

**The Hague Convention  
on the Civil Aspects of  
International Child Abduction**

Explanatory Documentation  
prepared for  
Commonwealth Jurisdictions

*Revised 1990*



Commonwealth Secretariat

# The Hague Convention on the Civil Aspects of International Child Abduction

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

February 1990

Commonwealth Secretariat, Marlborough House,  
London SW1Y 5HX.

© Copyright 1990

Printed and published by  
The Commonwealth Secretariat

May be purchased from  
Commonwealth Secretariat Publications  
Marlborough House  
London SW1Y 5HX

ISBN 0 85092 351 4

## CONTENTS

Preface		v
Chapter One	THE NEED FOR A CONVENTION	1
Chapter Two	THE SUBSTANTIVE PRINCIPLES OF THE CONVENTION	5
Chapter Three	ADMINISTRATIVE ARRANGEMENTS AND PROCEDURE UNDER THE CONVENTION	13
Chapter Four	ACCESSION AND IMPLEMENTATION	21
Appendix A	THE ENGLISH TEXT OF THE CONVENTION	25
Appendix B	LEGISLATIVE AND OTHER MATERIAL	31

## PREFACE

When Commonwealth Law Ministers met in Barbados in 1980 they expressed their profound concern that legal systems were increasingly unable to safeguard adequately the welfare of children. They observed a trend whereby increasingly parties to dispute over custody had been abducting their children and taking them to foreign jurisdictions, frequently in defiance of court orders, to circumvent or pre-empt the operation of the law. By so doing they deprived the courts of exercising their role in assuring the best interests of the child. Law Ministers welcomed the fact that the matter was about to be addressed by the Hague Conference on Private International Law, and expressed the hope that deliberations at The Hague would not only be successful, but that a large number of countries - Commonwealth and non-Commonwealth - would accede to any resulting Convention as a matter of priority. Since then the Convention has been concluded.

In 1981 the Commonwealth Secretariat published explanatory documentation on The Hague 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.

Over the past nine years, a significant body of parties and of case law has built up with the result that the time is opportune for publication of a fully rewritten "accession kit" on this Convention.

The present "kit" has been prepared for the Commonwealth 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, yet again, its indebtedness to Professor McClean for his significant and continuing contributions to Commonwealth law to Commonwealth Governments and to their Law Ministers in so many tangible ways.

Legal Division  
Commonwealth Secretariat  
Marlborough House  
Pall Mall  
London SW1Y 5HX  
UNITED KINGDOM

February 1990

## 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.

By the date of a review of the working of the Convention by a Special Commission of the Hague Conference in October 1989, fourteen States had become parties to the Convention. These were

Australia  
Austria  
Belize  
Canada  
France  
Hungary  
Luxembourg  
Norway  
Portugal  
Spain  
Sweden  
Switzerland  
United Kingdom  
United States.

At the October 1989 review commission, representatives of seven other States indicated that legislation to implement the Convention was before their Parliament, or about to be introduced:

Argentina  
Finland  
German Federal Republic  
Greece  
Ireland  
Mexico  
Netherlands.

It is also understood that New Zealand is considering legislation to the same end.

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 cooperation in this area."

### The unsatisfactory legal position

International child abduction is undoubtedly a growing problem, although it is difficult to give precise figures. 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.

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 (much of which was collected by the Permanent Bureau of the Hague Conference at the time of the 1989 Special Commission). 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 therefrom. It is not a Convention for the reciprocal recognition and enforcement of foreign custody orders. It seeks to protect children by safeguarding the relationships which they actually have with those exercising care over them. It does this by protecting "rights of custody" 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 if such rights were "actually exercised", or would have been so exercised if the child had not been removed or retained. A removal or retention is considered wrongful if it is in breach of such rights (Article 3).

#### 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.

This definition is open-ended in that it specifies rights of custody 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 (Article 5). 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.

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. 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 (see In the Marriage of Hicks (Family Court of Australia, 1987, unreported), discussing English law). 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 (Minor: abduction: rights of custody abroad) [1989] 2 All ER 465, CA) in respect of an Australian order, and by a French court (Procureur-Général v Baume (Aix-en-Provence CA, 23 March 1989)) in respect of an English order. Where a child is a ward of court, the court may be the body with relevant "rights of custody" (Re J (Abduction: Ward of Court) [1989] 3 WLR 825).

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 (Article 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 Article 15).

The provision that the custody rights must have been actually exercised at the time of the removal or retention seeks to exclude claims by persons who, though they may technically retain such rights, have ceased to exercise them. Where the right in question is only the right to determine the child's place of residence, it may be more difficult to understand what is meant by this right being "actually exercised". However, it is probable that in practice this will not be difficult to establish: a person's conduct may easily show that he or she has retained the expectation to be consulted about the child's place of abode.

### 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 (Article 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, however, In the Marriage of Gollogly and Owen (Family Ct of Australia, Townsville, October 1989) where the child had left Alaska in 1986 (before the US became a Contracting State) and an argument that the child could be regarded as habitually resident there in early 1989 was rejected.) The Convention ceases to apply when the child attains the age of sixteen years (Article 4), and any pending applications automatically lapse at that date.

## Grounds for refusing to return a child

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, as has been argued, 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.

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)).

- (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".

An illustration of the courts' approach is provided by the English case of Re E (A Minor) (Abduction) ([1989] 1 FLR 135, CA). The abducting parent, the father, alleged in affidavit evidence that the mother's promiscuity and drug abuse made her unfit to have the care of the child and on this ground resisted the application for the child's return to South Australia. The Court of Appeal gave effect to the policy of the Convention in two respects. Procedurally, it refused to allow the possibility of oral evidence by the parties because of the delay this would create; and substantively they ordered

the return of the child notwithstanding the allegations, noting that the child would be adequately protected by the law (and if need be the social work agencies) of South Australia. By way of contrast stands one of the few cases in which return has been refused on the ground that there was a grave risk of such harm. This was a Scottish case (MacMillan v MacMillan 1989 SLT 350) which concerned an abduction from Canada. The applicant for return was a parent with a history of depressive illness and alcoholism.

Another illustration underlines the willingness of the courts to return the child. In C v C (Abduction) (Rights of Custody) ([1989] 1 WLR 654, CA) the English Court of Appeal reversed the first instance judge who had refused to order 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 at the Hague Special Commission was divided, some experts 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.

The approach adopted in C v C was endorsed in a later Court of Appeal decision (Re G (A Minor) (Abduction) [1989] 2 FLR 475, CA) but not before the Australian Central Authority had expressed some concern, a concern which at one stage threatened to promote the case into a test case before the House of Lords. The Australian concern may rest in part on its own interpretation of Article 12 of the Convention as requiring not just return to the State of habitual residence but return to (the care of) the applicant. This interpretation is reflected in the relevant Australian Regulations, reproduced in Appendix B, but is not justified by any corresponding language in the Convention text.

The reference in the text of Article 13 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, California, would ultimately lead to their transfer back to England. The phrase in the Convention has been applied in similar circumstance by a Swiss court (Surdez v Surdez (Trib des Franches-Montagnes, Switzerland, 3 July, 1989) (return to France refused as child almost certain to be returned to Switzerland on merits)) but the courts have also considered in this context the material circumstances in which the child would be placed were he

returned (Re A (A Minor) (Wrongful Removal of Child) (1988) 18 Fam Law 383).

- (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)).

The expressed wishes of the child are not binding on the court, which must decide what weight to give to them in the light of the other facts of the case (Re Turner (Family Ct of Australia, 1988; unreported but cited (1989) 15 CLR at 631)).

- (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 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.

It has to be conceded that there may be cases in which this particular provision operates to "reward" a successful abductor, and who manages to conceal his whereabouts for a whole twelve-month period. Provided that the other parent acts promptly to invoke the Convention, and the Central Authority of the recipient country works effectively, such cases will be few.

#### 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.

#### Access cases

These provisions apply to breaches of rights of custody, as defined above. It is to be noted that they do not apply to breaches of access rights only. Thus if a parent who has the day to day care of the child but who is under an obligation (whether imposed by court order or agreement or otherwise) to allow the other parent to visit the children removes the children, thus rendering it impossible for the visits to take place, such removal is not wrongful under the Convention.

While withholding the remedy of return in a case of breach of access rights only, the Convention seeks to reinforce access arrangements which involve children moving between Contracting States. Thus 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).

## 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 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.

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 review of the Convention conducted by a Special Commission of the Hague Conference in October 1989. 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 (see the Family Law (Child Abduction Convention) Regulations, reg.15, set out in Appendix B), 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. Ewbank J in the English case of Re A (A Minor) (Wrongful Removal of Child) (1988) 18 Fam L 383 made it clear that the existence or otherwise of an affidavit, and whether or not it accompanied the application or the subsequent originating process in the court proceedings, was not crucial; the court will be slow to allow procedural technicalities to delay the consideration of the case.

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. It was used, however, in Re A (A Minor) (Wrongful Removal of Child) (supra) and the English court was still able to make an order for the return of the child 26 days after the issue of the originating summons (and those 26 days included the Christmas-New Year holiday periods).

#### Evidence on factual issues

A person seeking to oppose the application for the return of the child will seek to raise one of the issues set out in Articles 12 and 13 and examined in Chapter Two, above. There may, for example, be an allegation of abuse of the child by the applicant parent; or an assertion of close bonding between child and the abducting parent. Evidence on these matters will normally be by affidavit, and the courts have made it very clear that they will not delay the hearing of applications to allow for the assembly of fuller material.

The policy of the Convention is to secure the swift return of the child, the merits of the case being reserved to the courts of the child's habitual residence. The party opposing return has a heavy burden of proof; return will be refused only if the evidence presented is "both obvious and incontrovertible" (Re D (A Minor) (Child Abduction) [1989] 1 FLR 97n). It is not enough merely to make allegations; that will not cause the court to adjourn for further evidence where the resulting delay would defeat the purposes of the Convention (Parsons v Styger (1989) 67 O.R. (2d) 3, 11).

#### Earlier decisions in the recipient country

The Convention makes provision for the contingency that, prior or subsequent to the application being heard, a decision relating to the custody of the child might have been given in the requested State or be entitled to recognition in that State. It is stated that any such decision shall not of itself be a ground for refusing to return the child but that the reason for the decision may be taken into account in determining the application (Article 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 return the child to the foreign country of habitual residence of the child (a New York court found itself in this position in Sheikh v Cahill (546 NYS 2d 517 (Sup Ct, 1989)); 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.

#### **No fresh decision on the merits**

Once the courts of the recipient country have received notice of the wrongful removal or retention of a child (in the usual case by receiving an application for the child's return, but possibly also by being asked to take provisional measures) those courts may not seek to determine the underlying custody issues unless and until they have decided that the child is not to be returned (Article 16). A decision to return the child is not to be taken as a determination on the merits of any custody issue (Article 19).

## 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, and Appendix B contains a collection of relevant material, both the text of legislation and explanatory matter.

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 texts in Appendix B contain useful precedents and also indicate a range of other topics dealt with in implementing legislation. Rules of court will in some cases provide supplementary procedural regulations. The following listing of major points may be useful, reference being made to the three legislative texts (from Australia, Canada - Alberta, but other Provincial legislation is similar, and the United Kingdom):

- a. Designation of Central Authorities (Australia, regs.3-9; Alberta, s.4; U.K., s.3).
- b. Designation of contracting States (Australia, reg.10; Alberta, s.6; U.K., s.2).
- c. Costs and legal expenses (Australia, reg.7; Alberta, s.3; U.K., s.11).
- d. Which courts are to have jurisdiction (U.K., s.4).
- e. Interim and provisional powers of courts (Australia, reg.15(1)(a) to (c); Alberta, s.5; U.K., s.5).
- f. Evidential provisions (Australia, reg.23; U.K., s.7).
- g. Power to make declaration under Article 15 of the Convention (Australia, reg.17(1); U.K., s.8).

The Australian Regulations contain useful material on questions of access (reg.24), and the United Kingdom statute makes detailed provision as to reports (s.6), the prohibition on decisions on the merits while an application is pending (s.9), and the effect of an order under the Convention on previous court orders (ss.25, 27 and Sched. 3).

Appendix A

THE ENGLISH TEXT OF

THE CONVENTION

Extract from the final Act of the  
Fourteenth Session of the Hague  
Conference on Private  
International Law  
(included the recommended Form of Request)

## Final Act of the Fourteenth Session

---

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Yugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at The Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of the Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments –

### A The following draft Conventions –

#### I

#### CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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 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 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.

#### CHAPTER V - GENERAL PROVISIONS

#### *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 executive, 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 authorized thereto, have signed this Convention.

Done at The Hague, on the .... day of ..... 19... 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.

**F The following Recommendation concerning the draft Convention on the Civil Aspects of International Child Abduction –**

The Fourteenth Session,

Recommends to the States Parties 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 ..... on the Civil Aspects of International Child Abduction

REQUESTING CENTRAL AUTHORITY OR APPLICANT	REQUESTED 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 identity card No. if any .....

2.3 Date and place of marriage .....

**II – REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised custody before the removal or retention)**

3 name and first names .....  
 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 the 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 of the child; authorization empowering the Central Authority to act on behalf of applicant.

## Appendix B

### LEGISLATIVE AND OTHER MATERIAL

#### AUSTRALIA

Family Law (Child Abduction Convention) Regulations  
Lindsay Curtis 'The Hague Convention on the Civil Aspects  
of International Child Abduction: the Australian  
experience' (reprinted from volume 15 of the  
Commonwealth Law Bulletin)

#### CANADA

International Child Abduction Act (chapter I-6.5) of the  
Province of Alberta (1986)  
Memorandum by the Government of Canada for the Law  
Ministers' Meeting in Harare, Zimbabwe, 1986  
(LMM(86)39)

#### UNITED KINGDOM

Child Abduction and Custody Act 1985 (cap.60) (extracts)  
Memorandum by the Government of the United Kingdom for  
the Law Ministers' Meeting in Harare, Zimbabwe, 1986  
(LMM(86)19)

COMMONWEALTH OF AUSTRALIA

FAMILY LAW (CHILD ABDUCTION  
CONVENTION) REGULATIONS

CITATION

1 These Regulations may be cited as the Family Law (Child Abduction Convention) Regulations.

INTERPRETATION

2(1) [Definitions] In these Regulations, unless the contrary intention appears-

"applicant" means a person who has made an application referred to in regulation 11, 13 or 24, as the case requires;

"Commonwealth Central Authority" means the Commonwealth Central Authority appointed under regulation 3;

"Central Authority" has the meaning it has in the Convention;

"child" means a person who has not attained the age of 16 years;

"Convention" or "Convention on the Civil Aspects of International Child Abduction" means the Convention on the Civil Aspects of International Child Abduction referred to in section 111B of the Act, a copy of the English text of which is set out in Schedule 1;

"convention country" means a country that under regulation 10 is a convention country;

"filed" has the same meaning as in the Family Law Regulations;

"removal", in relation to a child, means the wrongful removal or retention of a child within the meaning of the Convention;

"responsible Central Authority", in relation to action to be taken in a State or Territory, means the Commonwealth Central Authority or the State Central Authority of that State or Territory, as the case requires;

"rights of access" has the same meaning as in the Convention;

"rights of custody" has the same meaning as in the Convention, and includes rights arising by the operation of law or by reason of a judicial or administrative decision or by an agreement having legal effect under a law in force in a convention country;

"Rules of Court" has the same meaning as in the Family Law Regulations;

"State Central Authority" means a person appointed under sub-regulation 8(1) to be the Central Authority of a State or Territory;

"the Act" means the Family Law Act 1975.

2(2) [Purpose of Regulations] The purpose of these Regulations is to give effect to section 111B of the Act.

#### COMMONWEALTH CENTRAL AUTHORITY - APPOINTMENT

3 The Attorney-General shall appoint an officer of the Australian Public Service to be the Commonwealth Central Authority.

#### COMMONWEALTH CENTRAL AUTHORITY - RESIGNATION

4 The Commonwealth Central Authority may resign the office of Commonwealth Central Authority by writing signed by that Authority and delivered to the Attorney-General.

#### COMMONWEALTH CENTRAL AUTHORITY - DUTIES, POWERS AND FUNCTIONS

5(1) [Performance of obligations under Convention] In addition to the other functions conferred on the Commonwealth Central Authority by these Regulations, the functions of the Commonwealth Central Authority are-

- (a) to do, or co-ordinate the doing of, anything that is necessary to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention; and
- (b) to advise the Attorney-General, either on the initiative of the Commonwealth Central Authority or on a request made to that Authority by the Attorney-General, on all matters that concern, or arise out of performing, those obligations, including any need for additional legislation required for performing those obligations.

5(2) [Duties, etc., under Convention] The Commonwealth Central Authority has all the duties, may exercise all the powers, and shall perform all the functions, that a Central Authority has under the Convention.

#### ACTING COMMONWEALTH CENTRAL AUTHORITY

6(1) [Appointment of officer] The Attorney-General may appoint an officer of the Australian Public Service to act as the Commonwealth Central Authority-

- (a) during a vacancy in the office of the Commonwealth Authority, whether or not an appointment has previously been made to the office; or

(b) during any period, or during all periods, when the person holding that office is, or is about to be, absent from duty or from Australia or is for any reason unable to perform the functions of that office,

but a person appointed to act during a vacancy shall not continue so to act after the expiration of 12 months, commencing on the day on which the vacancy occurred.

6(2) [Vacancy in office] Where the office of the Commonwealth Central Authority becomes vacant while a person is acting as the Commonwealth Central Authority, that person may continue so to act until the Attorney-General otherwise directs, the vacancy is filled or a period of 12 months commencing on the day on which the vacancy occurred expires, whichever first happens.

6(3) [Resignation] An appointment of a person to act as the Commonwealth Central Authority ceases to have effect if that person resigns the appointment by writing signed by that person and delivered to the Attorney-General.

6(4) [Duties, powers and functions] While a person is acting as the Commonwealth Central Authority, that person has all the duties, may exercise all the powers, and shall perform all the functions, of that Authority.

6(5) [Effect of appointment] An appointment of a person under sub-regulation (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.

6(6) [Effect of defect in appointment, etc.] The validity of anything done by or in relation to a person purporting to act pursuant to an appointment under sub-regulation (1) shall not be called in question on the ground that the occasion for the appointment of that person had not arisen, that there is a defect or irregularity in or in connection with the appointment of that person, that the appointment had ceased to have effect or that the occasion for that person to act had not arisen or had ceased.

IMMUNITY OF COMMONWEALTH CENTRAL AUTHORITY, &C.,  
IN RESPECT OF ORDERS TO PAY COSTS

7 A person who holds office as the Commonwealth Central Authority, who is appointed to act as that Authority or who, being a State Central Authority, exercises the powers and performs the functions of that office shall not be made subject to any order to pay costs in relation to his or her exercising the powers, or performing the functions, of the Commonwealth Central Authority.

## STATE CENTRAL AUTHORITY - APPOINTMENT

8(1) [**Appointment by Attorney-General**] The Attorney-General may appoint a person to be the Central Authority of a State or Territory for the purposes of these Regulations.

8(2) [**Power of appointment**] The power to appoint a person under sub-regulation (1) includes a power to appoint any person from time to time holding, occupying or performing the duties of a specified office or position of the Commonwealth or of a State or Territory.

8(3) [**Effect of appointment**] An appointment of a person under sub-regulation (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.

## STATE CENTRAL AUTHORITY - DUTIES, POWERS AND FUNCTIONS

9 Subject to sub-regulation 8(3), a State Central Authority has all the duties, may exercise all the powers, and may perform all the functions, of the Commonwealth Central Authority.

## CONVENTION COUNTRIES

10 Subject to Article 40 of the Convention, each of the following countries is a convention country:

- (a) a country specified in Schedule 2;
- (b) any other country in respect of which the Convention has entered into force for Australia.

## APPLICATION FOR RETURN OF CHILD ABDUCTED FROM AUSTRALIA

11(1) [**Application for transmission of claim**] Where a person claims under a law in force in Australia to have rights of custody of a child removed from Australia to a convention country, the person may apply in writing to the Commonwealth Central Authority or to a State Central Authority to have that claim transmitted to the Central Authority in that convention country.

11(2) [**Form of application**] An application under sub-regulation (1) shall be in accordance with Form 1 in Schedule 3.

11(3) [**Application to State Central Authority**] Where an application under sub-regulation (1) is made to a State Central Authority and that Authority is satisfied that the application is in accordance with the requirements of the Convention, the State Central Authority shall forward the application to the Commonwealth Central Authority.

11(4) [**Action required**] Where the Commonwealth Central Authority is satisfied that an application made to it under sub-regulation (1) or an application forwarded to that Authority under sub-regulation (3) is in accordance with the requirements of the Convention, the Commonwealth Central Authority shall take on behalf of the applicant any action required to be taken by a Central Authority under the Convention.

#### LANGUAGE OF APPLICATIONS UNDER REGULATION 11

12 An application under regulation 11 in respect of a child shall be accompanied by a translation into the official language or one of the official languages of the convention country to which the child has been removed, or if that convention country has made a reservation under Article 42 of the Convention objecting to the use of English, a translation into French.

#### APPLICATION FOR RETURN OF CHILD ABDUCTED TO AUSTRALIA

13 Where the Commonwealth Central Authority receives an application in respect of a child removed from a convention country to Australia and is satisfied that the application is an application to which the Convention applies and is in accordance with the requirements of that Convention, the Commonwealth Central Authority shall take action under the Convention to secure the return of the child to the applicant.

#### APPLICATIONS TO COURT

14 Nothing in these Regulations prevents a person, institution or other body from applying directly to a court of competent jurisdiction, whether or not under the Convention, in respect of the breach of rights of custody of, or breach of rights of access to, a child removed to Australia.

#### ORDERS

15(1) [**Application to court**] The responsible Central Authority may, in relation to a child removed to Australia, apply to a court having jurisdiction under the Act for-

- (a) an order for the issue of a warrant for the apprehension or detention of the child;
- (b) an order directing that the child not be removed from a place specified in the order;
- (c) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body in order to secure the welfare of the child pending the determination of an application under regulation 13; or
- (d) an order for the return of the child to the applicant.

15(2) [**Power of court to make orders**] A court may, in respect of an application made under sub-regulation (1), make an order of the kind referred to in that sub-regulation and such other order as the court think fit.

15(3) [**Conditions on removal of child**] Where under sub-regulation (2) a court makes an order in relation to the removal of a child from a place specified in the order, the court may impose such conditions on the removal of the child from that place as the court thinks fit.

15(4) [**Form of application**] An application under sub-regulation (1) shall be in accordance with Form 2 in Schedule 3.

#### ORDERS FOR THE RETURN OF CHILDREN

16(1) [**Application filed less than one year after removal**] Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

16(2) [**Application filed at least one year after removal**] Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1)(d) if the date on which that application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

16(3) [**Circumstances where court may refuse order**] A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that-

- (a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;
- (b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
- (c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or
- (d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

16(4) [Information concerning child's social background] For the purposes of sub-regulation (3), the court may take into account such information relating to the social background of the child as may be provided by the Central Authority of the convention country from which the child was removed.

16(5) [Child no longer in Australia] A court may stay or dismiss an application for an order of the kind referred to in paragraph 15(1)(d) in relation to a child if it is satisfied that the child is no longer in Australia.

#### REQUESTS FOR ORDERS: WRONGFUL REMOVAL

17(1) [Declaration of wrongful removal] A court having jurisdiction under the Act may, if requested by a responsible Central Authority, by order declare that the removal of a child from Australia to a convention country was wrongful within the meaning of Article 3 of the Convention.

17(2) [Request for declaration from foreign court] A court hearing an application for an order of the kind referred to in paragraph 15(1)(d) in relation to the removal of a child from a convention country to Australia may request the applicant to obtain an order of a court, or a decision of a competent authority, of that country, declaring that the removal was wrongful within the meaning of Article 3 of the Convention.

#### EFFECT OF OTHER CUSTODY ORDERS IN AUSTRALIA OR OVERSEAS

18 On the hearing of an application under sub-regulation 15(1) in relation to a child, a court shall not refuse to make an order under sub-regulation 15(2) for the return of the child to the applicant by reason only that in relation to that child there is in force or enforceable in Australia an order in relation to the custody of the child, but may take into account the reasons for the making of that order.

#### HEARINGS

19(1) [Time limit] Where an application is made under regulation 15, the day fixed by a court for the hearing of the application shall be a day not later than 7 days after the date of the filing of the application.

19(2) [Service of application] A responsible Central Authority shall, in accordance with the Rules of Court, cause a copy of the application referred to in sub-regulation (1) to be served on the person or persons who removed the child in respect of which the application is made and on the person, institution or other body in whose possession the child is.

## ARRANGEMENTS FOR RETURN OF CHILD

20(1) [**Arrangements by Central Authority**] Where an order is made under regulation 16, the responsible Central Authority shall cause such arrangements as are necessary to be made in accordance with the order for the return of the child to the applicant.

20(2) [**No notification that order stayed**] If, within 7 days after the making of an order under regulation 16, the responsible Central Authority has not been notified that the order has been stayed in accordance with sub-rule 1(10) of Order 32 of the Rules of Court, the child shall be returned to the applicant.

## SECURITY FOR COSTS, &c

21 A responsible Central Authority or a court; as the case may be, shall not require any security or bond for the payment of cost or expenses of or incidental to proceedings instituted or anything done for the purposes of the performance by Australia of its obligations under the Convention.

## COSTS OF APPLICANTS

22 Where a court makes an order under regulation 15, 17 or 24 it may, on the application of the responsible Central Authority, make an order directing that the necessary expenses incurred by or on behalf of the applicant, including travelling expenses, costs incurred in respect of locating a child, costs of legal representation of the applicant and expenses incurred in respect of the return of the child, be paid by the person who removed the child to Australia or who prevented the exercise of rights of access.

## EVIDENTIARY PROVISIONS

23(1) [**Admissibility of application, etc.**] In proceedings under these Regulations in a court, an application under regulation 13, 14 or 24 and any document or documents attached to or forwarded in support of that application are admissible as evidence of the facts stated in the application or document.

23(2) [**Admissibility of statement in document**] In proceedings under these Regulations in a court, a statement contained in a document-

- (a) purporting to set out or summarize evidence given in proceedings in a court in a convention country, or before a competent authority of that country, in relation to the custody of a child and to have been signed by the person before whom the evidence was given;

- (b) purporting to set out or summarize evidence taken in a convention country for the purposes of proceedings under these Regulations (whether in response to a request made by the court or otherwise) and to have been signed by the person before whom the evidence was taken; or
- (c) purporting to have been received as evidence in proceedings in a court in a convention country or before a competent authority of that country in relation to the custody of a child and to have been signed by a judge or other officer of the court or that authority,

is admissible as evidence of any fact stated in the document to the same extent as oral evidence of that fact, without proof of the signature of the person purporting to have signed it or of the official position of that person.

23(3) [**Judicial notice of foreign law**] In proceedings under these Regulations in a court, the court may take judicial notice of a law in force in a convention country.

23(4) [**Admissibility of foreign order or decision**] In proceedings under these Regulations in a court, a document purporting to be an order, or a copy of an order, of a court in a convention country, or a decision of a competent authority of that country, in relation to the custody of a child, and to have been signed by a judge or other officer of the court or that authority is admissible as evidence of that order or decision, as the case may be, without proof of the signature of the person purporting to have signed it or of the official position of that person.

#### ACCESS - GENERAL

24(1) [**Application for transmission of claim**] Where a person claims to have rights of access in relation to a child in a convention country, the person may apply in writing to the Commonwealth Central Authority or a State Central Authority to have the claim in respect of rights of access to that child transmitted to the Central Authority in that country.

24(2) [**Application to State Central Authority**] Where an application under sub-regulation (1) is made to a State Central Authority, and that authority is satisfied that the application is in accordance with the requirements of the Convention, the State Central Authority shall forward the application to the Commonwealth Central Authority.

24(3) [**Form of application**] An application under sub-regulation (1) shall be in accordance with Form 3 in Schedule 3.

24(4) [**Steps to be taken by Commonwealth Central Authority**] Where the Commonwealth Central Authority is satisfied that-

- (a) an application referred to in sub-regulation (1) or (2); or

(b) an application forwarded to the Commonwealth Central Authority by the Central Authority of a convention country in relation to rights of access to a child in Australia,

is an application to which the Convention applies and is in accordance with the requirements of the Convention, the Commonwealth Central Authority shall take such steps as are necessary for the purpose of enabling the performance of the obligations of Australia under Article 21 of the Convention.

24(5) [**Application for order**] A responsible Central Authority may apply to a court having jurisdiction under the Act for an order in relation to rights of access to a child in Australia.

24(6) [**Power of court to make orders**] A court may, in respect of a application made under sub-regulation (5), make such orders in relation to rights of access to a child as the court thinks fit.

24(7) [**Form of application**] An application under sub-regulation (5) shall be in accordance with Form 4 in Schedule 3.

#### POWER OF COURT TO MAKE ORDER FOR RETURN OF CHILD

25 Nothing in these Regulations shall be taken to prevent a court of competent jurisdiction, at any time, from making an order for the return of a child to an applicant otherwise than under these Regulations.

# The Hague Convention on the Civil Aspects of International Child Abduction: the Australian experience

*By Lindsay Curtis, Deputy Secretary, Attorney-General's Department, Canberra, Australia.*

The international abduction of children is a serious matter for Australians. Our geographic isolation accentuates the problem. The following description, taken from an American context, applied equally to the Australian situation before Australian Accession to the Hague Convention. It still applies where a child is abducted to a non-convention country—

Most (people) who experience the abduction of a child across international frontiers are at a complete loss about what to do and where to turn. There is no office in this country that is equipped to give them the necessary aid and direction. If they travel to the country where they presume the child to be, seeking help from the authorities, they find themselves shunted from one agency to another with no one office charged with responsibility to help them. Attorneys in both countries run into the same difficulties, especially where the whereabouts of the abductor and the child are unknown. They can attest to the enormous expenditures for travel, detective services, and other costs incurred by their clients in foreign abduction cases, not to speak of the emotional stress and strain involved.<sup>1</sup>

The Hague Convention on the Civil Aspects of International Child Abduction 1980 addresses these problems. The Convention derives its legal importance from the possibility of people establishing legal and jurisdictional links which are artificial to the child's welfare. The Convention solution is the speedy return of a child which has been wrongfully removed to, or retained in, a country which is not its place of habitual residence. The basic premise of the Convention is that the home jurisdiction of the child is the jurisdiction best fitted to deal with disputes as to custody, and that the child should be returned to that jurisdiction with the least delay. The Convention assumes that the best interests of the child are served by such a speedy return, to permit the proper resolution of a custody dispute in the domestic forum of the home country. The Convention recites "that the interests of children are of paramount importance in matters relating to their custody". But the welfare of the child may only be considered by the court of the requested country in exceptional circumstances. It is not a matter which ordinarily falls for consideration by a court exercising jurisdiction in accordance with the Convention.

The Convention is set out in Schedule 1 to the Family Law (Child Abduction Convention) Regulations (the Regulations). The Convention entered into force in respect of Australia on 1 January 1987. Currently the Convention is in force for Australia with the following States: Canada, France, Portugal, Switzerland, the United Kingdom, Spain, Luxembourg, Hungary and the United States of America. After 1 October 1988 it is in force with Austria.

The Family Law Act 1985 (Cth) has, of course, long contained provisions for the registration in Australian courts of overseas custody orders and for their

---

1. Bodenheimer: *The Hague Convention on Child Abduction* (1980) 14 *Family Law Quarterly*, pp. 110-111

enforcement in Australia as Australian orders. These provisions apply, however, only in relation to Papua New Guinea and New Zealand. The Convention differs from this procedure in the following essential respects—

- (a) It provides for official machinery to take action to secure the return to her or his home country of an abducted child.
- (b) It establishes a special legal regime to deal with these children, independently of the domestic law of member countries for the ordinary enforcement of custody or access orders.

The Convention does not require a breach of a custody order of a court to set the processes of the Convention in motion. It is sufficient if there be a removal of the child from Australia in contravention of the rights of any persons, body or institution in respect of the custody of the child, or of access to the child. Removal of a child which amounts to the contravention of the rights of a State authority under a State welfare order would be within the Convention.

In cases of pre-judgment child abduction where the applicant has not, after the child's removal or retention, obtained a custody order, the court in the requested State has regard to the custody status existing by operation of law in the state of origin. If parents have joint and equal custody rights in that State before divorce, the taking of the child by one of them would be a wrongful removal.<sup>1</sup>

Thus removal from Australia in breach of the rights of guardianship and custody conferred by s. 63F of the Family Law Act would be a wrongful removal for the purpose of the Convention, even in the absence of a Court order.

The Convention applies only to children under the age of 16. Thus, with respect to the age of children, it is not co-extensive with the operation of custody orders under the Family Law Act. It applies only to children who were habitually resident in a Contracting State immediately before any breach of custody or access rights. The reference to the law of the State of habitual residence is intended to be a reference not only to its domestic law but also to its conflict of law rules. This may involve an inquiry as to the extent to which the law of the State of habitual residence recognises foreign custody orders.

The concept of custody in the Convention extends beyond the concept of custody in the Family Law Act. Custody, as defined in s. 63E(2) of the Family Law Act is—

- (a) the right to have the daily care and control of the child, and
- (b) the right and responsibility to make decisions concerning the daily care and control of the child.

Guardianship, for the purposes of the Family Law Act, is defined by s. 63E(1). It involves the responsibility for the long-term welfare of the child and the powers, rights and duties that are, apart from the Act, vested by law or custom in the guardian of a child. The rights of custody are, however, specifically excluded from the rights and responsibilities of guardianship.

For the purposes of the Convention, rights of custody are defined 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". (Article 5(a)). Notwithstanding the reference in the Convention definition to rights relating to the care of the person of the child, there has been an issue in the United Kingdom whether rights of a custodian under an Australian custody order should be regarded as rights of

---

1. *Re Hicks*, Family Court of Australia, 1987 Nygh J, (unreported).

custody. A custody order has been viewed as being equivalent only to a care and control order under the English legislation.<sup>1</sup>

In *Re Arthur*, a declaration was obtained from the Family Court at Parramatta that the removal of the child concerned from Australia was wrongful. This is a procedure envisaged by Article 15 of the Convention. The declaration was made on the *ex parte* application of the father, who was seeking the return of the child in question from England. The declaration was accepted by the English Court as removing any doubt whether the removal of the child from Australia was wrongful for the purposes of the Convention.

The right to determine the child's place of residence is not, it is suggested, a matter going to the daily care and control of the child; it is therefore a matter which falls within the scope of guardianship for the purposes of the Act. The practical significance is that, unless an order is made giving the custodian the sole guardianship of a child or a child agreement is registered having the same effect, the parents remain joint guardians—s. 63F(1). The removal of a child from Australia by the custodian, in the case of joint guardianship, involves wrongful removal for the purposes of the Convention, notwithstanding that the removal might not be a breach of the custody order made under the Family Law Act.

The Family Law Act prohibits the removal from Australia of a child who is the subject of an order with respect to custody or guardianship without the consent of any person who is, under the order, entitled to custody, guardianship or access or in accordance with a court order: s. 70A(1). Thus for the purpose of domestic law, the removal of a child from Australia is wrongful where a person entitled to access to the child under a court order has not consented to the removal of the child or a court has so ordered. It is by no means clear that, where removal is wrongful under the Family Law Act by reason only of the lack of consent of a person entitled to access to the child, such a removal would be wrongful for the purposes of the Convention.

The Convention requires each member country to establish an official, who is known as the Central Authority. The function of the Central Authority is to act, whether administratively or by an application to a court as necessary, on behalf of the person seeking the return of an abducted child. The Convention provides that a federal state may establish a number of Central Authorities in each of its domestic jurisdictions. While the Convention contemplates that an application may be made by a person seeking the return of an abducted child directly to the Central Authority of the country to which the child has been taken or in which the child is being held or the Courts of that country, the more usual course is for the parent or other custodian of the child to apply to the Central Authority which then transmits the application to the Central Authority of the other country. That Central Authority is then obliged by the Convention to take such action as is appropriate to obtain the return of the child in accordance with the Convention.

The Secretary of the Attorney-General's Department is the Federal Central Authority. Central Authorities have also been appointed in each State and Territory for the purposes of taking proceedings for the location and return of an abducted child.

The procedures to give effect to the Convention are set out in the Regulations, the making of which is authorised by s. 111B of the Family Law Act.

---

1. *Re Arthur*, English High Court of Justice, 1988, Ewbank J (unreported).

*Applications for return of children abducted to Australia*

An application under the Convention for the return of a child abducted to Australia may be directed in the first instance to the Federal Central Authority by the Central Authority of the Convention country which is the habitual residence of the child. However, an application may be made directly by any person, institution or other body claiming that a child has been removed or retained in breach of custody rights (Article 8).

Officers in the Department peruse each such application to determine whether they are satisfied that it is an application to which the Convention applies and that it is in accordance with the requirements of the Convention (r. 13). The requirements of r. 13 introduce an unnecessary bureaucratic overlay into the procedure required by the Convention. Moreover, the requirement that the Central Authority be satisfied that the application is an application to which the Convention applies and is in accordance with the requirements of the Convention calls for a consideration of matters which may have later to be dealt with by the court where there is any dispute about the facts. It should be sufficient that these matters appear on the face of the material presented to the Central Authority and, indeed, this accords with what is done in practice.

The Federal Central Authority will then forward the application to the relevant State or Territory Central Authority if the whereabouts of the child are known. In other cases, the Federal Central Authority makes an application to the Family Court.

Upon receipt of an application the State or Territory Central Authority concerned makes urgent application to the Family Court of Australia or the Family Court of Western Australia as the case may be for *ex parte* restraining orders to prevent a child, when located by the police after abduction, from being secreted away again before the court has an opportunity to deal with the substantive application for the return of the child in accordance with the Convention.

Application to the Family Court may be made for—

- (a) an order for the issue of a warrant for the apprehension or detention of the child;
- (b) an order directing that the child not be removed from a place specified in the order;
- (c) an order for the surrender of all current passports relating to the child;
- (d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body in order to secure the welfare of the child pending the determination of the application for return; and
- (e) orders that, as soon as practicable, the Respondent be served with sealed copies of the Application and sealed copies of any orders made.

To give effect to the *ex parte* orders and to locate the child, copies of the orders may be served on the Australian Federal Police or the relevant State Police Forces, the Secretary of the Department of Immigration and Ethnic Affairs, the Secretary of the Department of Foreign Affairs and Trade, or the relevant Embassy or High Commission.

Once the child has been located and is in the custody of the relevant welfare authority the best way of caring for the child should be carefully determined by that authority. If appropriate *secure* arrangements can be made with a relative or friend of the child these might be preferred to institutionalised care arrangements. If appropriate arrangements can be made between the police and welfare authorities

the latter might accompany the police executing the warrant in order to view the circumstances in which the child is being kept.

The Federal Central Authority is informed when the child is located. The Federal Central Authority informs the international Central Authority which made the original application.

Legal assistance is usually provided to the State Central Authorities from the State Government Solicitor's office in the State concerned to obtain those orders and in the subsequent substantive hearings.

When the substantive application for the return of the child comes before the Court, the discretion that the Court would have had, apart from the Convention, as to the making of an order for return, is severely circumscribed. The Court must make an order for return unless one or more of the exceptions in Articles 13 and 20 are made out.<sup>1</sup> In particular, the Court may not have regard, independently of those exceptions, to the question whether return is in the best interests of the child. It is an assumption of the Convention that, in the absence of circumstances falling within one or more of the exceptions, the best interests of the child are served by being returned so that disputed issues of custody can be determined by the courts of the State of habitual residence. The cases in which any of the exceptions might apply have been suggested by Kay J to be "likely to be few and far between".<sup>2</sup> In *Turner*<sup>3</sup> it was accepted that a girl of 13 years was of sufficient maturity for her objection to being returned to be made out.

The bureaucratic focus of the Regulations also appears in the procedures for making an application to the Court. Although it is clear that the Convention contemplates that an application may be made directly to the court by the person whose rights of custody have been breached by the abduction of a child, the procedures set out in the regulations are predicated upon an application being made by the relevant Central Authority, and do not fit an application by the custodial person. In *Barraclough*<sup>4</sup> Kay J took the practical course of ignoring the form in which the application was made to the court, in purported reliance on the forms prescribed by the Regulations, by the parent seeking the return of the child and went to the merits of the case.

Arrangements regarding the child's return will be made by the State and Federal Central Authorities in consultation with the overseas Central Authority having regard to the proposed arrangements for the return of the child nominated on the original application.

#### *Applications for return of children abducted from Australia*

Where a child has been wrongfully removed from, or retained out of, Australia an application in accordance with Form 1 of Schedule 3 to the Regulations, may be made for the return. A form for this purpose may be obtained from the local registries of the Family Court. Children are unlikely to be returned because of breaches of access orders.<sup>5</sup>

The completed form is forwarded to the Federal Central Authority for transmission to the Central Authority in the contracting country where the child is thought to be (r. 11(3)). Central Authorities will assist applicants to complete the form and prepare affidavits if this is necessary.

1. *Re Hicks*, see *supra*.

2. *Re Lambert*, Family Court of Australia, 1987 (unreported).

3. *Re Turner*, Family Court of Australia, 1988, Lambert J (unreported).

4. *Re Barraclough*, (1987) 11 Fam LR 773.

5. *Bouzan v Bouzan*, English High Court of Justice, 1987 (unreported).

The Federal Central Authority satisfies itself that the application is, on its face, in accordance with the requirements of the Convention before forwarding it to the relevant Central Authority of the country where the child is thought to be.

#### *General*

Experience has shown that contacting Interpol through police channels before warrants are issued in the relevant Convention country is unwise. Police enquiries may alert an abductor and allow him/her to flee a Convention country or make it more difficult to locate to serve a warrant of apprehension.

#### *Costs*

Persons from an overseas Convention country making an application are not required to bear any legal costs incurred by Central Authorities in Australia giving effect to its Convention obligations but the applicant is responsible for the fares and other costs associated with the return of the child.

Some Convention countries have made reservations in accordance with Article 42 to declare they are not bound to assume any costs in their country except insofar as the costs may be covered by that country's system of legal aid and advice (Article 26). In relation to applications for return from these countries applicants may be required to pay legal costs related to the return of the child.

Where a child is abducted *from* Australia, an application for financial assistance for the return of the child may be made under the Overseas Custody (Child Removal) Scheme administered by the Department. Financial assistance will only be granted after an examination of the applicant's means and needs.

If applicants wish to request Central Authorities to seek orders directing that expenses incurred in locating and returning the child be paid by the person who removed the child from Australia they should inform the Central Authority with which they lodge their application.

Before arrangements are completed for the return of the child it will be necessary to ensure that there is a valid passport and/or document of identity in respect of the child.

#### *Experience of Attorney-General's Department to Date*

From 1 January 1987 to 31 July 1988 there have been 32 cases seeking return of a child or children to or from Australia, in which the Department has been involved.

Of the 32 cases, 13 have concerned children wrongfully removed from Australia and 18 have concerned children wrongfully removed to Australia. One case involved a child which it was said might have been brought to Australia but there was no record of entry to Australia.

Of the 13 cases where children have been removed from Australia, seven cases concerned removals to the United Kingdom, in two cases the children went to Canada and there has been one case to each of Switzerland, France and Portugal. The break-up by States is as follows: two cases from Victoria, five cases from New South Wales, two cases from Queensland, one case from each of Western Australia, South Australia and the Northern Territory. In eight of these outwards cases the children were ordered to return or have been returned to Australia, in two cases the child has not been located, in one case we are awaiting action by the authority, in one case the authority did not recognise that the Convention applied and in one case return was refused.

Of the 18 cases involving children wrongfully removed to Australia, five went to Victoria, nine to New South Wales, three to Queensland and one to Western Australia and one child did not appear to have been brought to Australia at all.

Of these 17 inwards cases 11 came from the United Kingdom, three from Canada, two from France, one from Hungary and one from Portugal.

In nine of these inwards cases the children have returned to their homes either in pursuance of a court order or by agreement of the parties, in two cases the children cannot be located, in one case return was refused because of the child's wishes, in one case return was inappropriate because only access was violated. The remaining four cases are being processed.

In relation to inwards cases there has sometimes been great difficulties in locating the children or determining whether they ever came to Australia. Once a child arrives in Australia and passes through the immigration check the police have few avenues open to them to assist in location. In one case we are still unable to find a family of three children despite months of searching.

Parties are able to bring their own applications for return before the courts and argue that the Convention applies and four additional cases have come to our notice where this has been done. In one of these cases the English High Court of Justice ordered the return of a child to Australia.

Return fares have created problems. A problem arose in relation to the cost of return fares for a child from Scotland where the child had been taken into custody in Victoria but the applicant was unable to meet the cost of the return fare. The United Kingdom does not have a financial assistance scheme to provide costs for return fares for children from the United Kingdom but it is understood that the Lord Chancellor's Department is now looking at the possibility of establishing a scheme similar to the Commonwealth's Overseas Custody (Child Removal) Scheme (Australian).

In the cases sent to Canada difficulties have arisen with regard to slow communications and the matter of costs. When it ratified the Convention, Canada made a reservation to the effect that authorities would not be responsible for legal costs and in two requests for return sent to Canadian Provinces the children were located but the authority refused to take action over a number of weeks until the applicant agreed to pay the costs for private solicitors to bring proceedings or satisfied legal aid means and needs tests. The United States of America has also made a reservation as to legal costs so it is likely that when Australian applicants seek the return of children from American States similar requests for costs will delay the return of children.

Cases sent to the United Kingdom have been expeditiously and satisfactorily concluded. After meeting a means and needs test some Australian applicants have been assisted with return fares to Australia for their children under the Overseas Custody (Child Removal) Scheme.

### *Conclusion*

In the cases to which it applies, the procedures under the Convention have proved to be remarkably efficacious in achieving its objectives, namely, the speedy return of the child to the country of habitual residence so that disputed questions of custody can be determined there. But the weakness of the Convention lies, of course, in the limited number of countries which are so far parties. Given the wide range of possible destinations to which a child abducted from Australia may be taken, there must still be a considerable need to resort to the procedures available outside of the Convention. Although the courts in the common law countries have come to the view that, generally speaking, the best interests of an abducted child are served by making orders for the return of the child to the country of residence to allow the courts there to decide what is in the best interests

of the child, it seems that there are many countries where such a result is unlikely or at best uncertain. The gloomy reality seems to be that, outside of the Convention or of reciprocal agreements “(T)he general state of private international law in relation to the recognition of foreign custodial arrangements engenders a climate in which abductors have considerable reason for optimism. In some cases, the general law of the ‘state of refuge’ will confer unqualified custodial rights on the abductor in complete disregard of any other foreign system of law. In other cases, much more familiar to common lawyers, the jurisdictional rules as to custody disputes will be permissive in the state of refuge and will allow a court in that state to make a decision on the merits”.<sup>1</sup>

---

1. Farquhar “The Hague Convention on International Child Abduction Comes to Canada,” (1983) 4 *Canadian Journal of Family Law* 8.

PROVINCE OF ALBERTA

INTERNATIONAL CHILD ABDUCTION ACT  
CHAPTER I-6.5

*(Assented to August 15, 1986)*

*Table of Contents*

Definition	1
Convention in force in Province	2
Exception from Convention	3
Central Authority	4
Care and maintenance	5
Contracting States	6
This Act prevails	7
Coming into force	8
Schedule	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

- |                                 |   |
|---------------------------------|---|
| Definition                      | 1 In this Act, "Convention" means the Convention on the Civil Aspects of International Child Abduction set out in the Schedule.   |
| Convention in force in Province | 2 The Convention, except as provided in section 3, applies in the Province.   |
| Exception from Convention       | 3 The Crown in right of Alberta is not bound to assume any costs resulting under the Convention from the participation of legal counsel or advisers or from court proceedings except in accordance with the legal aid plan established under the <i>Legal Profession Act</i> .  |
| Central Authority               | 4 The Attorney General or his designate shall be the Central Authority for the Province for the purpose of the Convention.  |
| Care and maintenance            | 5 Where the Central Authority takes charge of a child who has been wrongfully removed or retained in accordance with Article 3 of the Convention, a director designated under the <i>Child Welfare Act</i> may provide for the care and maintenance of the child.   |
| Contracting States              | 6(1) In any proceeding, a certificate issued by or under the authority of the Secretary of State for External Affairs of Canada containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.<br><br>(2) The Attorney General shall publish in The Alberta Gazette the names of the Contracting States to the Convention. |
| This Act prevails               | 7 If there is a conflict between this Act and any enactment, this Act prevails.   |
| Coming into force               | 8 <i>This Act comes into force on Proclamation.</i>   |

SCHEDULE

CONVENTION ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION

## THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Memorandum by the Government of Canada

At the Senior Officials' Meeting held in London in January 1986, Canada agreed to prepare a brief paper on the Hague Convention on the Civil Aspects of International Child Abduction in the light of its experience under that Convention.

2. Canada ratified in June 1983 the Hague Convention on the Civil Aspects of International Child Abduction, making use of a federal State clause. The Convention was initially extended to four provinces. It is now in force in eight of the ten Canadian provinces and the Yukon Territory. It should be extended to the Province of Saskatchewan very soon. Consequently, the only Canadian jurisdictions having yet to adopt the Convention are the province of Alberta and the Northwest Territories.

3. On the international level, it is in force amongst Canada, France, Portugal and Switzerland and it will come into force on August 1, 1986 in the United Kingdom. Hungary has recently acceded to it. President Reagan referred the Convention to the United States Senate in October of last year. There is a possibility that the United States will be in a position to ratify it at the beginning of next year.

4. Domestically as well as internationally, the violation of custody rights has been a subject of concern in Canada for the past several years. A great number of measures have been taken, including important legislative ones at both the federal and provincial levels, to ensure that children are provided with effective protection against disruptions in their lives which necessarily occur when they are abducted. As noted by the Commonwealth Law Ministers in April/May 1980, the paramount consideration in this area is the best interests of children.

5. That principle is the basis of the Hague Convention on the Civil Aspects of International Child Abduction which provides a frame work that should enable States to effectively deal with transborder abductions.

6. The task of commenting on the Convention is greatly facilitated by the fact that there already exists excellent analysis of the convention. Suffice it to mention two of these. The first is the official report of the Hague Conference which thoroughly explains the background to the Convention and its provisions. It was prepared by Elisa Perez-Vera who was the Rapporteur Special throughout the negotiations of the Convention. This document is readily available from the Hague Conference on Private International Law. The second is the explanatory documentation prepared for the Commonwealth jurisdictions by Mr. J. M. Eekelaar. It is one of a series of "accession kits" published by the Commonwealth Secretariat. Mr. Eekelaar makes a very useful analysis of the practical implications of the Convention and the draft Model Act attached to his report will surely assist all States contemplating implementing legislation. Canada would like to commend Professor Eekelaar and the Commonwealth Secretariat for this very useful work.

7. This paper will comment on the Convention, in light of Canada's analysis of the Convention and its limited experience. Although the Convention has been in force since 1983,

there have been very few cases where it has been invoked in Canadian practice, probably because there are only three other Contracting States and because the Convention does not apply to abductions which occurred before its coming into force (Article 35).

#### Approach taken by the drafters of the convention

8. The drafters of the Convention considered that the situation they were addressing was as follows: a custodial parent faced with the abduction of his or her child (sometimes children) to another State usually faces two problems: a factual one (locating the child) and a legal one (ensuring the respect of his or her custody right).

9. The parent does not always know to which State the child has been abducted, but even when the State where the child is located is known, the custodial parent usually does not know how to obtain the cooperation of the local authorities, if that is at all possible. Traditionally, authorities in many States, including Canada, have been reluctant to intervene in such matters. (It seems, however, that in several States, including Canada, this attitude is changing.) It was, therefore, considered important to provide assistance to the parent in locating the child.

10. The mechanism provided in the Convention to this end is the Central Authority. The duties of the Central Authority, which include taking appropriate measures to discover the whereabouts of the child, are defined in Article 7. It must be remembered that this Convention is an administrative as well as a judicial cooperation Convention. It is basically seen as a framework to encourage international cooperation. For such a practical problem as international child abduction, all involved will have to adopt a flexible approach towards the application of the Convention.

11. The second problem was ensuring respect of custody orders. The traditional legal mechanism, recognition and enforcement of judgments, could be long and a successful outcome was far from assured. This was due in part to the length of the procedure, at the end of which it was often considered that the child was too well established in his or her new environment to be displaced once again.

12. Consequently, the traditional approach to providing for the respect of custody rights was rejected for the purpose of the Convention. Instead, Article 12 prescribes that the judge must order the return of the child if there has been a wrongful removal or retention in terms of Article 3. There is, of course, a time consideration (1 year) and a party opposing the return may do so within the limits of Article 13. These exceptions to the return of the child, for example, if the return would place the child in an intolerable situation, are drafted restrictively in an effort to limit the circumstances in which the child will not be returned. In light of the Convention's stated objectives, it will be important that authorities interpret restrictively the exceptions of Article 13.

13. The same comment applies to Article 20 which provides that the return 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. This clause was adopted after a long and difficult debate to prevent the inclusion of a provision on public policy which would have allowed Contracting States to oppose the return of the child where this would be considered incompatible with the fundamental principles of the requested State relating to family and to children. This provision which was far too broad (it opened the door to a reconsideration of the merits of the custody order), risked seriously compromising the success of the Convention's. All the delegations agreed that Article 20 should be allowed to apply only exceptionally and in rare circumstances. It would seem important that when

adopting the Convention, States do not attempt to broaden the possible scope of Article 20 or even identify specific circumstances for its possible application in order not to encourage the use of this Article.

14. Mr Eekelaar states on page 19 of his report that:

"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."

This is an important statement which stresses that States will no longer permit forum shopping and thereby encourage abductions. By doing this, States take the children's side, i.e. the right of children to be protected against disruptions in their lives which occur when a custody order is violated by one parent. Such an approach counters the argument that by intervening in child abduction cases the State is taking sides in what is seen as a private matter. Protecting children can surely be seen as a question of public policy.

#### Implementation of the Convention by Canada

15. Comments on the implementation of the Convention in Canada could be useful for other States, especially in light of certain of the issues raised by Mr. Eekelaar.

16. As mentioned above, ten of the twelve Canadian jurisdictions have now adopted the necessary implementing legislation. In all of these cases, the implementing Act was quickly passed by the Legislatures with only favourable comments. Essentially, the Canadian jurisdictions adopted the text of the Convention. In a few jurisdictions, such as Quebec, the text was either re-arranged or a few provisions were added to it. This method was recommended by the Uniform Law Conference of Canada to ensure that the Convention itself has the force of law in Canada. A few regulations were adopted to complement the Convention but it is important that the procedure be as clear and uncomplicated as possible to ensure that the applicant can proceed rapidly.

17. Each jurisdiction has designated its Attorney General as Central Authority and has appointed a person to represent the Attorney General. Requests under the Convention can be made either to the Federal Central Authority or to the relevant Provincial or Territorial Central Authority. Provincial Central Authorities have played a significant role in processing requests received from Foreign Central Authorities or in assisting parents in making a request to a Foreign Central Authority. Their involvement is essential inasmuch as they can have direct access to other services that may be required, such as the different provincial departments or social services, child welfare, official guardians and, of course, the police departments. The role of the police is likely to become important in determining the whereabouts of children. In most of the cases that we have dealt with under the Convention, there was sufficient information to find the children. The role of the police where no such information is available remains to be defined. Decisions will also have to be made with respect to the disclosure of information on the whereabouts of the children once it is obtained. Should the address be communicated to the Foreign Central Authority? If so, under what conditions?

18. On the basis of our limited experience, we have found it useful to have the applicant parent or someone on his or her behalf take charge of the child in the requested State when the child is to return to Canada and are informing applicants accordingly. Foreign

authorities in those countries should not systematically be relied upon to take care of the child. Canadian embassies abroad have cooperated in cases of international child abduction. This, however, must be done taking into account limited resources and their diplomatic status. They cannot replace the parent and there is a limit to the kind of interventions they can make with foreign authorities.

19. When ratifying the Convention, Canada declared that, except for the Province of Manitoba, it will provide legal aid and counsel to foreign applicants insofar as they qualify under the legal aid system of the jurisdiction involved. In Manitoba, the Attorney General is prepared to represent the custodial parent whether he or she lives in Canada or abroad. In the few cases that have gone to court in Canada under the Convention, the provincial jurisdiction involved provided a lawyer to represent the child in court as Professor Eekelaar suggests in page 12 of his report. On the other hand, the parent who submitted the application was often advised by the Provincial Central Authority to retain the services of a local lawyer in private practice and was informed that he could obtain legal aid if he was eligible. Canada does not pay for the costs, including travel expenses, involved in the return of a child from Canada to the requesting State. In a successful case of the return of a child from a requested State to Canada, the custodial parent made all the necessary arrangements for the travel of her child.

20. It should also be noted that in Canada, the Convention is applied on a basis of reciprocity: it only applies to cases involving children habitually residing in another Contracting State.

21. The language of communication in the international context will always raise difficult questions. Clarifications with other Contracting States have already been necessary. Under the Convention, the matter is governed by Article 24 which states that:

"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".

A Contracting State may object to the use of French or English, but not both. This provision governs the language of any documents sent to the Central Authority. In most States, an application to the Central Authority in either English or French will probably be entertained.

22. In any event, the determining factor on this question of translation remains the possibility that the documents may have to be used in relation to an application to the court of the requested State. It cannot be assumed that a foreign judge will either accept or understand the document written in what is for him a foreign language. Consequently, we are advising any applicant in Canada that he or she should provide a translation of at least the documents on which the custody rights are based.

23. We also tell applicants that, although the Convention does not require that the application be accompanied by documents or that judicial decisions or agreements between the parties attesting to the right of custody accompany the application, they would be well advised, if the judicial authority of the requested State is required to consider their application, to append all the necessary documents in order to expedite the process by preparing a complete file for the court in advance. Article 15 enables the judicial or administrative authorities of the requested State to ask that the applicant obtain from the authorities of the State of the habitual residence of the child a decision that the removal or retention of the child was wrongful within the meaning of Article 3 of the Convention. In

view of the difficulties of obtaining such a determination on the original application, we would hope that the procedure would be used in exceptional cases.

24. Finally, the most difficult point in relation with the Convention has been up to now the exercise of access rights. It seemed important during the negotiations of the Convention that a provision on access rights be included. The access right is the counterpart to the custody right and the child has a right to be able to establish a relationship with both his parents. Unfortunately, sending a child to a foreign country for the exercise of access rights may often result in abduction, insofar as the child does not come back at the end of the stated period. This seems to occur more frequently where the parents are in different States, particularly where the access periods are few and far between and the access parent believes that he or she will not see the child again.

25. Canadian judges have ordered the custodial parent to send the child to a foreign jurisdiction for the exercise of access rights. In some cases, however, where there has been a previous abduction or evidence of non-cooperative behaviour on the part of the access parent, Canadian judges have ordered that the exercise of access rights take place only within the jurisdiction of the custodial parent. It is hoped that enhanced cooperation between authorities of the different States will ensure that the children do return after the exercise of access rights and reassure the access parent that he or she will be able to effectively exercise their rights.

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]

**B**E 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

1.—(1) In this Part of this Act “the Convention” means the ~~Convention on the Civil Aspects of International Child Abduction~~ <sup>The Hague Convention.</sup> 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.

2.—(1) For the purposes of the Convention as it has effect ~~under this Part of this Act~~ <sup>Contracting States.</sup> 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,

**PART I** 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 ;

PART I

and such a request shall be duly complied with.

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.

Proof of documents and evidence.

(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.

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.

Declarations by United Kingdom courts.

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—

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

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

1969 c. 54.  
1968 c. 34  
(N.I.)

1968 c. 49.

PART I  
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 II

### RECOGNITION AND ENFORCEMENT OF CUSTODY DECISIONS

## 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.

1969 c. 54.

(3) In section 17 of the Children and Young Persons Act 1969 (termination of supervision orders) at the end there shall be added—

- “ (c) in the case of an order made by virtue of section 1 of this Act, if an event mentioned in paragraph (a) or (b) of section 25(1) of the Child Abduction and Custody Act 1985 occurs with respect to the child.”.

(4) In Schedule 3 to the Children and Young Persons Act (Northern Ireland) 1968 after paragraph 2 there shall be inserted— PART III  
1968 c. 34  
(N.I.).

“ 2A. A supervision order made by virtue of section 95(1)(d) or, in the case of a child or young person committed to the care of a fit person under Part V, sections 143(6)(d) or 144 shall cease to have effect if an event mentioned in paragraph (a) or (b) of section 25(1) of the Child Abduction and Custody Act 1985 occurs with respect to the child ”.

(5) In section 5(2) of the Child Care Act 1980 (circumstances in which resolutions under section 3 vesting parental rights and duties in a local authority cease to have effect)— 1980 c. 5.

(a) the word “ or ” at the end of paragraph (b) shall be omitted ; and

(b) at the end there shall be inserted the words “ or

(d) an event mentioned in paragraph (a) or (b) of section 25(1) of the Child Abduction and Custody Act 1985 occurs with respect to the child ”.

(6) In section 16 of the Social Work (Scotland) Act 1968 (assumption of parental rights and powers by local authority) in subsection (11) after paragraph (d) there shall be inserted the words “ ; or ” 1968 c. 49.

(e) an event mentioned in paragraph (a) or (b) of section 25(1) of the Child Abduction and Custody Act 1985 occurs with respect to the child.”

(7) At the end of section 106 of the Children and Young Persons Act (Northern Ireland) 1968 there shall be inserted— 1968 c. 34  
(N.I.).

“ (3) A parental rights order shall cease to have effect if an event mentioned in paragraph (a) or (b) of section 25(1) of the Child Abduction and Custody Act 1985 occurs with respect to the child.”

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

(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.

**27.**—(1) In this Act “ custody order ” means any such order or authorisation as is mentioned in Schedule 3 to this Act and “ custody proceedings ” means proceedings in which an order within paragraphs 1, 2, 5, 6, 8 or 9 of that Schedule may be made or in which any custody order may be varied or revoked. Interpretation.

**PART III** (2) For the purposes of this Act “ part of the United Kingdom ” means England and Wales, Scotland or Northern Ireland and “ the appropriate court ”, in relation to England and Wales or Northern Ireland means the High Court and, in relation to Scotland, the Court of Session.

(3) In this Act “ local authority ” means—

(a) in relation to England and Wales, the council of a non-metropolitan county, a metropolitan district, a London borough or the Common Council of the City of London ; and

(b) in relation to Scotland, a regional or islands council.

Application as respects British Islands and colonies.

**28.**—(1) Her Majesty may by Order in Council direct that any of the provisions of this Act specified in the Order shall extend, subject to such modifications as may be specified in the Order, to—

(a) the Isle of Man,

(b) any of the Channel Islands, and

(c) any colony.

(2) Her Majesty may by Order in Council direct that this Act shall have effect in the United Kingdom as if any reference in this Act, or in any amendment made by this Act, to any order which may be made, or any proceedings which may be brought or any other thing which may be done in, or in any part of, the United Kingdom included a reference to any corresponding order which may be made or, as the case may be, proceedings which may be brought or other thing which may be done in any of the territories mentioned in subsection (1) above.

(3) An Order in Council under this section may make such consequential, incidental and supplementary provision as Her Majesty considers appropriate.

(4) An Order in Council under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Short title, commencement and extent.

**29.**—(1) This Act may be cited as the Child Abduction and Custody Act 1985.

(2) This Act shall come into force on such day as may be appointed by an order made by statutory instrument by the Lord Chancellor and the Lord Advocate ; and different days may be so appointed for different provisions.

(3) This Act extends to Northern Ireland.

## SCHEDULES

### SCHEDULE 1

#### CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

### SCHEDULE 2

#### EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN

Section 27(1).

### SCHEDULE 3

#### CUSTODY ORDERS

##### PART I

##### ENGLAND AND WALES

1.—(1) An order made by a court in England and Wales under any of the following enactments—

- 1969 c. 46. (a) section 7(2) of the Family Law Reform Act 1969 ;
- 1969 c. 54. (b) subsection (2) of section 1 of the Children and Young Persons Act 1969 (being an order made in pursuance of subsection (3)(c) of that section otherwise than in a case where the condition mentioned in subsection (2)(f) is satisfied with respect to the child) ;
- (c) section 15(1) of the Children and Young Persons Act 1969 (being a care order made on the discharge of a supervision order other than a supervision order made in a case where the condition mentioned in section 1(2)(f) of that Act was satisfied with respect to the child) ;
- 1971 c. 3. (d) section 9(1), 10(1)(a) or 11(a) of the Guardianship of Minors Act 1971 ;
- 1973 c. 18. (e) section 42(1) or (2) or 43(1) of the Matrimonial Causes Act 1973 ;
- 1973 c. 29. (f) section 2(2)(b), (4)(b) or (5) of the Guardianship Act 1973 ;
- 1975 c. 72. (g) section 17(1)(b), 33(1), 36(2) or 36(3)(a) of the Children Act 1975 or section 2(2)(b) or (4)(b) of the Guardianship Act 1973 as applied by section 34(5) of the Children Act 1975 ;

- (h) section 8(2)(a), 10(1) or 19(1)(ii) of the Domestic Proceedings and Magistrates' Courts Act 1978 ; SCH. 3  
1978 c. 22.
- (i) section 26(1)(b) of the Adoption Act 1976. 1976 c. 36.

(2) After the commencement of section 26(1)(b) of the Adoption Act 1976 paragraph (g) of sub-paragraph (1) above shall have effect with the omission of the reference to section 17(1)(b) of the Children Act 1975.

2. An order made by the High Court in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a child to any person.

3. An order made by the Secretary of State under section 25(1) of the Children and Young Persons Act 1969 (except where the order superseded was made under section 74(1)(a) or (b) or 78(1) of the Children and Young Persons Act (Northern Ireland) 1968 or was made under section 97(2)(a) of that Act on a complaint by a person under whose supervision the child had been placed by an order under section 74(1)(c) of that Act). 1969 c. 54.  
1968 c. 34 (N.I.).

4. An authorisation given by the Secretary of State under section 26(2) of the Children and Young Persons Act 1969 (except where the relevant order, within the meaning of that section, was made by virtue of the court which made it being satisfied that the child was guilty of an offence).

## PART II

### SCOTLAND

5. An order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the custody, care or control of a child or access to a child, excluding—

- (i) an order placing a child under the supervision of a local authority ;
- (ii) an adoption order under section 12(1) of the Adoption (Scotland) Act 1978 ; 1978 c. 28.
- (iii) an order relating to the tutory or curatory of a child ;
- (iv) an order made under section 16(8), 16A(3) or 18(3) of the Social Work (Scotland) Act 1968 ; 1968 c. 49.
- (v) an order made in the exercise of any power under Part III of the Social Work (Scotland) Act 1968 to authorise any person to take a child to a place of safety, to issue, renew or recall a warrant for the apprehension or detention of a child, or to order the detention of a child in secure accommodation ;
- (vi) an order made in proceedings under this Act.

6. A supervision requirement or other order made by a children's hearing in Scotland under section 44(1), 47, 48, 72(1) or 74(1) of the Social Work (Scotland) Act 1968.

7. An order made by the Secretary of State under section 74(3) of the said Act of 1968.

## SCH. 3

## PART III

## NORTHERN IRELAND

8. An order made by a court in Northern Ireland under any of the following enactments—

- 1886 c. 27. (a) section 5 of the Guardianship of Infants Act 1886 (except so far as it relates to costs) ;
- 1961 c. 15 (N.I.). (b) section 49 of the Mental Health Act (Northern Ireland) 1961 ;
- 1968 c. 34 (N.I.). (c) any of the following provisions of the Children and Young Persons Act (Northern Ireland) 1968—
- (i) section 95(1)(a) or (b) ;
  - (ii) in the case of a child or young person with respect to whom a supervision order under section 95(1)(d) has been made, section 97(2)(a) ;
  - (iii) section 108 ;
  - (iv) in the case of a child or young person committed to the care of a fit person under Part V of that Act, section 143(6)(a) or (b) or 144 (being, in the case of an order under section 144, an order corresponding to an order under section 95(1)(a) or (b) of that Act) ;
- S.I. 1972/1263 (N.I. 12). (d) paragraph 7 of Schedule 9 to the Education and Libraries (Northern Ireland) Order 1972 (being an order corresponding to an order under section 95(1)(a) or (b) of the said Act of 1968) ;
- S.I. 1978/1045 (N.I. 15). (e) Article 45(1) or (2) or 46 of the Matrimonial Causes (Northern Ireland) Order 1978 ;
- S.I. 1980/563 (N.I. 5). (f) Article 10(2)(a), 12(1) or 20(1)(ii) of the Domestic Proceedings (Northern Ireland) Order 1980.

9. An order made by the High Court in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a child to any person.

- 1969 c. 54. 10. An order made by the Secretary of State under section 25(2) of the Children and Young Persons Act 1969 superseding an order within paragraph 1(1)(b) or (c) of this Schedule.

# THE IMPLEMENTATION OF THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION WITHIN THE UNITED KINGDOM

A paper prepared by the Government of the United Kingdom

## PART I: LEGISLATIVE ASPECTS

This paper has been prepared on a slightly false pretence. Although the United Kingdom has enacted the Child Abduction and Custody Act 1985 Part I of which will give effect to the Hague Convention on International Child Abduction of 1980 (hereafter "The Hague Convention") this Act only comes into force on 1st August of this year. Therefore this paper will concentrate on the problems encountered in implementing the 1985 Act and in particular Part I and on the arrangements which have been made by the United Kingdom in respect of the Central Authorities and the procedure for these Authorities to receive applications under the Convention. Practical problems cannot be described although it is hoped that few or even none will occur.

2. The Child Abduction and Custody Act 1985 will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention of the same year on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (hereafter "The European Convention"). The latter Convention is of less importance in the context of the Commonwealth than the Hague Convention. However, Article 23 of the European Convention enables a state which is not a member of the Council of Europe to accede to the European Convention. In the interests of combating the growing social problem of child abduction each Commonwealth country should weigh up the advantages and disadvantages of acceding to the European Convention. The rest of this Paper deals with the Hague Convention.

3. The impetus behind the Hague Convention came from the Commonwealth. In October 1976, following a suggestion made in January 1976 by the Canadian representative the Hague Conference on Private International Law agreed to include in its programme for the Fourteenth Session the preparation of a Convention dealing with the problem of international child abduction. This proposal was given added momentum by the recognition at the meeting at Winnipeg in August 1977 of the Commonwealth Law Ministers of the need for international agreement on the subject. A special Commission drafted the Convention which was put in its final form at the meeting in October 1980 of the Fourteenth Session. The resulting Convention is given effect to in the United Kingdom in Part I of the 1985 Act. As the impetus came from the Commonwealth, there is much to be said for this process to be continued by as many Commonwealth countries as possible by their ratification of this Convention.

4. The Hague Convention has now been ratified by Canada, France Portugal and Switzerland. The U.S.A., West Germany and The Netherlands already have intimated that they intend to ratify the Hague Convention within the next two years. It is interesting to note the experience of Switzerland, which has not experienced any cases of child abduction since ratifying the Convention.

5. In proceedings in the United Kingdom the general principle where the custody or upbringing of a child is in question is that the court is required to have regard to the welfare of the child as the first and paramount consideration (see section 1(1) of the Guardianship of Minors Act 1971 and *J v C* (1970) A.C. 668). The first problem which the United Kingdom was confronted with when deciding whether to implement the Hague Convention

was whether the provisions of the Convention would derogate from the paramountcy principle. In the United Kingdom Government's view this is not so and it was reinforced in this view by the following arguments. First, the general principle of law that the child's welfare is paramount is now widely recognised in other countries particularly in the Commonwealth and in Europe as well as in the United Kingdom. Indeed the preamble to the Hague Convention recites that the states signatory to the Convention are "firmly convinced that the interests of children are of paramount importance in matters relating to custody". Secondly, as was succinctly put by Buckley L.J. in *Re L* (1974) 1 WLR 250 and is enshrined in the provisions of the Hague Convention, where a child has been abducted to another country, a full investigation of the merits of the case may be incompatible with the welfare of the child. In such circumstances as the Hague Convention so provides, an order that the child should be returned forthwith to the country from which he has been removed, in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as in his best interests. However, there may be an exceptional case where the child should not be returned to his or her home jurisdiction because, for example, the custodial parent has become inadequate or it is necessary to protect the child against ill treatment.

Articles 12 and 13 of the Hague Convention provide grounds on which the judicial or administrative authority hearing an application under the Hague Convention can refuse to return a child. Such cases will be very exceptional, both because any country which ratified the Convention must pay regard to the preamble and the great majority of these countries do already accept the paramountcy principle. Therefore, abducted children will be returned to their home jurisdiction which is the proper and only forum for determining custody disputes over these children.

6. As has already been mentioned in this Paper, Part I of the 1985 Act gives effect to the Hague Convention. The provisions in Part I give legislative force to those Articles of the Convention which could not be directly applied into United Kingdom law as was the case for the Hague Convention Articles set out in Schedule 1 to the 1985 Act. Certain other Articles were not given direct force within the United Kingdom by the Act. The provisions of these Articles either created only international obligations to which the United Kingdom is of course bound or were already reflected in the law of the United Kingdom.

7. There are two important lynch pins under the Hague Convention. First, the Central Authority which by virtue of Article 6 all the contracting states to the Convention are obliged to designate and secondly, the judicial or administrative authorities who are required to hear applications under the Convention (see Articles 11 to 15 and Article 21). The Central Authority assumes responsibility for making the administrative arrangements necessary to achieve the objectives of the Convention. The functions of the Central Authority which are set out in Articles 7 to 10 are extensive, including, inter alia, receiving from and sending to other Central Authorities applications under the Convention, tracing the whereabouts of the child, initiating or facilitating the institution of proceedings. The functions of the United Kingdom Central Authorities are described in more detail later on in this Paper. All that needs to be said at present is that without the Central Authority the Hague Convention cannot fully operate. By virtue of section 3 of the 1985 Act the Lord Chancellor is designated the Central Authority for England and Wales and Northern Ireland and, is also, because the United Kingdom has more than one Authority, the Supreme Central Authority for the United Kingdom. The Secretary of State for Scotland is the Central Authority for Scotland.

8. Although it is to the Central Authorities to which applications under the Convention will normally come (direct application to the judicial or administrative authorities is permitted by Article 29 of the Convention), it is for the designated judicial or administrative authorities under the Convention to determine whether or not a child should be restored to the person whose rights of custody have been infringed. Section 4 of the 1985

Act designates the High Court in England and Wales and Northern Ireland and the Court of Session in Scotland as the judicial authority to determine Hague Convention Applications. The reason why these courts have this jurisdiction conferred on them is:

- (i) their jurisdiction extends throughout the whole of the parts of the United Kingdom in which they sit;
- (ii) the provision of rules to determine which lower court should have jurisdiction could lead to considerable difficulties and complexities;
- (iii) the importance of securing consistency and speed in the giving of decisions; and,
- (iv) the international nature of the jurisdiction.

The rules of court which have been made for the Hague Convention for these courts further ensure that Hague Convention applications will, in accordance with reason (iii) above be determined expeditiously.

9. The United Kingdom Government was faced with a number of problems when devising the legislative scheme to implement the Hague Convention. The first issue arises because Article 16 of the Convention provides that:

"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."

It was decided that the effect of this Article was that it would impose a Stay (or Sist in Scotland) on any existing proceedings. Section 9 of the 1985 Act defines for the purposes of Article 16 what are proceedings determining "the merits of rights of custody". Such proceedings include, for example, care orders made under section 1 of the Children and Young Persons Act 1969 and custody orders made in matrimonial proceedings, under sections 42 and 43 of the Matrimonial Causes Act 1973. The effect of Article 16 and section 9 of the 1985 Act is that once a Hague Convention Application has been made, any custody proceedings in respect of the same child will be stayed and the stay will only be lifted if the Convention application is unsuccessful. These provisions therefore ensure that the child's home jurisdiction has primacy in determining questions of custody.

10. The second issue was what was to be the effect of a United Kingdom custody order as defined in section 27(1) of the 1985 Act when the court had ordered the return of a child under the Hague Convention. In addition, Article 17 of the Hague Convention provides that the sole fact that a decision relating to custody had been made in the requested Contracting State was not a ground for not making a Hague Convention Order. The solution, which is contained in section 25(1) of the 1985 Act was to provide that once an order for the return of a child had been made under the Hague Convention any custody order relating to the child would cease to have effect. Section 25(1) of the 1985 Act also prevents the issue of custody being raised in the child's home jurisdiction on the basis that there is an existing (and possibly conflicting) custody order made in the United Kingdom.

11. The third issue concerned the question of the costs of applications under the Hague Convention. Article 26 of the Convention provides that Central Authorities are not to require any payment from an applicants in respect of measures taken by them, including the costs involved in representation in legal proceedings for the return of the child.

Paragraph 3 of Article 26 enables a Contracting State to enter a reservation to limit this financial help to those costs covered by the Contracting State's system of legal aid and advice. The United Kingdom has entered such a reservation. The effect of this reservation is that an applicant under the Hague Convention seeking the return of a child who has been taken to the United Kingdom will be given free legal aid when he or she applies to the appropriate United Kingdom Central Authority. All the costs of the proceedings will be paid by the United Kingdom Government under the legal aid system. There will be no means test for the applicant and he or she will not be required to pay any contribution. A similar system is in operation in Canada.

12. As this Paper has already mentioned the 1985 Act will enable the United Kingdom to ratify not only the Hague Convention but also the European Convention. A conflict may arise if simultaneous applications are made in respect of the same child by different persons under both Conventions. The United Kingdom Government was determined to avoid this conflict. The 1985 Act provides that any application under Part I of the Act in respect of the Hague Convention will be determined before the application under the European Convention can be considered (section 9(b) and 16(4)(c)). An application under the European Convention will only be entertained if the application under the Hague Convention is in accordance with the statements made by the United Kingdom representatives at the time of the adoption of this Convention at the Fourteenth Session of the Hague Conference. Article 19 of the European Convention permits the Hague Convention to prevail where the Contracting States are parties to both Conventions: Article 20.1 permits the Hague Convention to prevail where one State is party to the Hague Convention but not to the European Convention. The United Kingdom has entered reservations against the European Convention to this effect.

## PART II: PRACTICAL ASPECTS

13. When the United Kingdom central authority receives a request for the return of the child who has been allegedly abducted to the United Kingdom the first task is to ensure that the application is not manifestly outside the scope of the Convention. This is not considered to be an onerous task but clearly requires a lawyer or other person with knowledge of the scope and operation of the Convention to consider the application. When the application is accepted Article 7 provides that the central authority itself must take certain measures which cannot be delegated e.g. to solicitors. Generally, these duties will simply amount to collection, transmission and coordination of information, and where appropriate, the initiation of procedures by other internal authorities such as insuring that the immigration authorities prevent further abduction of the child. It is envisaged that the central authorities will have close but nevertheless informal links with the police, social services and probation departments, immigration and customs authorities etc. It will sometimes be necessary to give urgent instructions to one or another agency and for these reasons it is important for close links to be maintained so that an atmosphere of trust between internal agencies may be developed. Likewise, it is obviously important that the assistance of those agencies is invoked only in those cases where it is necessary.

14. Having, if necessary, taken whatever provisional measures are indicated, the central authority will then place the application in the hands of a solicitor. The problem arises how the solicitor should be chosen. It is clearly important that the central authority is not accused or suspected of favouritism in its choice of solicitors: likewise, it is important that the solicitors chosen should have experience of family law in general and, where possible, the operation of the Convention in particular. It is therefore proposed that, in consultation with the Law Societies in the three jurisdictions, a panel of approved solicitors should be established to cover the whole country and from which the solicitor should be drawn. It would be open to all solicitors to apply to join the panel. In this way it is hoped that a high standard of service may be maintained without any question of "favouritism" arising.

15. Although the central authorities are obliged, under the Convention, to work efficiently and quickly, nevertheless there is always the possibility that for any number of reasons (not the least of which may be possible delays in the post), applications may fail to be dealt with rather less speedily than may be hoped. In order to combat this difficulty and in order to try to obtain a speedy and informal method of exchanging information both on particular cases and on general experience of operation of the Convention, the European Community countries (all of which have signified their intention to ratify either or both the Hague Convention and the European Convention on Recognition and Enforcement of Custody Decisions) have set up a system of "correspondents". This system provides for one official within the central authority in each country, giving his or her name, address and telephone number who may be contacted informally and quickly by any other of the "correspondents" with a view of finding out what has happened in a particular case, giving or receiving further information. Such a system helps to avoid the possibility that urgent cases might get lost in the necessarily somewhat bureaucratic machine and it is to be hoped that the trust, mutual knowledge and cooperation which will grow up between the various correspondents will supplement the operation of the Convention in a useful way. A similar system of correspondents may be useful between the countries of the Commonwealth.

16. Finally, the value of the Convention is apparent in combating the social evil of child abduction. With mutual trust and sensible co-operation the countries of the Commonwealth, with their shared Common Law tradition, can make a valuable contribution to stamping out this evil ensuring the best possible future for the innocent children involved.

## Other Publications in the same series

1. The Hague Convention on the Service of Process, The Taking of Evidence and Legislation
2. International Conventions in the Field of Succession
3. The Hague Convention on the Civil Aspects of International Child Abduction
4. International Conventions concerning Applications for and Awards for Maintenance
5. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
6. Three International Conventions on Hijacking and Offences on Board Aircraft
7. The Hague Convention on International Access to Justice
8. The Hague Convention on the Taking of Evidence Abroad
9. The UN Convention on the Law of the Sea, 1982: Book 1 - General Introduction (first of a series of four books)
10. A Guide to the International Drugs Conventions
11. The Convention on the Elimination of All Forms of Discrimination Against Women
12. Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
13. International Convention Against the Taking of Hostages
14. The Scheme for the Transfer of Convicted Offenders within the Commonwealth
15. The UN Convention on the Law of the Sea, 1982: Book 2 - Maritime Zones. I - Internal Waters to Contiguous Zone
16. International Conventions on the Safety of Civil Aviation

© Copyright 1990

Printed and published by  
The Commonwealth Secretariat

May be purchased from  
Commonwealth Secretariat Publications  
Marlborough House  
London SW1Y 5HX

ISBN 0 85092 351 4

