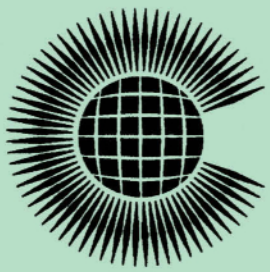
The Hague Convention on the Civil Aspects of International Child Abduction

Explanatory Documentation
prepared for
Commonwealth Jurisdictions

Revised 1997



Commonwealth Secretariat

The Hague Convention on the Civil Aspects of International Child Abduction

Explanatory Documentation prepared for
Commonwealth Jurisdictions by
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in association with
the Commonwealth Secretariat

June 1997

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PREFACE

In 1981 the Commonwealth Secretariat published explanatory documentation on The Hague Convention on the Civil Aspects of International Child Abduction, prepared by Mr. J M Eekelaar. This appeared in the series of "Accession Kits" for international conventions prepared by the Commonwealth Secretariat, designed to keep Commonwealth Governments, who are not parties to the Conventions with which they deal, fully informed of relevant international developments and to facilitate accession by them should they wish. A number have chosen to do so.

In 1990, in the light of a significant number of countries which had become parties and of case law that had built up, a fully rewritten "accession kit" on this Convention prepared by Professor David McClean was published by the Secretariat.

Over the past seven years, further developments have taken place which justify the revision of the "kit". This edition has also been prepared for the Secretariat by Professor David McClean who has, for many years, acted as a consultant to the Secretariat on Mutual Legal Assistance matters and in particular on Hague Conventions in that field. The Secretariat takes this opportunity of expressing, again, its indebtedness to Professor McClean for his significant and continuing contributions to Commonwealth law and assistance to Commonwealth Law Ministers in so many tangible ways.

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June 1997

CHAPTER ONE

THE NEED FOR A CONVENTION

Introduction

On 25 October 1980 a Convention on the Civil Aspects of International Child Abduction was signed at The Hague. The English text of the Convention is reproduced in Appendix A, below. The Convention was drawn up under the auspices of the Hague Conference on Private International Law, the specialist inter-governmental agency working in that field and in which the Commonwealth Secretariat enjoys Observer status; the inclusion of the subject of international child abduction in the agenda of the Hague Conference was largely the result of an initiative by the Canadian Government. The Convention has proved to be one of the great successes of the work of the Hague Conference, and it has benefited from the attention given in other fora to the needs of children, notably in the work leading to the UN Convention on the Rights of the Child.

As at 17 March 1997 the following 45 States had ratified or acceded(*) to the Hague Child Abduction Convention; in the case of accessions the entry into force of the convention between the acceding States and another Party depends upon acceptance of the accession by the other Party concerned:

Argentina
Australia (States and mainland Territories)
Austria
*Bahamas
*Belize
Bosnia and Herzegovina
*Burkina Faso
Canada
*Chile
*Colombia
Croatia
*Cyprus
Denmark (not Faroe Islands or Greenland)
*Ecuador
Finland
France
Germany
Greece
*Honduras
Hungary
*Iceland
Ireland
Israel
Italy
Luxembourg
Former Yugoslav Republic of Macedonia
*Mauritius
*Mexico
*Monaco
Netherlands (for the Kingdom in Europe)
*New Zealand
Norway
*Panama
*Poland
Portugal
*Romania
*Saint Kitts and Nevis
*Slovenia
Spain
Sweden
Switzerland
United Kingdom (and the Isle of Man)
United States of America
Venezuela
*Zimbabwe

At one of the periodic meetings of a Special Commission of the Hague Conference to review the operation of the Convention held in March 1997, the representatives of Belgium and of South Africa indicated that legislation to implement the Convention was about to be introduced.

It will be seen that the Convention has already gained very considerable support from both common law and civil law countries, and that a number of Commonwealth countries are already Parties to it. Its principles are also clearly reflected in the Inter-American Convention on the International Return of Children signed in Montevideo on 15 July 1989, and it may well be that consideration of the Inter-American Convention by signatory Governments will lead to additional accessions to the Hague Convention itself. For the Commonwealth, Law Ministers made their collective view clear in the Communiqué of their Meeting at Harare in July-August 1986:

> Ministers were concerned at international child abductions by parents, a topic they had discussed at length in the past. They re-affirmed their belief that the Hague Convention on the Civil Aspects of International Child Abduction offered an effective international mechanism for ensuring the return of a child abducted in violation of custody rights, and that this should serve as the basis for expanding Commonwealth co-operation in this area.

International child abduction is undoubtedly a growing problem, although it is difficult to give precise figures. The Table represents an attempt to analyse the statistics supplied to the 1997 Special Commission meeting by a number of Central Authorities. Despite the efforts of the Permanent Bureau of the Hague Conference to gather statistics in common form, the data are neither complete nor easily interpreted. It is, however, clear that over 1,000 requests for assistance were received by the reporting Central Authorities in 1966 (or the most recent period of twelve months used as the basis for the statistical return).

The unsatisfactory legal position

It is also a problem with which traditional legal rules provide no satisfactory solution. A foreign court order as to the custody of a child may not be recognised and enforced under the normal legislation as foreign judgments, because it will almost certainly be variable by the foreign court, and may be regarded as not "final and conclusive". In any event, that legislation is usually apt only for judgments requiring the payment of sums of money, not those affecting personal status or the care of children. All this means that child custody has to be treated as a distinct category, and distinct principles have to be developed for the resolution of cases falling within it.

It has to be admitted that the courts in common law jurisdictions have failed to develop a consistent approach to the handling of international child abduction cases. That state of affairs is not at all surprising when one considers some characteristics of the cases and of the legal context in which they have to be addressed.

The first characteristic is that the cases are extremely "fact-sensitive". That means in turn that it is difficult for courts to state guiding principles at other than a very generalised level.

The second is that where such principles have been stated, as in the leading Privy Council case of *McKee v McKee* ([1951] AC 352), their interpretation has proved to be controversial. Some courts have interpreted *McKee v McKee* as requiring the courts of a country in which the abducted child is found to review the merits in full, others as allowing the peremptory return of the child to the country from which he was abducted without an examination of the merits, and others again as requiring such a return in the absence of evidence of a grave risk to the child were such an order made.

Table

HAGUE CONVENTION CASES FOR 1996
(OR MOST RECENT YEAR)
AS REPORTED BY CENTRAL AUTHORITIES

	Requested	**Requesting**
Argentina	9	40
Australia	39	58
Austria	12	18
Burkina Faso	1	0
Canada	26	44
Cyprus	7	6
Denmark	7	12
Finland	10	3
France	36	n/a
Germany	114	81
Hungary	10	13
Ireland	40	47
Italy	70	n/a
Netherlands	54	6
Norway	13	13
Portugal	12	7
Romania	6	0
Spain	40	16
Switzerland	27	28
UK	186	217
USA	286	367
Total cases	**1005**	**976**

The following cases are picked up from the above

Bahamas	3	1
Belize	1	3
New Zealand	29	32
Zimbabwe	2	0

The final characteristic is the prevalence of the view that in this as in other types of case involving children, the welfare of the child should be the paramount consideration. This is undoubtedly an important factor, but the 'welfare principle' is not actually self-defining. It embodies the assumptions prevalent in a particular society, on such matters as whether a young boy is better brought up by his father or his mother. So an appeal to the welfare principle is not to some international standard but to the values of a particular legal system; an appeal to the welfare principle may encourage a court to form its own judgment of the merits of the case rather than accept the position applying under some foreign system of law or indicated in a decision of a foreign court. It compounds the underlying legal uncertainty as to the weight to be given to foreign law in this area as a whole.

There is, indeed, a tension within the welfare principle in the particular context of international child abduction which presents the courts with a dilemma. A full examination of the factors which need to be examined to give proper weight to the welfare principle would require the assembly of a quantity of evidence, much of which would have to be obtained from the other country concerned. This could take a very considerable amount of time, creating delay in the resolution of the case which all would recognise as itself likely to prejudice the welfare of the child.

International action

The unhappy state of the common law position as reached by case-law development makes recourse to international agreement, of value in itself for purely practical reasons, even more desirable. One approach is to provide for the international enforcement of custody orders along the lines familiar within federal states, as in the Extra-Provincial Custody Orders legislation of the Canadian jurisdictions. This type of approach is found in some regional arrangements such as the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, prepared under the auspices of the Council of Europe and signed on May 20, 1980. A decision relating to custody given in a Contracting State is to be recognised, and where it is enforceable in the State of origin made enforceable, in any other such State. The problem with this approach is that it relies entirely upon the existence of a court order in the foreign State, and invites difficulties as to jurisdiction. The approach may be helpful in some cases, but a broader set of principles is necessary.

This set of principles is to be found in the Hague Convention. Its main characteristics are that

- it covers a very wide range of circumstances in which a child is taken across an international boundary or retained outside his own country;
- it does not depend upon the existence of any court order in that country;
- it provides a clear general rule that the child must be returned forthwith, with limited and carefully drafted exceptions to protect the child's interests;
- it ensures that official assistance is made available promptly both to assist parents wishing to invoke its provisions and also to intervene effectively to secure the welfare of the child pending its return.

Most countries find that becoming a Party to the Hague Convention, while it may add some administrative expense, saves much time and expense in terms of legal aid costs, and the time of judges and other court staff. The law is much clearer, and often a child is returned voluntarily once the position is explained to the abductor. The whole process is swifter and less stressful than the long-drawn out battles which can be found in the pre-Convention cases. Above all, this serves the interests of the child. The future of the family can be resolved without the added pressures created by the abduction, and decisions as to the child's future will be taken in the most appropriate forum, and so be more soundly based.

In Chapter Two a detailed account of the principles of the Convention is given, with reference to the case-law in a number of jurisdictions. Information as to the actual operational details is in Chapter Three, and Chapter Four examines accession and legislative implementation.

CHAPTER TWO

THE SUBSTANTIVE PRINCIPLES OF THE CONVENTION

The central tenet of the Hague Convention is that children should be returned to their State of habitual residence if they have been wrongfully removed from that State or wrongfully retained outside it. It is not a Convention for the reciprocal recognition and enforcement of foreign custody orders. It seeks to protect children by protecting existing "rights of custody". These are rights attributed to a person, institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before its removal or retention. A removal or retention is considered wrongful if it is in breach of such rights (Article 3). The Convention rests on the belief that any change in those rights is best considered by the courts of the State of habitual residence, and not by those of any State to which the child may have been abducted.

Rights of custody

It is important to consider, therefore, what the expression "rights of custody" means. Different countries may have different understandings of the ideas denoted by words such as "custody", "guardianship" and "care and control". Some have the concept of "parental rights"; in others, such as the United Kingdom since the Children Act 1989, this concept and that of "custody" are avoided in current legislation, ideas of "parental responsibility for the child" and of the child's residence being preferred. What is important, however, is the definition of "rights of custody" used in the Convention.

The rights of custody with which the Convention is concerned are defined (Art. 5(a)) as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; this will include, for example, the right of a parent who does not have custody of a child to give or refuse consent to the removal of the child from the jurisdiction by the custodian parent (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 651, CA).

Such rights, by whatever name they might be called in a State's domestic legal system, are "rights of custody" for the purposes of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated. Hence, if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention.

The father of an illegitimate child, even under a legal system which regards the mother as the sole legal guardian, may be regarded as having 'rights of custody', especially where is both actually caring for a child and has the right to apply to the courts for legal custody rights (Cf *Re J (A Minor: Custody Rights)* [1990] 2 AC 562, HL and *Re B (A Minor) (Abduction)* [1994] 2 FLR 249, CA).

This may be of crucial significance if, for example after a divorce, the court grants joint custody to *both* parents but care and control to one only; or, more generally, if parents share parental responsibility. A joint custodian would normally be entitled to be consulted as to where the child should live, and if the custodian who has care and control removes the child without consulting him or her, that is a wrongful removal. The same holds where, without any court order, parents have joint rights as natural guardians of their children to decide where they are to reside. Again, the result would be the same if the court had specifically stated that a

child should not be removed from the jurisdiction without the consent of one parent; this has been held in an English case (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 651, CA) in respect of an Australian order, and by a French court (*Procureur-General v Baume* (Aix-en-Provence CA, 23 March 1989)) in respect of an English order.

The reference to rights of custody being attributed to an institution or body applies most naturally where the child concerned is in the care of a social welfare agency of national or local government or a charitable institution, but it has also been applied in certain circumstances to a court. These cases are those in which the child has been made a ward of court (*Re J (Abduction: Ward of Court)* [1989] Fam 85) or where, by virtue of being currently seised of a custody issue, the court is actively exercising its power to determine the place of residence of the child (*B v B (Abduction: Custody Rights)* [1993] Fam 32, CA). This has been held to be the case where an interim (as opposed to a final) custody order contains a prohibition on the parent awarded custody removing the child from the jurisdiction (*Thomson v Thomson* [1994] 119 DLR (4th) 235, 279-281, SupCtCan).

The rights of custody must exist under the law of the State in which the child was habitually resident immediately before the removal or retention (*In the Marriage of G and O* [1989] FLC 92-103; *In the Marriage of Brandon* [1990] FLC 92-153) and must have been actually exercised at the time of removal or retention (or would have been but for the removal or retention) (Art. 3. See also Art. 13(a)). The requirement of actual exercise of rights of custody does not mean that the child must have been in the care of the person having those rights; granting permission for the child to spend time with the other parent can be an exercise of those rights, and does not entitle the other parent to retain or remove the child (*Re W (Abduction: Procedure)* [1995] 1 FLR 878).

The custody rights referred to above may have arisen automatically under the law of the State of habitual residence or may have been defined under a decision or agreement operative under the law of that State (Art. 3(2)). This makes it clear that the Convention does not protect only custody rights arising under a court order. If a parent abducts a child before any such order is made, the other parent may seek its return under the Convention without necessarily seeking an order in his or her home State. This should assist in the speed of actions securing the return of such children. On the other hand, the action by that parent in seeking an *ex parte* custody order may help establish the legal position in the State of the child's habitual residence, and possibly remove the need for an enquiry on this matter (see Art. 15).

Children protected by the Convention

The convention applies to any child who was habitually resident in a Contracting State immediately before the breach of custody rights (Art. 4). The phrase "habitually resident" is, as a matter of policy, left undefined so that the facts can be considered free from any technical rules. In practice, the courts have seldom found any difficulty on this point. See, for example, *Re A (Minors) (Abduction: Habitual Residence)* [1996] 1 WLR 25 (two years' military posting of father gave habitual residence.

The court, in considering a request for the return of the child, must determine the issue of habitual residence on the basis of the available evidence; the normal rules as to burden of proof are inapposite, as the proceedings are not adversarial but *sui generis* (*Re N (Child Abduction: Habitual Residence)* [1993] 2 FLR 124, CA; *In the Marriage of Hanbury-Brown and Hanbury-Brown* [1996] FLC 92-671, Full Ct). Of particular relevance in abduction cases is the established in many jurisdictions that the unilateral removal of a child by one parent, without the consent or acquiescence of the other, does not change the habitual residence of the child

(*Re J (A Minor) (Abduction)* [1990] 2 AC 562, 572, CA; *Re A F (A Minor) (Abduction)* [1992] 1 FCR 269, CA). In this context, it is not possible to treat a child as habitually resident in two different countries; such a finding would be incompatible with the aims of the Convention (*Re V (Abduction: Habitual Residence)* [1995] 2 FLR 992; *In the Marriage of Hanbury-Brown and Hanbury-Brown* [1996] FLC 92-671, Full Ct; *Cameron v Cameron*, 1996 SLT 306, IH).

The Convention ceases to apply when the child attains the age of sixteen years (Art. 4), and any pending applications automatically lapse at that date.

Wrongful removal and wrongful retention

The Convention refers to "wrongful removal" or "wrongful retention", meaning in each case removal or retention out of the jurisdiction of the courts of the state of the child's habitual residence. The contrast between the two phrases is between an act of removal which at once breaches custody rights, and a keeping of the child which only breaches those rights when it is continued beyond the limits of lawfulness in terms of time; a typical example of wrongful retention occurs when a child is not returned after an agreed period of access (*Re H (Abduction: Custody Rights)* [1991] 2 AC 476). For the purposes of the Convention, "retention" is not a continuing state of affairs, but something which occurs when the child should have been returned to its custodians, or when the person with rights of custody refuses to agree to an extension of the child's stay in a place other than that of its habitual residence. The Convention only applies where the removal or retention takes place after it came into force as between the relevant countries.

Where a child is removed by the only parent with rights of custody, the removal cannot be wrongful. A later order of the courts of the foreign State giving custody rights to the other parent cannot render the continuing keeping of the child "wrongful retention" (*Re J (A Minor) (Abduction)* [1990] 2 AC 562 (also reported *sub nom C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961); *Thomson v Thomson* (1994) 119 DLR (4th) 235, 284, SupCtCan).

The Convention contains provisions as to the taking of judicial notice of the law of the State of the habitual residence of the child, and of decisions taken in that State (Art. 14). An application for the return of a child may be accompanied by certificates or affidavits as to the law of the State of the child's habitual residence; but this is not a mandatory requirement and failure to observe it is not fatal to, though may delay, the application (Art. 8(f)). The judicial or administrative authorities of a Contracting State may request the applicant to obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention was wrongful (Art. 15); this will only be done if there is real doubt as to the legal position in the State of habitual residence, for unnecessary delays are to be avoided (*Perrin v Perrin*, 1994 SC 45).

Action to return the child

The Central Authority established for the purposes of the Convention (for the system of Central Authorities, see Chapter Three) in the State where a child is, on receiving an application for the return of the child either directly from a person, institution or body concerned or from another Central Authority, must take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child; failing an amicable settlement it must initiate, or facilitate the institution of, proceedings with a view to obtaining an order for the return of the child. The competent authorities are to act expeditiously in such proceedings,

and where there has been wrongful removal or retention must order return of the child forthwith, unless certain grounds for refusal are made out (see Arts 7-12).

Grounds for refusing to return a child

The policy of the Convention is to secure the swift return of the child. A heavy burden therefore rests upon an abducting parent who seeks to invoke one of these grounds for refusal. In considering the grounds for refusal, the court must take into account the information as to the social background of the child provided by the Central Authority or other competent authority of the State of the child's habitual residence (Arts 7(d), 13); but the mere making of allegations against the applicant will not cause the court to adjourn for further such information or for other evidence where the resulting delay would defeat the purposes of the Convention. In general, the court will decide the case on the basis of the affidavits; to adjourn for the taking of oral evidence is likely to lead to delays incompatible with the speedy response expected under the Convention (*Re E (A Minor) (Abduction)* [1989] 1 FLR 135, CA; *Parsons v Styger* (1989) 67 OR (2d) 3, 11, OntCA; *In the Marriage of Gazi* [1993] FLC 92-341, Full Ct; *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan).

Judicial or administrative authorities in the requested State are obliged to return "forthwith" to its habitual residence any child removed to or retained in that State in breach of custody rights as defined in the Convention provided that proceedings for the child's return have been instituted within a period of a year from the removal or retention. The only grounds for refusing to return the child are those expressly permitted by the Convention.

These grounds will be examined in turn:

(i) If the party opposing the return of the child establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention or had consented to or subsequently acquiesced in the removal or retention (Article 13(1)(a)).

This does little more than to reiterate the requirement that, for the removal to be wrongful, the custody rights breached must have been actually exercised, either jointly or alone, at the time of the breach or would have been so exercised were it not for the breach. However, it does make it clear that the burden of proving this lies on the party opposing return, at least where the custody right alleged to have been breached is the right relating to the care of the person of the child.

Where the right breached is the right to determine the child's place of residence, this ground of opposition does not seem to apply, although it is possible to conceive of such a right being "actually exercised". It is also hardly conceivable that this ground of opposition could apply where the reason why the rights were not exercised is precisely because the child was abducted. It was to cover this situation that the words "or would have been exercised but for the removal or retention" were added to Article 3(1)(b). In order to avoid contradiction within the Convention, and also to give effect to its manifest purpose, some words such as "unless those rights would have been exercised but for the removal or retention" must be implied after "retention" where it first occurs in Article 13(1)(a).

Thus the Convention covers the case where a parent, who has had the care of a child during the course of litigation, removes the child the moment the court orders its transfer to the other parent. That other parent "would have" exercised custody rights were it not for the removal or retention. Even if the removal took place *before* the order was made such a case would normally come within the Convention for while custody is in dispute the parents will normally

retain their equal rights to possession of the person of the child (and it could be argued that the parent who does not exercise this right during the dispute waives it on the understanding that the matter will be decided by the court and would not have done so if the child was likely to be removed) or at least the right to determine the place where the child should live.

One situation does, however, fall outside the Convention. This is where one of the parties to the proceedings (A) has no rights of custody, the other party (B) removes the child before the decision is made and the decision confers custody rights on A. The removal would not have been in breach of any custody right of A existing at the time of the removal. The situation could arise where a parent who has been given access rights only in an earlier order seeks, and obtains, custody; or where a welfare authority is seeking an order granting it parental rights. The Convention does not *prevent* the return of such children if this is thought appropriate (Articles 18 and 36).

So far as consent or acquiescence is concerned, it is curious that the ground of opposition expressly applies only where the person, institution or other body "having the care of the person of the child" consents to or acquiesces in the removal and not, at least expressly, where the person having the right to determine the place where the child shall live so consents or acquiesces. It is surely highly relevant to such circumstances. It would be gravely anomalous if the ground did not apply to that situation and it would seem reasonable, when implementing the Convention, that States should make it do so.

In the structure of the Convention text, "consent" is something which occurs at or before the time of removal or retention, in contrast to subsequent acquiescence. Consent can be inferred from the dealings between the parties some time before the removal or retention. Evidence of consent must be clear and compelling, and the onus of proof lies on the party alleging consent. Apparent consent obtained by deception will be disregarded (*Re B (A Minor) (Abduction)* [1994] 2 FLR 249, CA). A limited consent, for example to the abducting parent removing the child for a short period for a foreign holiday, does not amount to "consent" to a wrongful removal taking place within that period, e.g. by overstaying (see *Ottens v Ottens* (Family Court of Australia, 1988, unreported)).

"Acquiescence" in the sense in which it is used in the Convention is a pure question of fact, to which rules of domestic law as to the meaning of the term in other contexts have no application. The House of Lords in *Re H (minors) (abduction: acquiescence)* ([1997] 2 All ER 225, HL) rejected a distinction between "active" and "passive" acquiescence, a distinction not found in the text of the Convention, but one which had found favour in earlier English cases. The court is to enquire into the subjective state of mind of the wronged parent: has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? As with any enquiry into a state of mind, the court may draw inferences from the parent's outward and visible acts.

The House of Lords nonetheless laid down a rule of law, which justice required by way of exception. In exceptional cases, where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the children and are inconsistent with such return, he will be held to have acquiesced and will not be allowed to assert that he secretly intended to claim their return.

The scope of this exceptional class of case is not wholly clear. The House of Lords expressly approved *Re AZ (A Minor) (Abduction: Acquiescence)* ([1993] 1 FLR 682, CA) where a parent knowing of his rights made a statement indicating his acceptance of the situation at least for

the time being. This suggests, as was held in earlier cases, that even express words will not give rise to an inference of acquiescence where they are spoken without knowledge of the possibility of the rights being enforced; but awareness in general terms may suffice, even if the wronged parent was unaware of the expeditious and effective enforcement machinery provided by the Convention. Although it was formerly held as a matter of law that a single statement would amount to acquiescence even if retracted a short time later, the approach of the House of Lords supports the view, taken in reaction against that rigorous position, that a statement may be disregarded if it is clearly withdrawn before the abducting parent has done anything in reliance upon it, and that statements made in a state of confusion and emotional turmoil may to some extent be discounted (*Dept. of Health and Community Services v Casse* [1995] FLC 92-629).

In considering the effect of inactivity by the wronged parent, the court may take into account the fact that the wronged parent had initially received erroneous legal advice, and will examine whether in all the circumstances the failure promptly to commence proceedings does point to an acceptance of the situation. In *Re H. (minors) (abduction: acquiescence)* itself, the House held that for an Orthodox Jew to pursue remedies in the rabbinical courts in the country of habitual residence, which the abducting parent would know to be a binding religious requirement, was not inconsistent with an intention later to seek a remedy under the Convention.

(ii) If the party opposing the return of the child establishes that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation (Article 13(1)(b)).

This is the ground relied upon in almost all contested cases. The courts have recognised that some psychological harm to the child may be inherent in the very conflict which is before the court or might normally be expected to occur on the transfer of a child from one parent to another; the Convention envisages more substantial harm, a severe degree of harm hinted at by the later reference to the child being "*otherwise* ... in an *intolerable* situation" (*Re A (A Minor) (Abduction)* [1988] 1 FLR 365, CA; *In the Marriage of Gsponer* (1988) 94 FLR 164; *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan).

A parent may not rely on his own conduct, for example a refusal to accompany a child were the child to be returned to the foreign country, as creating a grave risk of psychological harm (*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, CA; *McCarthy v McCarthy*, 1994 SLT 743; *Medhurst v Markle* (1995) 17 RFL (4th) 428, Ont; *Thorne v Dryden-Hall* (1995) 18 RFL (4th) 15, BC).

The reference to the child being placed in an intolerable situation was in fact prompted by a consideration during the drafting of the Convention of the facts of an English case (*Re C (Minors)* [1978] Fam 105, CA) where it seemed very likely that the return of children to a distant jurisdiction would ultimately lead to their transfer back to England. The phrase in the Convention has been applied in similar circumstances but the courts have also considered in this context the material circumstances in which the child would be placed were he returned.

There are relatively few reported cases in which return has been refused. Examples are the Scottish case of *McMillan v McMillan* (1989 SLT 350, IH), where the applicant parent had a history of alcoholism and depression, and the abducting parent would probably be unable to accompany child if returned and the English case of *Re F (A Minor) (Abduction: Custody Rights Abroad)* ([1995] Fam 224, CA), where, if returned, the child would have to live in the family home where father had mistreated him, which would disturb the child.

Where the risk is of relatively slight harm, or where the risk is countered by the protection afforded by the courts and social welfare agencies of the State of habitual residence, the child will be returned for the issues to be resolved in the courts of that State (*Murray v Director, Family Services, ACT* [1993] FLC 92-416; *Cooper v Casey* [1995] FLC 92-575, Full Ct). The courts have adopted the practice in a number of cases of requiring the applicant, before return will be ordered, to accept conditions or to give undertakings, for example as to the maintenance and accommodation of the child and the abducting parent after their return; for examples of terms which may be agreed, see *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA) and *Re G (A Minor) (Abduction)* ([1989] 2 FLR 475, CA). Although the use of such undertakings has won judicial approval in a number of countries (see *Thomson v Thomson* [1994] 119 DLR (4th) 235, SupCtCan; *De L v Director General, NSW Dept. of Community Services* (High Ct. of Aust, 1996, unreported) there are dangers in the practice of accepting undertakings of this sort. The practice can come close to qualifying the clear duty of the court to order the child's return; and the court "must be careful not to usurp or be thought to usurp the functions of the court of habitual residence"(*Re M. (Abduction: Undertakings)* [1995] 1 FLR 1021, CA).

In *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA), the court ordered the return of a child to Australia; the mother faced Australian proceedings for contempt of court if she returned, and the relationship between the mother and child was such that its disruption would create a grave risk of psychological harm. Before the Court of Appeal hearing the father agreed to drop the contempt proceedings, and offered to pay air fares, maintenance, and school fees and provide a car and accommodation for the mother. The mother was still unwilling to return, but the court held that the abducting parent could not in that way create, and rely upon in her own favour, a risk of harm. The case is interesting in that it raises the general issue of the effect of contempt or criminal proceedings against the abductor; opinion amongst Central Authorities as reflected at meetings of the Special Commission of the Hague Conference to review the workings of the Convention is divided, some seeing these as useful additional pressures for return, others fearing that they might actually be a basis for arguments against the return of the child in certain circumstances.

Undertakings given to the court ordering return cannot, however, be enforced in the State of habitual residence, and there have been some notable cases in which the parent giving the undertakings has reneged on them once the child has arrived in that State (see *In the Marriage of McOwan* (1993) 17 FLR 377). An alternative approach, with the same object of ensuring the welfare of the child after return, is being stressed by the courts and was welcomed by the Special Commission of the Hague Conference at its March 1997 meeting. This is to stress the responsibility of the Central Authority of the State of habitual residence to "provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child" (Art. 7(h)). This was f

(iii) If the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views (Article 13(2)).

In giving weight to the wishes of the child, the Convention is in harmony with Article 12 of the UN Convention on the Rights of the Child. The term "objects" is to be given its natural meaning (*Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242, CA; *Urness v Minto*, 1994 SC 249, IH; *De L v Director General, NSW Dept. of Community Services* (High Ct of Aust, 1996, unreported)). The courts have been careful to avoid laying down a particular age below which a child's views will not be given weight. The child's age and maturity are first assessed; if it is judged appropriate to take the child's views into account, the court must then

decide what weight to give to them in the light of the other facts of the case (*Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819, CA).

(iv) If the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).

This ground for opposition embraces a broad public policy element. The Convention does not *require* States to adopt it and Governments must decide, in the light of the following discussion whether they wish to avail themselves of it. It is to be noted that it is strongly drawn and it does not include situations where all that can be shown is that the principles of family law of the requested state differ from those in the requesting state. However, it may be that the circumstances prevailing in the requesting State are such that to return the child there would seriously endanger his future exercise of basic human rights and fundamental freedoms, or those of the parent who would accompany him. In such a case, the policy of the requested State must prevail; an example might be a case of child refugees.

Longer-term cases

The grounds already examined apply to cases in which the application for the return of the child is made within twelve months of the wrongful removal or retention. If the application is made outside that period (and in practice such cases appear to have been few) an additional ground is applicable:

If more than a year has elapsed between the removal or retention and the institution of proceedings and it is demonstrated that the child is now settled in its new environment (Article 12).

This ground of opposition comes closest to allowing the court to review the merits. The Convention sought to strike a balance between the overriding policy of deterring abductors by encouraging the rapid return of abducted children and the realisation that, in time, return of such children might indeed be against their best interests. After a year had passed since the abduction or retention it was felt that the new circumstances generated by the child's new environment compelled genuine consideration. Therefore, once that period has passed, it is open to the abductor to demonstrate that the child has settled in his or her new environment. If he fails to establish this (perhaps because the child has been continually moved) the requirement to return the child, subject to the grounds of opposition already discussed, remains; if he succeeds, the court will be free to decide the case on a full review of its merits.

"Settled" is to be given its natural meaning, which includes an examination of the existing facts demonstrating the establishment of the child in a community and an environment, and a consideration of the perceived stability of the position into the future. It is submitted. however, that it is going too far to insist that the settlement should be "permanent insofar as anything in life can be said to be permanent" (*Re N (Minors) (Abduction)* [1991] 1 FLR 413 (where an inoperative fax machine in the Lord Chancellor's Department took the case over the 12 month limit)). The "new" features of the situation are to be examined: they will include place, home, school, friends, activities and opportunities, but not *per se* the continuing relationship with the abducting parent (*Ibid; In the Marriage of Graziano and Daniels* (1991) FLC 92-212; *Perrin v Perrin*, 1994 SC 45). The court has to consider whether the child is so settled in its new environment that it is justifiable to set aside the otherwise mandatory requirement to return the child, whether the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention (*Soucie v Soucie*, 1995 SLT 414, IH).

Perceived merits not a ground for refusal

It is significant that none of these grounds for refusal is equivalent to a simple finding that "to return the child would be contrary to the child's best interests". To have permitted a ground of this nature to justify refusal to return the child would have opened the way to an examination of the merits of the dispute between the adult parties and thus undermined the foundations of the Convention. The grounds set out all require an express finding of the presence of a specific element in the situation and it is on this that the objection to return must be based, not an omnibus survey of the child's general condition.

Article 16 of the Convention prohibits the judicial and administrative authorities of a Contracting State, after receiving notice of a wrongful removal or retention of a child (which presumably need not be in the form of an actual application for the return of the child), from deciding on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

The sole fact that a decision as to custody has been taken in the requested country, or is entitled to recognition there, is not a ground for refusing to return a child under the Convention, but the court considering an application under the Convention may take into account the reasons for the earlier decision (Art. 17). This means, on the one hand, that a court which had previously decided on the merits to award custody to one parent may, after a series of kidnappings and rekidnappings, be obliged to order that parent to return the child to a foreign country of habitual residence of the child (see *Sheikh v Cahill,* 546 NYS 2d 517 (SupCt of New York, King's County, 1989) where after conflicting custody orders in England and New York, the New York court found itself in this position); but that the grounds for a previous decision, *e.g.* that one parent be declared unfit to have the care of the child, could be taken into account in considering the application of Article 13 to the facts of the case.

Securing the child's safe return

Courts in a number of jurisdictions have sometimes required the parent seeking the return of the child to accept conditions or to give undertakings before return will be ordered. So, in *C* v *C (Abduction: Rights of Custody)* ([1989] 1 WLR 654, CA) the court ordered the return of a child to Australia, accepting undertakings by the father to drop the contempt proceedings instituted against the mother, to pay air fares, maintenance, and school fees and provide accommodation and a car. For approval of the practice in general, see *Thomson* v. *Thomson* [1994] 119 DLR (4th) 235 (SupCtCan.); *De L v Director General, NSW Dept. of Community Services* (1996) 70 ALJR 932 (High Ct of Aust). However, courts have held that they have no power to impose conditions when ordering return under the Convention (*Police Commissioner of South Australia v Temple* (1993) FLC 92-365 (Full Court); *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (NZ CA) (though it might be otherwise if one of the grounds of Article 13 were held made out, and the court returned the child as a matter of discretion)).Undertakings are unenforceable once the parties have left the jurisdiction and there have been cases in which a parent giving undertakings has reneged on them after the return of the child (e.g., *McOwan v McOwan* ((1994) FLC 92-451).

The use of conditions and undertakings is, therefore, problematic. A rather different approach gained considerable support at the recent Special Commission of the Hague Conference. It was brought to the attention of the Special Commission by the Australian delegation, and has its origins in a number of Australian and New Zealand (*ZP v PS* (1994) FLC 92-480; *Cooper v Casey* (1995) FLC 92-575; *A v Central Authority for New Zealand* [1996] 2 NZLR 517,

NZCA). This approach places an obligation, within limits of available resources, on the Central Authorities of the two countries concerned, in terms of Article 7(h) of the Convention, to take steps to ensure that the child was adequately protected. The Australian working paper at the meeting of the Hague Special Commission in 1997 spoke, inter alia, of a duty "to assist and protect returning parents" and of the need to alert the appropriate protection agencies and judicial authorities of the return of any child who might be in danger.

Access cases

Article 21 allows a party resident outside a Contracting State to present to that State's Central Authority an application for making arrangements for organising or securing the effective exercise of rights of access. Central Authorities are not placed under any mandatory duties with respect to such applications other than generally to promote co-operation on these questions and in practice this can be achieved by passing the matter on to a local lawyer who may then either negotiate an agreement between the parties or institute whatever proceedings may be necessary in the local courts on behalf of the party living abroad. In an English case under the Convention, the court said that, subject to the welfare principle, it would seek to give effect to access rights under the law of the applicant's country with any necessary modifications (*B v B Minors: Enforcement of Access Abroad* [1988] 1 WLR 526).

However, in access as in custody cases, the Convention only applies to a child who was habitually resident in a Contracting State immediately before any breach of the relevant rights, and this means that the Convention must have been in force as between the countries concerned at the relevant time (*B v B (Enforcement of Access Abroad)* [1988] 1 WLR 526).

CHAPTER THREE

ADMINISTRATIVE ARRANGEMENTS AND PROCEDURE UNDER THE CONVENTION

The Preamble to the Convention makes explicit the twin premises upon which the Convention is based: first, that the interests of children are of paramount importance in matters relating to their custody and, second, that, in cases of international abduction, these interests are best served by the establishment of procedures ensuring their prompt return to the place where they were habitually resident prior to their removal.

Insofar as the central issue of the Convention concerns the way judges decide cases, its major objective can be achieved without implications for resources or the imposition of administrative burdens. But, in order properly to safeguard the interests of a child who has recently been brought into one country from another and whose presence in the recipient country is challenged by a person living abroad, some administrative machinery needs to be available. This machinery has three major roles. One is to facilitate the passage of information concerning the child; another is to provide, or help to secure, the provision of assistance to the party who lives abroad; the third is generally to concern itself with the welfare of the child in question.

Central Authorities

The Convention adopts the method of some other Hague Conventions of channelling administrative arrangements in Contracting States through "Central Authorities" to be designated by each State. It must be stressed that this does not involve the establishment of any new administrative authority. The designation can be *pro forma* only. The bodies so designated will become the points of contact between Contracting States in matters concerning the Convention. Provision is made for Federal States, and States with more than one system of law, to appoint more than one Central Authority, although one of them must be authorised to receive applications from abroad for transmission to the appropriate Authority within the State (Article 6).

Role of Central Authorities

The duties of Central Authorities are set out in Article 7 of the Convention:

> Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
>
> In particular, either directly or through any intermediary, they shall take all appropriate measures
>
> a to discover the whereabouts of a child who has been wrongfully removed or retained;
>
> b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
>
> c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d	to exchange, where desirable, information relating to the social background of the child;
e	to provide information of a general character as to the law of their State in connection with the application of the Convention;
f	to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
g	where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers
h	to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
i	to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

It is important to notice that the duties are qualified in two ways. First, the Authority need only take "appropriate" measures to achieve the specified objectives; each State may determine for itself which kinds of measures are appropriate given its own legal and administrative structure. Second, the Authority may achieve this through "any intermediary"; thus, it may pass the matter over to an appropriate agency, whether public or private. It is probable that most countries would wish to proceed in this way with respect to many of the functions listed in Article 7.

Most Governments locate the Central Authority in the office of the Law Minister (or Attorney-General, if different). How far the functions specified in that Article could be appropriately discharged by personnel of that office would be a matter for judgment in each case. It is likely that function (e) (provision of information of a general character about the law of the State) could be adequately discharged within the Department. On the other hand, function (a) (discovery of the child) would probably be passed on to the police. Function (b) (taking action to prevent further harm to the child) might in some cases be passed over to (public or private) social welfare agencies.

The other functions will normally require the services of someone acting on behalf of the absent parent. That person may become involved in negotiations to secure the voluntary return of the child or to bring about an amicable settlement of the dispute (function (c)) or the initiation of legal proceedings (function (f)). This suggests that he might appropriately be a lawyer. Indeed, one of the functions of the Central Authority is "where the circumstances so require", to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers (function (g)) .

Legal aid; costs and expenses

Article 25 entitles nationals or persons habitually resident in the Contracting State from which the request for return of the child has come to legal aid and advice in the requested State as if a national and habitually resident in that State. Where the requested State has a legal aid system, the solution to the problem of representation lies in putting the case in the hands of a lawyer who operates under that system (at least, if the applicant would qualify for such aid under the system). But the Convention has been careful to state that such an entitlement exists only where it exists for citizens of the requested State. If it does not, the Central Authority can do no more than to "facilitate" the provision of legal aid and advice, which will presumably

mean seeing whether the applicant's case will be taken on by a local lawyer in private practice. In a number of countries, lawyers are willing to handle these cases without fee, *pro bono publico*.

This whole matter was discussed in the course of the 1993 meeting of the Special Commission of the Hague Conference. This also took into account the provisions of Article 26 which gives States a choice so far as legal costs and expenses are concerned. If the State ratifies the Convention without making a Reservation on this point, it may not require the applicant to make any payment towards these costs (though charges may be made in respect of fares and other costs incurred in the actual return of the child). A State may however enter a Reservation in accordance with Article 42 saying that it is not bound to assume any legal costs except insofar as they are covered by its system of legal aid and advice.

The agreed conclusions of the Special Commission on this point are as follows:

> The Special Commission saw a correlation between the obligations of Central Authorities under Article 7f to assist in the initiation of court proceedings for return of a child and the reservation under Article 26 concerning lawyers' fees, made by a number of States. Countries with broad territories and either no legal aid system or territorially non-unified legal aid had experienced or might experience in the future difficulties in obtaining legal representation for applicants who could not afford legal fees. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved.

In many Commonwealth jurisdictions there will be some public official - a Director of Social Welfare, an Official Solicitor, or the Attorney-General himself - whose department has functions in child protection cases. It is thought that in most jurisdictions, any necessary legal proceedings could most conveniently be set in train through such a department and the costs could properly be carried on the public funds available to that department. In Australia, for example, the application is made to court by the appropriate Central Authority which will instruct counsel to represent it.

Making an application for the return of a child

An applicant under the Convention is given the option of three methods of mobilising its provisions. He may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State (which means in practice the State where the child is thought or known to be) (Article 8). However, this is without prejudice to the right of the applicant, if he so wishes, to bypass the Central Authorities and make a direct application to the courts of a Contracting State (Article 29).

So long as the removal or retention is wrongful within the meaning of the Convention, the outcome should not be affected by the manner in which the proceedings originate. Use of the Central Authority network is almost always preferable, as official channels are at once made available (which may prove of particular value in the essential first task of locating the child) and the expense and delay which can result from employing a lawyer agent in the foreign country may be avoided.

If the application is made through Central Authorities, the Convention requires it to be accompanied by certain information, set out in Article 8. The information must include (a) the identity of the applicant, the child and the alleged abductor; (b) where available, the date of birth of the child; (c) the grounds on which the claim for return is based; (d) all available

information relating the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The information may also include (a) an authenticated copy of any relevant decision or agreement; (b) a certificate or affidavit from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State and (c) any other relevant documents. The Hague Conference has recommended a standard model form of application which is appended to the Convention.

An Authority may also require (and this might be useful) that the application be accompanied by written authorisation empowering it or some other person to act on behalf of the applicant (Article 28). These communications should (where relevant) be accompanied by a translation into the official language, or one of the official languages, of the requested State, or, "where that is not feasible" into French or English (Article 24). However, a State may, by entering a reservation under Article 42, object to the use of French or English in this connection, but not to both.

Response by the requested Central Authority

On receipt of an application, the Central Authority of the requested State may proceed no further with it if it is "manifest" that it falls outside the provisions of the Convention or is otherwise not well founded. If it does this, it is bound to inform the applicant, or the Central Authority through which the application was submitted, of its reasons for reaching this conclusion (Article 27).

If the application is accepted, the first step is to confirm the whereabouts of the child and the abducting parent, or to take whatever steps are necessary to locate them if their whereabouts were unknown to the applicant. It is here that the expertise which Central Authorities acquire can be most valuable: locating a family called "Smith" who are known to be "in the London area" is no easy task, but the provision of information such as the address of a known relative in the area might save many weeks of investigation and delay.

The next step is that identified in Article 10, that the Central Authority should "take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". So, if the whereabouts of the child are known, it may deem it best in the first instance to approach some social agency (for example, an officer of the International Social Services; or a local state or voluntary child welfare agency) to ascertain whether this can be achieved. Experience has shown that some abductors do decide on a voluntary return once the Convention rules are explained to them and the strong likelihood of a successful court application for the return of the child becomes apparent

The Central Authority should also keep in view its duty, under the Convention, to prevent further harm being caused to the child "by taking or causing to be taken provisional measures". The appropriateness of taking such measures may best be judged by a child welfare agency. If these measures fail to secure the voluntary return of the child or an agreed resolution of the dispute, the Authority (or the lawyer acting on behalf of the applicant) should institute proceedings for the return of the child. The judicial procedure should be simple and rapid. The court should be able to act on the basis of the documents submitted with the application. Opportunities for delay by the abductor should be reduced to a minimum, and courts should attempt to determine the matter within days rather than weeks. In order to encourage rapidity, Article 11 states that if a decision has not been reached within six weeks from the institution of proceedings, the applicant or the Central Authority is entitled to ask for the reasons for the delay.

If an order for the return of the child is made, it is the duty of the Central Authority to ensure that appropriate arrangements exist for ensuring the safe return of the child. Any expenses so incurred may be recovered by the Central Authority, and the court ordering the child's return may direct that these be met by the abductor (Article 26).

Evidence

In order to achieve the purposes of the Convention, it is necessary that courts can act on the basis of the evidence presented to them in the documentation accompanying the application. Thus Article 30 requires that the application and supporting documentation should be admissible in court proceedings. It is, therefore, obviously desirable that Central Authorities should try to ensure that this documentation is as complete as possible when the application is submitted.

So far as the legal position in the State of habitual residence is concerned, the court asked to order the return of a child needs to be satisfied that there were "rights of custody" interfered with by the wrongful removal or retention. The Convention contains a number of provisions designed to minimise potential evidential problems in this area.

First, Article 8(f) permits (but does not require) an application to be accompanied by a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from "a qualified person" concerning the relevant law of that State.

Second, in deciding whether there has been a wrongful removal or retention within the meaning of the Convention, the courts of the requested State may take notice "directly of the law of, and of judicial or administrative decisions, formally recognised or not, in the State of habitual residence of the child without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable" (Article 14). Thus if, for example, the adult parties had merely separated without the intervention of a court order, a general statement of the law of the State (provided, for example, by the Central Authority of that State) concerning the custody rights of parents of legitimate children (if the parties were married) or of illegitimate children (if they were not) should be accepted. If the rights were exercised under a court order or formal agreement, the court should accept an authenticated copy of the order or agreement.

There is a third provision in Article 15, which permits the courts of the requested State, prior to ordering the return of the child, to request that the applicant obtain from the authorities of the State of the child's habitual residence "a decision or other determination" that the removal or retention was wrongful within the meaning of Article 3 "where such a decision or determination may be obtained in that State". It is to be hoped that this will seldom be necessary, and the procedure could lead to delays.

CHAPTER FOUR

ACCESSION AND IMPLEMENTATION

Procedure for accession

Article 38 provides that the instrument of accession to the Convention shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, and that the Convention shall enter into force in the acceding State on the first day of the third calendar month after such deposit. But the accession affects relations only between the acceding State and such Contracting States as accept the accession. This acceptance is made by declaration in the same manner as the accession.

The Convention contains express provisions for Contracting States which comprise two or more territorial units in which different systems of law are applicable and States in which executive, judicial and legislative powers are distributed between central and other authorities of the State. In the former case, the Contracting State may, at the time of accession, declare that the Convention shall extend to one, some or all of the territorial units (Article 40); in the latter, Article 41 expressly states that accession "shall carry no implication as to the internal distribution of powers within that State" and Article 33 makes it clear that non-unitary States are not bound to apply to provisions of the Convention between their internal territorial units. These clauses are intended to permit States of a federal character to accede to the convention and implement it in the manner required by their particular constitutional circumstances.

Reservations

The only Reservations which are permitted (see Article 42) are those in respect of translations (a Contracting State may object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority: Article 24(2)) and of legal costs and expenses (under Article 26(3), discussed in Chapter Three above).

Notification to the Conference Bureau

Although the Ministry of Foreign Affairs of the Kingdom of the Netherlands carries out all the formal depository functions, the Permanent Bureau of the Hague Conference on Private International Law (the address of which is

6 Scheveningseweg
2517 KT The Hague
Netherlands)

has an important role as a continuing source of information about the operation of the Convention.

It is particularly important that the Permanent Bureau be notified of the identity of the Central Authority (with the name of the relevant officer(s), address, telephone, fax and other numbers) and that changes in these details are similarly notified. The Bureau is thus in a position to provide the information to the Central Authorities of other Contracting States. The Bureau also appreciates receiving copies of relevant legislative texts, significant judicial decisions under the Convention, and any statistical or other reports prepared by Central Authorities.

Legislative provision

Some legislation will be necessary in order to give effect to the Convention. It is, of course, a matter for local decision whether effect is given to the Convention by restating its provisions in legislative form (as in the Australian Family Law (Child Abduction Convention) Regulations; there is also a single section in the parent Family Law Act) or by scheduling the text of the Convention (or the English or French text alone) to a short Act. The latter practice has been followed in Canada and the United Kingdom.

Whatever practice is followed, the legislation will have to address certain matters (notably the designation of the Central Authority and of other Contracting States); the following listing of major points may be useful, reference being made to the three legislative texts:

a. Designation of Central Authorities

b. Designation of Contracting States

c. Costs and legal expenses

d. Which courts are to have jurisdiction

e. Interim and provisional powers of courts

f. Evidential provisions

g. Power to make declaration under Article 15 of the Convention

The United Kingdom statute, relevant parts of which are set out in Appendix B, makes detailed provision as to reports, the prohibition on decisions on the merits while an application is pending, and the effect of an order under the Convention on previous court orders.

APPENDIX A
TEXT OF THE CONVENTION
Reproduced from *Collection of Conventions (1951-1988)* of the Hague Conference

XXVIII. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded October 25, 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting

State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV – RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI – FINAL CLAUSES

Article 37

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 Fourteenth Session.

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.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this 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.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which excutive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force –

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
(2) the accessions referred to in Article 38;
(3) the date on which the Convention enters into force in accordance with Article 43;
(4) the extensions referred to in Article 39;
(5) the declarations referred to in Articles 38 and 40;
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, 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 Fourteenth Session.

Recommendation adopted by the Fourteenth Session

The Fourteenth Session,
Recommends to the States Paties to the *Convention on the Civil Aspects of International Child Abduction* that the following model form be used in making applications for the return of wrongfully removed or retained children—

Request for return

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

REQUESTING CENTRAL AUTHORITY OR APPLICANT	REQUESTING AUTHORITY

Concerns the following child: ..... who will attain the age of 16 on ..... 19.....

NOTE: The following particulars should be completed insofar as possible.

I — IDENTITY OF THE CHILD AND ITS PARENTS

1 *Child*

name and first names .....
date and place of birth .....
habitual residence before removal or retention .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

2 *Parents*

2.1 Mother: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identity card No, if any .....

2.2 Father: name and first names .....
date and place of birth .....
nationality .....
occupation .....
habitual residence .....
passport or identitiy card No, if any .....

2.3 Date and place of marriage .....

II — REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercied custody before the removal or retention)

3 name and first name .....
nationality of individual applicant .....
occupation of individual applicant .....
address .....
passport or identity card No, if any .....
relation to the child .....
name and address of legal adviser, if any .....

III — PLACE WHERE THE CHILD IS THOUGHT TO BE

4.1 Information concerning the person alleged to have removed or retained the child

name and first names .....
date and place of birth, if known .....
nationality, if known .....
occupation .....
last known address .....
passport or identity card No, if any .....
description and photo, if possible (see annexes) .....

4.2 Address of the child .....

4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child .....

IV — TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

.....

V — FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

.....

VI — CIVIL PROCEEDINGS IN PROGRESS

.....

VII — CHILD IS TO BE RETURNED TO

a name and first names .....
date and place of birth .....
address .....
telephone number .....

b proposed arrangements for return of the child .....

VIII — OTHER REMARKS

.....

IX — LIST OF DOCUMENTS ATTACHED*

.....

Date .....

Place .....

Signature and/or stamp of requesting Central Authority or applicant

.....

* e.g. Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background or the child; authorization empowering the Central Authority to act on behalf of applicant.

APPENDIX B
PARTIAL TEXT OF
CHILD ABDUCTION AND CUSTODY ACT 1985 (UK)

ELIZABETH II

Child Abduction and Custody Act 1985

1985 CHAPTER 60

An Act to enable the United Kingdom to ratify two international Conventions relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions.

[25th July 1985]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INTERNATIONAL CHILD ABDUCTION

The Hague Convention.

1.—(1) In this Part of this Act " the Convention " means the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th October 1980.

(2) Subject to the provisions of this Part of this Act, the provisions of that Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom.

Contracting States.

2.—(1) For the purposes of the Convention as it has effect under this Part of this Act the Contracting States other than the United Kingdom shall be those for the time being specified by an Order in Council under this section.

(2) An Order in Council under this section shall specify the date of the coming into force of the Convention as between the United Kingdom and any State specified in the Order; and,

except where the Order otherwise provides, the Convention shall apply as between the United Kingdom and that State only in relation to wrongful removals or retentions occurring on or after that date.

(3) Where the Convention applies, or applies only, to a particular territory or particular territories specified in a declaration made by a Contracting State under Article 39 or 40 of the Convention references to that State in subsections (1) and (2) above shall be construed as references to that territory or those territories.

Central Authorities.

3.—(1) Subject to subsection (2) below, the functions under the Convention of a Central Authority shall be discharged—

(*a*) in England and Wales and in Northern Ireland by the Lord Chancellor; and

(*b*) in Scotland by the Secretary of State.

(2) Any application made under the Convention by or on behalf of a person outside the United Kingdom may be addressed to the Lord Chancellor as the Central Authority in the United Kingdom.

(3) Where any such application relates to a function to be discharged under subsection (1) above by the Secretary of State it shall be transmitted by the Lord Chancellor to the Secretary of State and where such an application is addressed to the Secretary of State but relates to a function to be discharged under subsection (1) above by the Lord Chancellor the Secretary of State shall transmit it to the Lord Chancellor.

Judicial authorities.

4. The courts having jurisdiction to entertain applications under the Convention shall be—

(*a*) in England and Wales or in Northern Ireland the High Court; and

(*b*) in Scotland the Court of Session.

Interim powers.

5. Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

Reports.

6. Where the Lord Chancellor or the Secretary of State is requested to provide information relating to a child under Article 7(*d*) of the Convention he may—

(*a*) request a local authority or a probation officer to make a report to him in writing with respect to any matter which appears to him to be relevant;

(*b*) request the Department of Health and Social Services for Northern Ireland to arrange for a suitably qualified person to make such a report to him ;

(*c*) request any court to which a written report relating to the child has been made to send him a copy of the report ;

and such a request shall be duly complied with.

Proof of documents and evidence.

7.—(1) For the purposes of Article 14 of the Convention a decision or determination of a judicial or administrative authority outside the United Kingdom may be proved by a duly authenticated copy of the decision or determination ; and any document purporting to be such a copy shall be deemed to be a true copy unless the contrary is shown.

(2) For the purposes of subsection (1) above a copy is duly authenticated if it bears the seal, or is signed by a judge or officer, of the authority in question.

(3) For the purposes of Articles 14 and 30 of the Convention any such document as is mentioned in Article 8 of the Convention, or a certified copy of any such document, shall be sufficient evidence of anything stated in it.

Declarations by United Kingdom courts.

8. The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention.

Suspension of court's powers in cases of wrongful removal.

9. The reference in Article 16 of the Convention to deciding on the merits of rights of custody shall be construed as a reference to—

(*a*) making, varying or revoking a custody order, or any other order under section 1(2) of the Children and Young Persons Act 1969 or section 95(1), 97(2), 143(6) or 144 of the Children and Young Persons Act (Northern Ireland) 1968 (not being a custody order) ; 1969 c. 54. 1968 c. 34 (N.I.)

(*b*) registering or enforcing a decision under Part II of this Act ;

(*c*) determining a complaint under section 3(5) or 5(4) of the Child Care Act 1980 or an appeal under section 6 or 67(2) or (3) of that Act ; 1980 c. 5.

(*d*) determining a summary application under section 16(8), 16A(3) or 18(3) of the Social Work (Scotland) Act 1968 ; 1968 c. 49.

1968 c. 34 (N.I.).

(*e*) making a parental rights order under section 104 of the Children and Young Persons Act (Northern Ireland) 1968 or discharging such an order, or giving directions in lieu of the discharge of such an order, under section 106(2) of that Act.

Rules of court.

10.—(1) An authority having power to make rules of court may make such provision for giving effect to this Part of this Act as appears to that authority to be necessary or expedient.

(2) Without prejudice to the generality of subsection (1) above, rules of court may make provision—

(*a*) with respect to the procedure on applications for the return of a child and with respect to the documents and information to be furnished and the notices to be given in connection with any such application ;

(*b*) for the transfer of any such application between the appropriate courts in the different parts of the United Kingdom ;

(*c*) for the giving of notices by or to a court for the purposes of the provisions of Article 16 of the Convention and section 9 above and generally as respects proceedings to which those provisions apply ;

(*d*) for enabling a person who wishes to make an application under the Convention in a Contracting State other than the United Kingdom to obtain from any court in the United Kingdom an authenticated copy of any decision of that court relating to the child to whom the application is to relate.

Cost of applications.

11. The United Kingdom having made such a reservation as is mentioned in the third paragraph of Article 26 of the Convention, the costs mentioned in that paragraph shall not be borne by any Minister or other authority in the United Kingdom except so far as they fall to be so borne by virtue of the grant of legal aid or legal advice and assistance under Part I of the Legal Aid Act 1974, the Legal Aid (Scotland) Act 1967, Part I of the Legal Advice and Assistance Act 1972 or the Legal Aid Advice and Assistance (Northern Ireland) Order 1981.

1974 c. 4.
1967 c. 43.
1972 c. 50.
S.I. 1981/228 (N.I. 8).

PART III

SUPPLEMENTARY

Termination of existing custody orders, etc.

25.—(1) Where—

(*a*) an order is made for the return of a child under Part I of this Act ; or

(*b*) a decision with respect to a child (other than a decision mentioned in subsection (2) below) is registered under section 16 of this Act,

any custody order relating to him shall cease to have effect.

(2) The decision referred to in subsection (1)(*b*) above is a decision which is only a decision relating to custody within the meaning of section 16 of this Act by virtue of being a decision relating to rights of access.

Expenses.

26. There shall be paid out of money provided by Parliament—

(*a*) any expenses incurred by the Lord Chancellor or the Secretary of State by virtue of this Act ; and

(*b*) any increase attributable to this Act in the sums so payable under any other Act.

SCHEDULES

SCHEDULE 1

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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4 The UN Convention on the Law of the Sea, 1982: Book 4 - The High Seas; Protection of the Marine Environment; Marine Scientific Research; Seabed Mining

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6 The Convention on the Elimination of All Forms of Discrimination Against Women

7 Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others

8 International Convention Against the Taking of Hostages

9 The Scheme for the Transfer of Convicted Offenders within the Commonwealth

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14 The UN Convention on Chemical Weapons: The Prohibition of Development, Production, Stockpiling and Use and Their Destruction

Private International Law

15 The Hague Convention on the Service of Process, The Taking of Evidence and Legislation

16 The Hague Convention on the Civil Aspects of International Child Abduction, Revised 1990

17 The Hague Convention on International Access to Justice

18 The Hague Convention on the Taking of Evidence Abroad

19 International Conventions in the Field of Succession

20 International Conventions concerning Applications for and Awards for Maintenance

21 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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