

For discussion
on 31 May 2004

**Bills Committee on
Adoption (Amendment) Bill 2003**

**Explanations for excluding certain Articles in
the Hague Convention on Protection of Children and Cooperation
in respect of Intercountry Adoption
from the schedule of the Adoption (Amendment) Bill 2003**

Purpose

This paper explains why certain Articles for the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (the Hague Convention) have not been included in the schedules of the Adoption (Amendment) Bill 2003 (the Amendment Bill).

Background

2. At the meeting on 30 April 2004, Members noted that while most of the Articles of the Hague Convention have been included in Schedule 3 of the Amendment Bill¹, some Articles have not been so included. Members requested that we provide explanations for not including such Articles.

Principles

3. There are precedents whereby only some articles of an international convention need to be scheduled in the local legislation to give effect to the convention, e.g. the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention on Child Abduction) which has been implemented through the Child Abduction and Custody Ordinance (Cap. 512) and the Hague Convention on the Law applicable to Trusts and their Recognition which has been implemented through the Recognition of Trusts Ordinance (Cap. 76).

4. Of the 48 Articles in the Hague Convention, the following which are intended to have the force of law in Hong Kong have been included in the local

¹ We have proposed Committee Stage Amendments to move Articles 10 and 11 on the principles for accrediting Non-Governmental Organizations as Accredited Bodies from Schedule 3 to a new Schedule (Schedule 4) which would be applicable to both local and intercountry (Convention and non-Convention) adoptions.

legislation -

- (a) 5 Articles have been included in the main body of the legislation, as more details are needed or cross-reference to other provisions in the Amendment Bill is needed (e.g. Article 24 is implemented through the new section 20H(1) under clause 24 of the Amendment Bill). These deal with the designation of DSW as the Central Authority, refusal for recognition, recognition of full adoption and simple adoption, and the Convention to have the force of law in relation to applications received after a certain date; and
- (b) 27 Articles have been scheduled (i.e. Schedule 3). These Articles deal with the scope of the Convention, the requirements for intercountry adoptions, functions of the Central Authority, accredited bodies and competent authorities, procedural requirements in intercountry adoptions, as well as recognition and effects of Convention adoptions etc.

5. The remaining 16 Articles have not been included, for the following reasons :

- (a) they contain no obligatory requirements (e.g. Preamble and the objects of the Convention in Article 1);
- (b) they purely operate on the international plane and are to be carried out by the Central People's Government (CPG) (e.g. matters among Contracting States in Articles 43 to 48);
- (c) they can be implemented administratively (e.g. communication between the Contracting State and the Permanent Bureau of the Hague Conference on Private International Law in Article 13); or
- (d) they are not applicable to the circumstances in the HKSAR (e.g. there are no such persons or bodies mentioned in Article 22(2) in the HKSAR).

6. A more detailed analysis showing those Articles not included in Schedule 3 (i.e. 5 Articles in the main body of the legislation and 16 Articles as explained in paragraph 5 above) is set out at the Annex.

Presentation

7. Members may wish to take note of the information above to facilitate their consideration of the Committee Stage Amendments for the Adoption (Amendment) Bill 2003.

Health, Welfare and Food Bureau
May 2004

**Detailed Explanations for excluding certain Articles of the Hague Convention
from the schedules of the Adoption (Amendment) Bill 2003**

Number	Article	Reasons for Exclusion
Preamble	<p>The States signatory to the present Convention, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin, Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children, Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child, of 20 November 1989, and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement</p>	<p>It is not an article to the Convention and has no binding effect. It does not contain any obligatory requirement either.</p> <p>This is similar to the arrangement for the Hague Convention on Child Abduction².</p>

² The preamble of the Hague Convention on Child Abduction is not scheduled in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
	and Adoption Nationally and Internationally (General Assembly Resolution 41/85, of 3 December 1986), Have agreed upon the following provisions –	
1	The objects of the present Convention are – <i>a)</i> to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law; <i>b)</i> to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; <i>c)</i> to secure the recognition in Contracting States of adoptions made in accordance with the Convention.	It merely sets out the objects of the Hague Convention and does not contain any obligatory requirement. This is similar to the arrangement for the Hague Convention on Child Abduction ³ .

³ The objects of the Hague Convention on Child Abduction are not scheduled in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
6	<p>(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.</p> <p>(2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.</p>	<p>Article 6(1) will be given effect by the new section 20E under clause 24 of the Amendment Bill, by which DSW will be designated as the Central Authority.</p> <p>Article 6(2) deals with the rights and responsibilities of the Contracting State as a whole (i.e. the rights and responsibilities of the Central People's Government (CPG)).</p> <p>The above arrangements are similar to those for the Hague Convention on Child Abduction⁴.</p>
13	<p>The designation of the Central Authorities and, where appropriate, the extent of their functions, as well as the names and addresses of the accredited bodies shall be communicated by each Contracting State to the Permanent Bureau of the Hague Conference on Private International Law.</p>	<p>Communication of such information between the CPG/HKSARG and the Permanent Bureau of the Hague Conference on Private International Law can be done administratively.</p>

⁴ Article 6(1) of the Hague Convention on Child Abduction has been given effect by section 5 of the Child Abduction and Custody Ordinance. Article 6(2) of the Hague Convention on Child Abduction has **not** been scheduled in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
22(2)	<p>Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who –</p> <p><i>a)</i> meet the requirements of integrity, professional competence, experience and accountability of that State; and</p> <p><i>b)</i> are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.</p>	<p>This Article provides for the processing of intercountry adoption applications by some persons or bodies other than Accredited Bodies. Given the small number of adoption cases in Hong Kong and for quality assurance, we have no intention to allow such persons or bodies to process any adoption applications for the time being.</p>
23(2)	<p>Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, notify the depositary of the Convention of the identity and the functions of the authority or the authorities which, in that State, are competent to make the certification. It shall also notify the depositary of any modification in the designation of these authorities.</p>	<p>Communication of information between the CPG/HKSARG and the depositary of the Hague Convention can be done administratively.</p>
24	<p>The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.</p>	<p>This Article will be given effect by the new section 20H under Clause 24 of the Amendment Bill.</p>

Number	Article	Reasons for Exclusion
25	<p>Any Contracting State may declare to the depositary of the Convention that it will not be bound under this Convention to recognize adoptions made in accordance with an agreement concluded by application of Article 39, paragraph 2.</p> <p>Article 39(2) provides that “Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.”</p>	<p>This Article merely operates on the international plane but we propose that Committee Stage Amendments (CSAs) be introduced to enable the Secretary for Health, Welfare and Food to make an order for possible non-recognition of adoption arrangements made in accordance with the agreements concluded by application of Article 39(2). The order would only be made if and when the CPG makes such a declaration.</p> <p>Adoption orders made in accordance with such agreements will still be recognized if they meet the requirements in section 17 of the Adoption Ordinance. This is in line with the arrangements for non-Convention adoptions.</p> <p>The draft CSAs would be along the following line :</p> <p>(1) Subject to subsection (2), the Secretary for Health, Welfare and Food may by order published in the Gazette declare that, for the purposes of this Ordinance, such adoptions as specified in the order shall be excluded from the meaning of "Convention adoption".</p> <p>(2) An order under subsection (1) may be made</p>

Number	Article	Reasons for Exclusion
		<p>only if -</p> <ul style="list-style-type: none">(a) the People's Republic of China has made a declaration under Article 25 of the Convention to the effect that Hong Kong will not be bound to recognize adoptions made in accordance with an agreement concluded by application of paragraph 2 of Article 39; and(b) the order is made in respect of adoptions made in accordance with the agreement.

Number	Article	Reasons for Exclusion
26-27	<p>26 (1) The recognition of an adoption includes recognition of</p> <ul style="list-style-type: none"> <i>a)</i> the legal parent-child relationship between the child and his or her adoptive parents; <i>b)</i> parental responsibility of the adoptive parents for the child; <i>c)</i> the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made. <p>(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having this effect in each such State.</p> <p>(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognizes the adoption.</p>	They will be given effect by, among others, sections 20F and 20G of the Amendment Bill.
28	The Convention does not affect any law of a State of origin which requires that the adoption of a child habitually resident within that State take place in that State or which prohibits the child's placement in, or transfer to, the receiving State prior to adoption.	This Article contains no obligatory requirement. It merely states that the Convention does not affect the domestic law on certain restrictions in placement etc. and there is no need to include this statement in the local legislation.

Number	Article	Reasons for Exclusion
32(2)	Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.	This will be given effect by amendment to section 22 under clause 27 of the Amendment Bill.
33	A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken.	Such reporting can be implemented by administrative means.
35	The competent authorities of the Contracting States shall act expeditiously in the process of adoption.	This has all along been a principle adopted by SWD and the NGOs currently involved in adoption. We will stipulate this in our accreditation system for ABs. There is no need to include this in the local legislation.
38	A State within which different territorial units have their own rules of law in respect of adoption shall not be bound to apply the Convention where a State with a unified system of law would not be bound to do so.	It merely confirms the international character of the Convention and does not contain any obligatory requirement. This is similar to the arrangement for the Hague Convention on Child Abduction ⁵ .

⁵ Article 33 of the Hague Convention on Child Abduction has not been included in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
39	<p>(1) The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.</p> <p>(2) Any Contracting State may enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.</p>	<p>This is an act of the Contracting State and is a matter for the CPG. Moreover, there is no such agreement applicable to the HKSAR. If there is any such future agreement, we would need to have specific legislative provisions to implement the agreements and to introduce consequential amendments to the Adoption Ordinance if necessary.</p> <p>This is similar to the arrangement for the Hague Convention on Child Abduction⁶.</p>
40	No reservation to the Convention shall be permitted.	This Article operates on the international plane and is to be observed by the Contracting States when joining the Convention. It is not necessary to include this in the local legislation.
41	The Convention shall apply in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in the receiving State and the State of origin.	This will be given effect by section 20D under clause 24 of the Amendment Bill.

⁶ Article 36 of the Hague Convention on Child Abduction has not been included in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
42	The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention.	This article covers the responsibility of the Secretary General of the Hague Conference on Private International Law. It is not necessary to include this in the local legislation.
43-48	<p>Article 43</p> <p>(1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Seventeenth Session and by the other States which participated in that Session.</p> <p>(2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.</p> <p>Article 44</p> <p>(1) Any other State may accede to the Convention after it has entered into force in accordance with Article 46, paragraph 1.</p> <p>(2) The instrument of accession shall be deposited with the depositary.</p> <p>(3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph <i>b</i>) of Article 48. Such an objection may also be raised by States at the time when they ratify, accept or approve the</p>	<p>They relate to the operation of the Convention among Contracting States which only operate on an international level and are not matters within the competence of the HKSARG.</p> <p>This is similar to the arrangement for the Hague Convention on Child Abduction⁷.</p>

⁷ Articles 37 to 45 of the Hague Convention on Child Abduction have not been included in the Child Abduction and Custody Ordinance.

Number	Article	Reasons for Exclusion
	<p>Convention after an accession. Any such objection shall be notified to the depositary.</p> <p>Article 45</p> <p>(1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.</p> <p>(2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.</p> <p>(3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.</p> <p>Article 46</p> <p>(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 43.</p> <p>(2) Thereafter the Convention shall enter into force –</p> <p style="padding-left: 20px;">a) for each State ratifying, accepting or approving it subsequently, or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance,</p>	

Number	Article	Reasons for Exclusion
	<p>approval or accession;</p> <p><i>b)</i> for a territorial unit to which the Convention has been extended in conformity with Article 45, on the first day of the month following the expiration of three months after the notification referred to in that Article.</p> <p>Article 47</p> <p>(1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary.</p> <p>(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.</p> <p>Article 48</p> <p>The depositary shall notify the States Members of the Hague Conference on Private International Law, the other States which participated in the Seventeenth Session and the States which have acceded in accordance with Article 44, of the following –</p> <p><i>a)</i> the signatures, ratifications, acceptances and approvals referred to in Article 43;</p> <p><i>b)</i> the accessions and objections raised to accessions referred to in Article 44;</p> <p><i>c)</i> the date on which the Convention enters into force in accordance with Article 46;</p>	

Number	Article	Reasons for Exclusion
	<p><i>d)</i> the declarations and designations referred to in Articles 22, 23, 25 and 45;</p> <p><i>e)</i> the agreements referred to in Article 39;</p> <p><i>f)</i> the denunciations referred to in Article 47.</p> <p>In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.</p> <p>Done at The Hague, on the 29th day of May 1993, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Seventeenth Session and to each of the other States which participated in that Session.</p>	