does not apply to the bank that holds the assets not as a trustee but just as a depository. That became Article 11(3)(d) of the final text – no doubt to the relief of the banking community![9]

I mentioned David's participation in the negotiations on what has come to be known as "the Hague Judgments project". This project began in 1992, and has so far resulted in two global instruments. First, the Convention on Choice of Court Agreements adopted in 2005 and in force for the UK, and then the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters which the UK ratified in July 2024, thanks in part to the rather amazing move of the EU Commission to block the UK's accession to the Lugano Convention.[10]

So, all in all, not a bad result for "The Hague", one might now say. But the genesis of the Judgments Project has been long and at times very difficult.

In his above-mentioned contribution to *Essays in honour of Peter North,* David gives a vivid description and analysis of the drama as it unfolded during the years he participated in the project as an observer for the Commonwealth Secretariat. He faithfully attended all the meetings of the laborious judgments project, from 1997 until 2001, when the project seemed on the verge of death, because it had resulted in what David called, with fine understatement, a "in some respects profoundly depressing" interim text (*supra* n 1 at 266).

In his essay, David alludes to the frustration of some participants at that point, obviously including himself. He had tried his best, though. For example, he intervened in the debate on the definition of the defendant's forum, arguing against a Japanese/New Zealand/US proposal to replace the notion of *habitual residence* by

[9]Art 11 reads: 'A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. … In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular – … d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third-party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.'

[10]See the Communication of 4 May 2021 from the Commission to the European Parliament and the Council Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0222.

that of *residence*, and where there was more than one, by *principal residence* – only to find that the question remained unresolved in the 2001 Interim text (Interestingly, the 2005 Choice of Court Convention now uses the term *residence*, not as a ground of jurisdiction, but as a condition for its applicability, while the 2019 Judgments Convention embraces the term *habitual residence* (and not residence or principal residence)).

However, David did not return for the negotiations on the Choice of Court Convention nor on the Judgments Convention. Indeed, the Commonwealth Secretariat was not represented at either of these negotiations.[11] As for David himself, he probably felt that he had enough of the protracted Judgments negotiations.

That said, the current Working Group of the Hague Conference trying to develop binding rules for parallel proceedings can still benefit from what David wrote about *forum non conveniens* in my *liber amicorum.*[12] As he notes there, *forum non conveniens* exists in many versions: English, Australian, Canadian, American and so on. Therefore, he argues, common law lawyers face a double challenge: not only to make *forum non conveniens* acceptable to civil lawyers, but first and foremost, to agree among themselves on how it works or should work.[13]

David might have lost his appetite for the Judgments project, but that did not discourage him from taking an active part in the Maintenance project, which he followed all the way from 1999 until its completion in 2007. I already referred to his major intervention to ensure that the Child Support Convention would include the reciprocal recognition and enforcement system practiced in the Common law world. But the minutes of the Diplomatic Session are replete with David's interventions.

Sometimes he was the conscience of the common law, reminding delegations from other common law States of its correct interpretation. This happened for example, when he had to explain to the Australian delegation that when it came to enforcing a foreign maintenance judgment, the test of whether proper notice had been given was a factual test, and not an issue determined by the law of the State of origin of the judgment.[14] In fact, David was the architect of the Convention's provision on notice as a ground for refusing enforcement.[15]

[11]On the question to what extent the Hague Judgments project has nevertheless impacted on the 2017 Commonwealth Model Law on Recognition and Enforcement of Foreign Judgments, see the contribution by Abubakri Yekini to this issue of the Journal.

[12]David McClean, "The Right to a Fair Trial, *Forum Non Conveniens* and the Limits of the Possible, in The Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private international Law*, (Intersentia, 2013) 357–369.

[13]At 367.

[14]Hague Conference on Private International Law, *Proceedings of the XXIst Session, Tome I (Part 2)* (The Hague, 2020), Minutes No 10, II-185.

[15]Art 22 Grounds for refusing recognition and enforcement: "Recognition and enforcement of a decision may be refused if – … (e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin – (i) when the law of

Quite often, David intervened to ask for clarification of proposals. He saw ambiguities and contradictions that no one else had noticed and pointed them out, but always in an unassuming manner. He would then propose a text that almost invariably found acceptance. To borrow from Leonard Cohen's song: *he saw the crack – in everything – and made sure that the light gets in*. He remained sharp until the very last day of the negotiations, where he noticed a discrepancy between the English and French texts in one of the Convention's final articles.

D. Conclusion

David's complete immersion in the child support/maintenance project was probably the height of his years at the Hague Conference. He put the wealth of his experience at the service of the project, which has resulted in a Convention with a strong humanitarian slant, and which continues to attract ratifications from around the world.[16]

But more generally, David's contribution to the work of the Hague Conference has been unique. This is, of course, due to his neutral position as an observer, his status as a renowned academic, but above all to his personal commitment to and support for the Hague work – even when this took the form of an academic event outside the Peace Palace: during the colloquium on a future Hague convention on environmental damage, which the Conference organised together with the University of Osnabrück in 1994, David presented a thorough and practical outline for a possible global treaty. His memorable conclusion was: "We have begun to develop a powerful and comprehensive Hague Convention. If the political will is there, the technical problems can certainly be solved".[17]

The need for such an instrument, now also to tackle climate change, has only increased since then. If the world is finally ready one day, David's considerations should certainly serve as input for the discussion and negotiations. They sound as fresh and plausible today as they did when he presented them with conviction 30 years ago.

Sometimes, during tense moments in the debate, when I saw David in the meeting room, I felt reassured because I knew we could count on him to keep everything on track. For me, for us, the staff of the Secretariat, it really felt like he was one of us. We remain deeply grateful to David for his dedication

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the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law".

[16]See the contribution by Paul Beaumont to this issue (323).

[17]See David McClean, "Procedural Matters", in C von Bar (ed), *Internationales Umwelthaftungsrecht I – Auf dem Wege zu einer Konvention über Fragen des Internationalen Umwelthaftungsrecht* (*Towards a Convention on Issues of International Environmental Liability Law*), (Cologne,1995) 195–204 (at 204).

and support during his many years in The Hague. But beyond our personal gratitude, David can be assured that countless people around the world continue to benefit from his work now and for many years to come.

Disclosure statement

No potential conflict of interest was reported by the author.

Appendix

Meetings of The Hague conference on private international law which David McClean attended (1978–2009)

1978 First Special Commission (SC) on the operation of the Evidence Convention
1980 XIVth Session (General Affairs, Child Abduction)
1984 XVth Session (General Affairs, Trusts)
1985 Extraordinary Session (Sales Contracts)
1986 SC Succession
1987 SC Succession (March/April and September/October)
1988 XVIth Session (Succession)
1991 SC Adoption
1994 Osnabrück Conference *Towards a Convention on the Private International Law aspects of Environmental Damage*
1997 SC Child Abduction Convention SC Judgments
1998 SC Judgments (March and November)
1999 SC Maintenance
SC Judgments (June and October)
2001 SC Child Abduction Convention
XIXth Session part I (Judgments, General Affairs)
2003 SC Maintenance
2004 SC Maintenance
2005 SC Maintenance
SC on the operation of the Adoption Convention
2006 SC Maintenance
SC on the operation of the Child Abduction Convention
2007 SC Maintenance (*David attending as Consultant to the Permanent Bureau*)
XXIst Session (Child Support Convention, Maintenance Applicable Law Protocol)
Foreign Law Experts meeting (jointly with EU)
2009 SC on the operation of the Apostille, Service, Evidence and Access to Justice Conventions