

Practical
Handbook
*on the
Operation of
the 1996 Hague
Child Protection
Convention*



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DE DROIT INTERNATIONAL PRIVÉ

**Practical Handbook on the operation of the *Hague Convention*
of 19 October 1996 on *Jurisdiction, Applicable Law, Recognition,*
Enforcement and Co-operation in Respect of Parental Responsibility
and *Measures for the Protection of Children***

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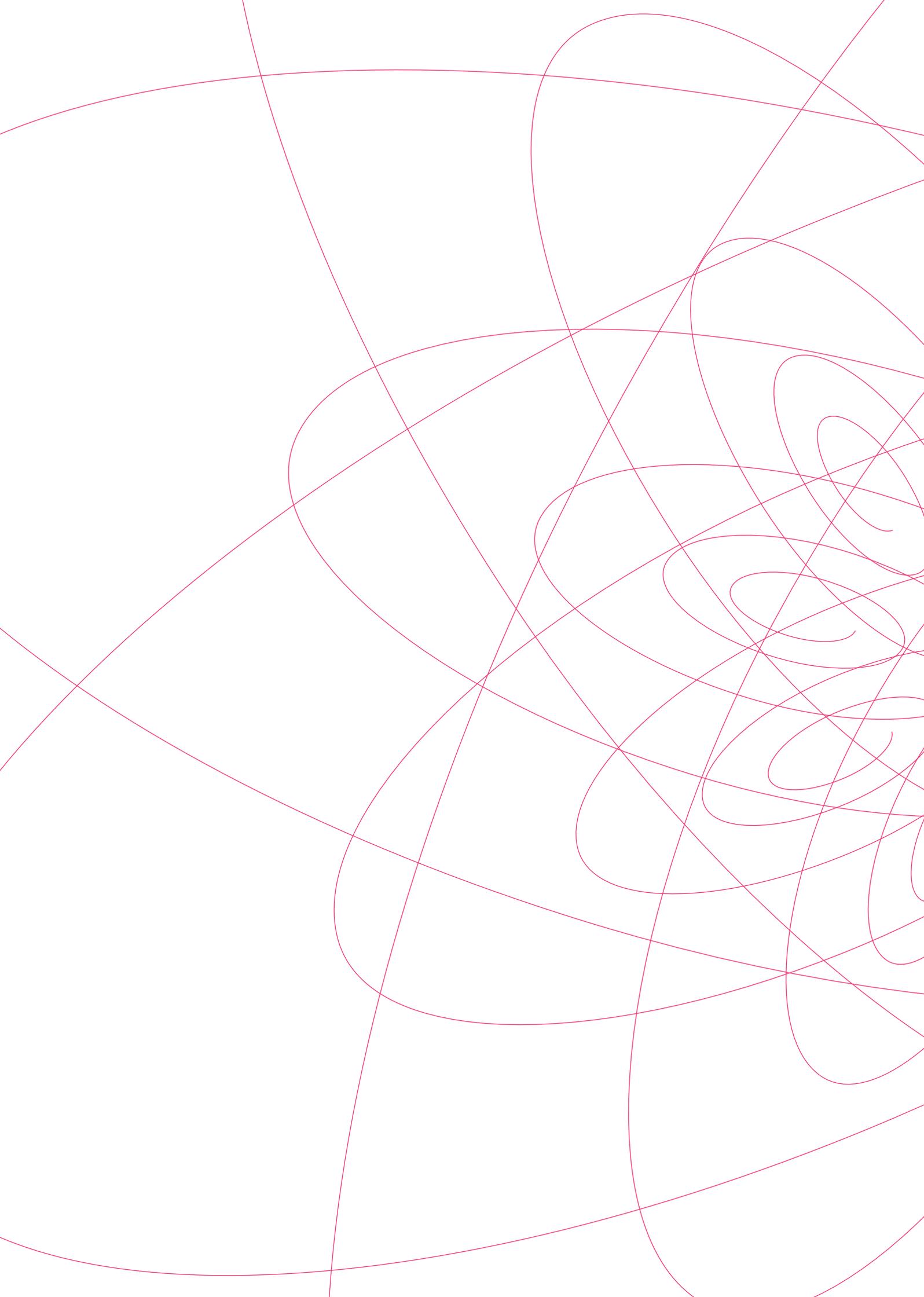
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1

Chapter 1

Introduction



- 1.1 The 1996 Hague Child Protection Convention¹ has the potential to become a widely ratified and used instrument. It addresses a very wide range of international child protection issues. The breadth of the Convention's scope therefore ensures that it has universal relevance. Furthermore, the Convention responds to a real, and evidenced, global need for a better international framework in relation to cross-border issues of child protection. The work of the Permanent Bureau of the Hague Conference on Private International Law continues to reveal situations of vulnerable children which could be eased by the application of the 1996 Convention. In addition, this Convention follows the innovation of the 1980 and 1993 Hague Children's Conventions² in that it combines an international legal framework with co-operation mechanisms. This inclusion of co-operation structures within the Convention is crucial for the Convention to achieve its objectives. Such structures promote better information exchange and mutual assistance across borders and ensure that, across a diverse range of States, mechanisms are in place to enable the legal rules to have their full practical effect.
- 1.2 The children who could benefit from an implementation of the 1996 Convention include, amongst others:
- those who are the subject of international parental disputes over custody or access / contact;
 - those who are the subject of international abduction (including in those States which are not able to join the 1980 Hague Child Abduction Convention);
 - those who are placed abroad in alternative care arrangements which do not come within the definition of adoption and are therefore outside the scope of the 1993 Hague Intercountry Adoption Convention;
 - those who are the subject of cross-border trafficking and other forms of exploitation, including sexual abuse;³
 - those who are refugees or unaccompanied minors;
 - those who relocate internationally with their families.

1 The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Hereinafter, any references to “the 1996 Hague Child Protection Convention”, the “1996 Convention” or “the Convention” are to this Convention. For the text of the Convention, see Annex I.

2 The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, hereinafter “the 1980 Hague Child Abduction Convention”, or “the 1980 Convention”. For further information on the practical operation of the 1980 Convention, please see the Guides to Good Practice under the 1980 Convention: available on the Hague Conference website at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”. The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, hereinafter “the 1993 Hague Intercountry Adoption Convention”, or “the 1993 Convention”. For further information on the practical operation of this Convention, please see the Guides to Good Practice under the 1993 Convention, also available at < www.hcch.net > under “Intercountry Adoption Section” then “Guides to Good Practice”.

3 In this regard, it should be noted that the provisions of the 1996 Convention complement the provisions of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (New York, 25 May 2000), which entered into force on 18 January 2002 (full text available at < http://treaties.un.org/doc/Treaties/2000/05/20000525%2003-16%20AM/Ch_IV_11_cp.pdf >). See, in particular, Arts 9(3) and 10(2) of the Optional Protocol.

- 1.3 The extensive cross-border movement of children in many regions of the world raises problems ranging from the sale and trafficking of children, the exploitation of unaccompanied children, to the plight of refugee children and the sometimes unregulated placement of children abroad. This cross-border movement of children could be assisted by the general framework for co-operation which the 1996 Convention puts in place. This applies, for example, to Southern and Eastern Africa,⁴ the Balkans, some of the States of Eastern Europe and the Caucasus, parts of South and Central America, as well as many parts of Asia.
- 1.4 The early ratification of the 1996 Convention by Morocco was an important sign of the Convention's potential value in States whose laws are influenced by, or based upon, Sharia law. Indeed, that the 1996 Convention was sensitive to this particular use can be seen by the explicit reference to the institution of *kafala* in Article 3. Further, those involved in the Malta Process⁵ have called for all States to give careful consideration to ratification of / accession to the 1996 Convention.⁶ Within Europe, the European Union has long recognised the benefit of the Convention for its Member States.⁷ Indeed, the EU's own Regulation concerning parental responsibility was, in a large part, based upon the 1996 Convention.⁸
- 1.5 The global appeal of the 1996 Convention is also perhaps attributable to the fact that it takes account of the wide variety of legal institutions and systems of child protection that exist around the world. It does not attempt to create a uniform international law of child protection. In this regard, reference may be made to the *United Nations Convention on the Rights of the Child* (hereinafter, the "UNCRC").⁹ Instead, the function of the 1996 Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems with diverse cultural or religious backgrounds.

4 See para. 4 of the Conclusions and Recommendations of the Seminar on Cross-Frontier Child Protection in the Southern and Eastern African Region (Pretoria, 22-25 February 2010), available at < www.hcch.net > under "News & Events" then "2010".

5 The "Malta Process" is a process of dialogue between senior judges and high ranking government officials from Contracting States to the 1980 and 1996 Conventions and non-Contracting States whose legal systems are based on or influenced by Sharia law. The dialogue involves discussions on how to secure better protection for cross-border rights of access / contact for parents and their children and how to combat the problems posed by international abduction between the States concerned. The Process commenced at the Judicial Conference on Cross-frontier Family Law issues, which took place in St. Julian's, Malta, on 14-17 March 2004. The Process continues to date: see < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

6 See the Third Malta Declaration at para. 3, available at < www.hcch.net > (path indicated, *supra*, note 5).

7 See, *e.g.*, Council Decision 2003/93/EC of 19 December 2002 authorising Member States to sign the Convention in the interest of the Community and Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, the 1996 Convention in the interest of the European Community.

8 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter, the "Brussels II a Regulation"). At the time of publication of this Handbook, 26 EU Member States have ratified the Convention and the two remaining countries are committed to ratifying the Convention in the near future.

9 The *United Nations Convention on the Rights of the Child* (20 November 1989). Text available at < <http://www2.ohchr.org/english/law/crc.htm> >.

1.6 With an increasing global understanding of the strengths of the 1996 Convention,¹⁰ and with the number of Contracting States¹¹ continuing to rise,¹² it is an apt time for this Handbook to be published. The Handbook responds to the request made to the Permanent Bureau in 2006 at the Fifth Meeting of the Special Commission on the 1980 and 1996 Conventions.¹³ In the responses to the Questionnaire¹⁴ circulated prior to the Special Commission meeting there had been strong support for a guide on the 1996 Convention. Following consultation at the meeting, the following Conclusion and Recommendation was adopted (para. 2.2):

“The Special Commission invites the Permanent Bureau, in consultation with Member States of the Hague Conference and Contracting States to the 1980 and 1996 Conventions, to begin work on the preparation of a practical guide to the 1996 Convention which would:

- a) provide advice on the factors to be considered in the process of implementing the Convention into national law, and
- b) assist in explaining the practical application of the Convention.”

1.7 The Permanent Bureau began its work by drafting a document focusing on practical advice for States that were considering implementing the Convention into national law (in accordance with para. 2.2(a)). The “implementation checklist” was finalised in 2009 and now appears as Annex II to this Handbook. A first draft of the Handbook was circulated to States¹⁵ in 2009. The Handbook was intended to be of assistance to States, even in draft form. States were requested to provide comments on the draft Handbook so that further refinements and improvements could be made prior to final publication. The draft Handbook was then further revised and submitted to Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, held from 1 to 10 June 2011 (hereinafter, the “2011 Special Commission (Part I)”) for final approval. In accordance with the Conclusions and Recommendations of the Special Commission, the Permanent Bureau was asked “in consultation with experts, [to] make amendments to the revised Draft Practical Handbook, in

10 See, e.g., the Declaration of the International Judicial Conference on Cross-Border Family Relocation (23-25 March 2010) at para. 7 which, in the context of cross-border family relocation cases, recognises the framework of the 1980 and 1996 Conventions as “an integral part of the global system for the protection of children’s rights”; the Conclusions of the Morocco Judicial Seminar on Cross-Border Protection of Children and Families, Rabat (Morocco, 13-15 December 2010); the Conclusions and Recommendations of the Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction (Mexico, DF, 23-25 February 2011); all available at < www.hcch.net > (path indicated, *supra*, note 5).

11 Where a reference is made to a “Contracting State” in this Handbook, unless stated otherwise, the reference is to a Contracting State to the 1996 Hague Child Protection Convention.

12 The remaining EU Member States (Belgium and Italy) as well as Argentina, Canada, Colombia, Israel, New Zealand, Norway, Paraguay and South Africa are also understood to be actively considering ratification of / accession to the Convention. Further, the USA signed the 1996 Convention on 10 October 2010.

13 Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006).

14 Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Prel. Doc. No 1 of April 2006 for the attention of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction, available at < www.hcch.net > under “Child Abduction Section” then “Questionnaires and responses”.

15 The draft Handbook was circulated to the National and Contact Organs of the Members of the Hague Conference on Private International Law, as well as to the Central Authorities of Contracting States to the 1996 and 1980 Conventions. A hard copy of the draft Handbook was also sent to Ambassadors of non-Member Contracting States to the 1996 and 1980 Conventions.

light of the comments provided at the Special Commission meeting” before proceeding with final publication (para. 54).

- I.8 The Permanent Bureau is grateful for the comments received at various points of the process, and for written comments from the following: Australia, Canada, the European Union, Portugal, the Netherlands (Office of the Liaison Judge, International Child Protection), New Zealand, Slovakia, Switzerland, the United States of America, as well as from several experts, including Nigel Lowe, Peter McEleavy, The Rt. Hon. Lord Justice Mathew Thorpe, and the International Social Service.¹⁶ This Handbook would not have been possible without the concerted efforts of the Permanent Bureau, especially the following: William Duncan, former Deputy Secretary General; Hannah Baker, Senior Legal Officer; Kerstin Bartsch, Senior Legal Officer; Juliane Hirsch, former Senior Legal Officer; Joëlle Küng, former Legal Officer; Eimear Long, former Legal Officer; and Nicolas Sauvage, former Legal Officer.
- I.9 As commented at the Fifth meeting of this Special Commission in 2006,¹⁷ the focus of this Handbook is necessarily different from that of the Guides to Good Practice under the 1980 Hague Child Abduction Convention.¹⁸ This Handbook does not focus to the same degree upon previously established “good practice” under the Convention to guide future practice because, as yet, there is little practice to draw upon. Instead, it aims to be an accessible and easily digestible **practical guide** to the Convention. Through the use of plain language, relevant and comprehensive case examples and simple flowcharts, it is hoped that the Handbook will promote a clear understanding of how the Convention is intended to operate in practice, thereby ensuring that good practice under the Convention is established and fostered from the outset in Contracting States. This Handbook draws heavily on the Explanatory Report to the 1996 Convention¹⁹ and should be read and used in conjunction with it. This Handbook does not replace or amend in any way the Explanatory Report which retains its significance as part of the preparatory work (*travaux préparatoires*) for the 1996 Convention.
- I.10 This Handbook is aimed at **all** users of the 1996 Hague Child Protection Convention, including States, Central Authorities, judges, practitioners and the general public.
- I.11 Please note that any guidance provided in this Handbook is not legally binding and nothing in it may be construed as binding on Contracting States to the 1996 Hague Child Protection Convention.

¹⁶ Conclusions and Recommendations of the 2011 Special Commission (Part I), paras 54 and 55, available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.

¹⁷ Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006), available at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.

¹⁸ All Guides to Good Practice published under the 1980 Convention are available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

¹⁹ P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605. This document is available at < www.hcch.net > under “Publications” then “Explanatory Reports”. Hereinafter, it is referred to simply “here as the Explanatory Report”.

2

Objectives of the 1996 Convention

Chapter 2

-
- A THE PREAMBLE OF THE 1996 CONVENTION
 - B SPECIFIC OBJECTIVES OF THE 1996 CONVENTION

- 2.1 The objectives of the 1996 Convention are set out in a broad fashion in the Preamble to the Convention and, in a more specific form, in Article 1 of the Convention.

A THE PREAMBLE OF THE 1996 CONVENTION

- 2.2 The Preamble makes clear that the Convention aims to improve the protection of children in international situations and, to this end, seeks to avoid conflicts between legal systems in relation to measures taken for the protection of children.
- 2.3 The Preamble sets these objectives in a historical context by making reference to the 1961 Hague Convention on the Protection of Minors²⁰ and its need for revision²¹ and by placing the 1996 Hague Child Protection Convention in the context of the UNCRC.²² The Preamble also sets out broad statements of principle which inform the provisions of the Convention; namely the importance of international co-operation for the protection of children and the confirmation that the best interests of the child are a primary consideration in matters related to the protection of the child (the principle of “best interests of the child” being referenced several times elsewhere in the body of the Convention).²³

B SPECIFIC OBJECTIVES OF THE 1996 CONVENTION

ARTICLE 1

- 2.4 Against this backdrop, Article 1 sets out the objectives of the Convention in a specific form. As the Explanatory Report to the Convention states, Article 1 acts in a similar way to a “table of contents” for the Convention²⁴ with Article 1 a) to e) broadly reflecting the aims of Chapters II to V of the Convention.²⁵
- 2.5 The first objective of the Convention, as set out at Article 1 a), is to determine the Contracting State whose authorities have **jurisdiction** to take measures directed to the protection of the person or the property of the child. It should be noted that the Convention determines only the relevant Contracting State whose authorities have jurisdiction and not the competent authorities within that State. Rules relating to jurisdiction are found in Chapter II of the Convention and are discussed below in **Chapters 4 to 7** of this Handbook.
- 2.6 The second and third objectives, described in Article 1 b) and c), relate to determining **applicable law**. The second objective is to identify the law to be applied by authorities when exercising their jurisdiction. The third objective is to identify the law applicable specifically to parental responsibility²⁶ arising without intervention by a judicial or administrative authority. Rules concerning these issues are set out in Chapter III of the Convention, and are discussed below in **Chapter 9** of this Handbook.

20 The *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*. Full text available at < www.hcch.net > under “Conventions” then “Convention 10”.

21 Explanatory Report, at para. 1.

22 *Ibid.*, at para. 8.

23 *Ibid.*

24 *Ibid.*, at para. 9.

25 Though it should be noted that Art. 1 b) and c) of the Convention are both dealt with in Chapter III of the Convention (Applicable Law).

26 As defined in Art. 1(2) of the Convention – see, *infra*, at paras 3.16 *et seq.*

- 2.7 The fourth objective, set out at Article 1 *d*), is to provide for the **recognition and enforcement** of such measures of protection in all Contracting States. Rules regarding both recognition and enforcement are set out in Chapter IV of the Convention and are discussed below in **Chapter 10** of this Handbook.
- 2.8 The fifth, and last, objective, set out at Article 1 *e*), is to establish such **co-operation** between the authorities of Contracting States as may be necessary in order to achieve the purposes of the Convention. This co-operation is provided for in Chapter V of the Convention and is discussed in **Chapter 11** of this Handbook.

3

*Scope of
application*

Chapter 3

-
- A IN WHICH STATES AND FROM WHAT DATE DOES THE 1996 CONVENTION APPLY?
 - B TO WHICH CHILDREN DOES THE 1996 CONVENTION APPLY?
 - C WHICH MATTERS ARE COVERED BY THE 1996 CONVENTION?
 - D WHICH MATTERS ARE NOT COVERED BY THE 1996 CONVENTION?

A IN WHICH STATES AND FROM WHAT DATE DOES THE 1996 CONVENTION APPLY?

ARTICLES 53, 57, 58, 61

- 3.1 The 1996 Hague Child Protection Convention applies only to measures of protection²⁷ which are taken in a Contracting State **after** the entry into force of the Convention in that State.²⁸
- 3.2 The recognition and enforcement provisions of the Convention (Chapter IV) apply only to measures of protection taken **after** the entry into force of the Convention **as between** the Contracting State where the measure of protection was taken and the Contracting State in which it is sought to recognise and / or enforce the measure of protection.²⁹
- 3.3 To understand whether the Convention applies in a particular case, it is therefore important to be able to ascertain:
- whether the Convention has entered into force in a particular State and upon which date it did so; and
 - whether the Convention has entered into force **as between** a particular Contracting State and another Contracting State and upon which date it did so.
- 3.4 The rules regarding whether the Convention has entered into force in a particular State differ depending upon whether the State has **ratified** or **acceded** to the Convention.
- **Ratification** of the Convention is only open to those States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session, *i.e.*, States which were Members of the Hague Conference on or before 19 October 1996.³⁰
 - All other States may **accede** to the Convention.³¹
- 3.5 The Convention will enter into force in a State as follows:
- for States that **ratify** the Convention, the Convention enters into force on the first day of the month following the expiration of three months after the State deposits its instrument of ratification;³²
 - for States that **accede** to the Convention, the Convention enters into force on the first day of the month following the expiration of nine months after the State deposits its instrument of accession.³³

27 “Measures directed to the protection of the person or property of the child” in accordance with Art. 1 are hereinafter referred to as “measures of protection” or simply “measures”. No comprehensive definition of such measures of protection is given in the Convention but see Arts 3 and 4 and, *infra*, paras 3.14-3.52.

28 Art. 53(1).

29 Art. 53(2).

30 Art. 57.

31 Art. 58. Accession is only available to States once the Convention itself has entered into force in accordance with Art. 61(1). The Convention entered into force, in accordance with Art. 61(1), on 1 January 2002, following the third ratification of the Convention (which was that of Slovakia, Monaco and the Czech Republic having been the first and second States to ratify the Convention). Since 1 January 2002 it has therefore been open to any State to accede to the Convention.

32 Art. 61(2) a).

33 Art. 61(2) b).

- 3.6 For States that **accede** to the Convention there is a longer waiting period prior to the Convention entering into force because, for the first six months following the accession, all other Contracting States have the opportunity of raising an objection to their accession. Three months after the expiry of that six-month period (*i.e.*, after a total of nine months) the Convention will enter into force in the acceding State. However, the accession will have effect only as regards relations between the acceding State and those Contracting States which have **not** raised an objection to the accession in that six-month period.³⁴
- 3.7 A State which ratifies the Convention **after** another State has already acceded to it can raise an objection to the accession of that State at the time of its ratification.³⁵ If such an objection is notified to the depositary by the ratifying State, the Convention will not affect relations as between the ratifying State and the State which has previously acceded to the Convention (unless and until the objection of the ratifying State is withdrawn³⁶).
- 3.8 In terms of the application of the Convention **as between** Contracting States, this means that the Convention will apply **as between** Contracting States when: (1) it has entered into force in **both** Contracting States; and (2) in the case of an acceding State, provided that, if another Contracting State has the option of raising an objection to the accession, that Contracting State has not done so.
- 3.9 Objections to accessions should be rare.

How to find up-to-date information on the status of the 1996 Convention

The status table of the 1996 Convention, published by the Permanent Bureau of the Hague Conference on Private International Law, is available online at < www.hcch.net >, under “Conventions”, “Convention 34”, then “Status Table”.

This table provides up-to-date information on the status of the 1996 Convention, including all ratifications of, and accessions to, the Convention and any objections to accessions.

34 Art. 58(3).

35 Art. 58(3).

36 The 1996 Convention does not contain an explicit provision on the withdrawing of objections to accessions. However, it has been accepted in the context of other Hague Conventions that such a withdrawal is possible (*e.g.*, see para. 67 of the Conclusions and Recommendations of the 2009 Special Commission on the practical operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions, available at < www.hcch.net > under “Apostille Section” then “Special Commissions”).

■ **EXAMPLE 3 (A)**³⁷ *State A accedes to*³⁸ *the Convention on 18 April 2010. State B ratifies*³⁹ *the Convention on 26 August 2010. Upon ratification, State B does not object to the accession of State A.*⁴⁰

The Convention enters into force in State A on 1 February 2011.⁴¹ The Convention enters into force in State B on 1 December 2010.⁴² The Convention enters into force as between the two States on 1 February 2011.

A contact order is made in State B on 14 February 2011.

*Since the order has been made after the entry into force of the Convention as between State B and State A, the provisions of Chapter IV of the Convention will apply and the order will be recognised by operation of law in State A.*⁴³

■ **EXAMPLE 3 (B)** *State C ratifies the Convention on 21 March 2009; State D accedes to the Convention on 13 April 2009. State C does not object to State D's accession.*

The Convention enters into force in State C on 1 July 2009.⁴⁴ The Convention enters into force in State D on 1 February 2010.⁴⁵ The Convention therefore enters into force as between the States on 1 February 2010.

A court order dealing with custody and contact arrangements is made in State C on 5 August 2009. In September 2009, one party seeks to have the order recognised and enforced in State D.

*As the custody and contact order has been made in State C before the Convention enters into force in State D (and therefore before the Convention enters into force as between the two States), the Convention mechanisms regarding recognition and enforcement will not apply.*⁴⁶

*However, if both States are Parties to the 1961 Hague Convention on the Protection of Minors, then the order may have to be recognised under that Convention.⁴⁷ If not, it should be checked whether there is any regional or bilateral agreement between State C and State D governing the recognition and enforcement of such custody and contact orders. If there is no regional or bilateral agreement either, there may still be existing provisions of domestic law in State D that will assist the parties.*⁴⁸

37 Where case examples are mentioned in this Practical Handbook, the reference to Contracting States assumes that the Convention has entered into force between these Contracting States prior to the events in question, unless otherwise indicated.

38 Art. 58(1).

39 Art. 57(2).

40 Art. 58(3).

41 Art. 61(2) *b*).

42 Art. 61(2) *a*).

43 Art. 23(1) (unless any of the grounds for refusal of recognition are established, in which case recognition may, but not **must**, be refused – see Art. 23(2) and, *infra*, **Chapter 10**).

44 Art. 61(2) *a*).

45 Art. 61(2) *b*).

46 Art. 53(2).

47 Art. 51. See, in particular, Art. 7 of the 1961 Hague Convention on the Protection of Minors. See also, *infra*, paras 12.2-12.3 for discussion of the relationship between this Convention and the 1961 Hague Convention. See also the Explanatory Report, at para. 169.

48 *Ibid.*, at para. 178, which states, “[n]aturally, the requested State may always recognise the decisions taken previously, but this would be by virtue of its national law and not of the Convention”.

■ **EXAMPLE 3 (C)**

State E **ratifies** the Convention on 5 March 2007. State F **accedes to** the Convention on 20 March 2008. In April 2008, State E notifies the depositary of its objection to the accession of State F.⁴⁹

The Convention enters into force in State E on 1 July 2007.⁵⁰ The Convention enters into force in State F on 1 January 2009.⁵¹ However, State F's accession will not affect relations between State F and State E due to State E's objection to its accession.⁵² The Convention will not enter into force as between the two States unless and until State E withdraws its objection to State F's accession.

In July 2009, an unmarried couple with two children who are habitually resident in State F, but nationals of State E, separate. There is a dispute about where the children should live, and with whom. The father brings proceedings in respect of this issue in State F. Since the Convention has entered into force in State F, State F has jurisdiction to take measures of protection in respect of the children in accordance with Article 5 of the Convention.⁵³

The mother cross-applies to the authorities in State F for permission to relocate to State E with the children. The authorities in State F grant the mother permission to relocate and grant the father contact with the children.

Following the relocation of the mother and children, the contact order is not adhered to. The father seeks to have the contact order recognised and enforced in State E.

Whilst the Convention has entered into force in both State E and State F, since State E objected to the accession of State F, the Convention has not entered into force as between the two States. The Convention mechanisms as regards recognition and enforcement will not therefore apply in this case.⁵⁴

However, if both States are Parties to the 1961 Hague Convention on the Protection of Minors, then the order may have to be recognised under that Convention. If not, it should be checked whether there is any regional or bilateral agreement between State E and State F governing the recognition and enforcement of such custody and contact orders. If there is no regional or bilateral agreement either, there may still be existing provisions of domestic law in State F that will assist the parties.

49 Art. 58(3).

50 Art. 61(2) a).

51 Art. 61(2) b).

52 Art. 58(3).

53 See, *infra*, Chapter 4.

54 Art. 53(2).

- **EXAMPLE 3 (D)** *State G accedes to the Convention on 13 August 2008. State H ratifies the Convention on 30 October 2009 and, upon ratification, notifies the depositary of its objection to State G's accession.⁵⁵*

The Convention enters into force in State G on 1 June 2009.⁵⁶ The Convention enters into force in State H on 1 February 2010.⁵⁷ However, the Convention will not have effect in relations between State G and State H, including after 1 February 2010, due to State H's objection to State G's accession.⁵⁸ The Convention will not enter into force as between the two States unless and until State H withdraws its objection to State G's accession.

B TO WHICH CHILDREN DOES THE 1996 CONVENTION APPLY?

ARTICLE 2

- 3.10 The Convention applies to all children⁵⁹ from the moment of their birth until they reach the age of 18 years.⁶⁰
- 3.11 Unlike the 1980 and 1993 Hague Children's Conventions, a child does not have to be habitually resident in a **Contracting** State to fall within the scope of the 1996 Convention. For example, a child may have his / her habitual residence in a **non-Contracting** State but still fall within the scope of Article 6 (refugee children, internationally displaced children or those whose habitual residence cannot be established), Article 11 (measures in cases of urgency) or Article 12 (provisional measures) of the 1996 Convention.⁶¹
- 3.12 However, it should be noted that where a child does have his / her habitual residence in a **Contracting** State, the rules of jurisdiction contained in Chapter II form a complete and closed system which applies as an integral whole in Contracting States. Therefore, "a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention".⁶²

55 Art. 58(3).

56 Art. 61(2) *b*).

57 Art. 61(2) *a*).

58 Art. 58(3).

59 It should be noted that the Convention may apply even if the child concerned is neither habitually resident in, nor a national of, a Contracting State, *e.g.*, Art. 6 of the Convention which relies solely on the presence of the child in the Contracting State. See the Explanatory Report, at para. 17, and, *infra*, paras 3.11-3.13.

60 For persons aged 18 years or over who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests, the *Hague Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, the "2000 Hague Protection of Adults Convention") will apply if the relevant States are Contracting States to that Convention. See also the Explanatory Report, at paras 15-16.

61 As regards Art. 6, see, *infra*, paras 4.13-4.18 and 13.58 *et seq.*; as regards Arts 11 and 12, see, *infra*, **Chapters 6** and **7**.

62 Explanatory Report, at para. 84. Save, of course, where Art. 52 applies, see, *infra*, paras 12.5-12.8.

- 3.13 In contrast, where a child does **not** have his or her habitual residence in a Contracting State, the authorities of a Contracting State may exercise jurisdiction upon the basis of the rules of the Convention where possible; but, in addition, there is nothing to prevent the authorities from exercising jurisdiction on the basis of the non-Convention rules of their State.⁶³ In this case, the obvious benefit of exercising jurisdiction on the basis of the rules of the Convention, where possible, is that the measure will be recognised and enforceable in all other Contracting States in accordance with the provisions of Chapter IV of the Convention.⁶⁴ On the other hand, where jurisdiction is exercised on the basis of non-Convention grounds of jurisdiction, measures of protection are not entitled to be recognised and enforced under the Convention.⁶⁵

■ **EXAMPLE 3 (E)** *A child is habitually resident and present in non-Contracting State X. The authorities in Contracting State A exercise jurisdiction to take a measure of protection in respect of the child under their non-Convention rules of jurisdiction on the basis that the child is a national of Contracting State A. Contracting State A is entitled to do so but the measure of protection may not be recognised under the Convention in other Contracting States.*⁶⁶

■ **EXAMPLE 3 (F)** *A child is habitually resident in non-Contracting State Y. The child has recently arrived in neighbouring Contracting State B as a result of the civil war which is ongoing in non-Contracting State Y. There was a massacre in his village and he has been left an orphan. The authorities in Contracting State B take measures of protection in relation to the child under Article 6(1) of the Convention. These measures of protection will be recognised by operation of law in all other Contracting States.*⁶⁷

⁶³ Explanatory Report, at paras 39 and 84.

⁶⁴ Provided that the other criteria contained in Chapter IV are satisfied – see, *infra*, **Chapter 10**.

⁶⁵ Art. 23(2) *a*) – where the measure of protection is taken by an authority whose jurisdiction is not based on one of the grounds provided for in the Convention, this is a ground upon which recognition may be refused under the Convention. See the Explanatory Report, at para. 122.

⁶⁶ Art. 23(2) *a*). See also, *infra*, **Chapter 13**, paras 13.58-13.60 regarding children who are refugees, internationally displaced or without a habitual residence.

⁶⁷ Art. 23(1). This will be the case unless a ground for refusal of recognition is made out under Art. 23(2) – see further, *infra*, **Chapter 10**.

C WHICH MATTERS ARE COVERED BY THE 1996 CONVENTION?

ARTICLE 3

- 3.14 The Convention sets down rules in respect of “measures directed to the protection of the person or property of the child”.⁶⁸ The Convention does not provide a precise definition as to what these “measures of protection” may include. However, examples of the issues on which such measures of protection may bear are set out in Article 3. This is not intended to be an exhaustive list of examples.⁶⁹
- 3.15 Measures of protection may, therefore, in particular deal with the following:
- (a) The attribution, exercise, termination or restriction of parental responsibility, as well as its delegation**⁷⁰
- 3.16 The term “parental responsibility” is defined in Article 1(2) of the Convention and includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.⁷¹ The description of the term in the Convention is purposely broad.⁷² The term covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and, generally, the legal representation of the child, whatever name is given to the legal institution in question.
- 3.17 Regarding the person of the child, the “rights and responsibilities” referenced in Article 1(2) include those which belong to parents, guardians or legal representatives in relation to the upbringing and development of the child. These rights and responsibilities could be to do with, for example, custody, education, health care decisions, determination of the residence of the child or the supervision of the child’s person and, in particular, his or her relationships.
- 3.18 The term “powers” in Article 1(2) has to do more specifically with the representation of the child. This representation is usually undertaken by parents but may be exercised, in whole or in part, by third parties, for example in cases of death, incapacity, unsuitability or unfitness of the parents, or where a child has been abandoned by his or her parents or has been placed with a third party for another reason. Such “powers” could be exercised in relation to the person or property of the child.

68 Art. 1.

69 For further discussion of a number of measures found in Art. 3, see, *infra*, **Chapter 13** on special topics. It should be noted that the examples given in Art. 3 are not rigid categories: measures of protection may well encompass one or more of the examples given, *e.g.*, in some Contracting States’ domestic laws, the placement of a child in a foster family (Art. 3 *e*)) may also involve a restriction of parental responsibility (Art. 3 *a*)). Such a measure of protection will clearly fall within the scope of the Convention. In addition, depending on the measures available in a Contracting State’s domestic law, “measures of protection” will not necessarily only emanate from a formal judicial or administrative tribunal: *e.g.*, an official of a public authority, such as a police officer or social worker, may be empowered under domestic law to take a “measure of protection” in respect of a child, usually in a situation of urgency. If the function of the measure is to protect the child, unless it falls within a category provided for in Art. 4, it would appear to fall within the material scope of the Convention.

70 Art. 3 *a*).

71 Art. 1(2).

72 See the Explanatory Report, at para. 14. The expression draws its inspiration from Art. 18 of the UNCRC. However, this concept of parental responsibility was not precise enough for certain delegations; hence the elaboration in Art. 1(2) of the 1996 Convention.

- 3.19 The terminology used for these concepts varies among States, with guardianship, parental authority, *patria potestas*, as well as “parental responsibility” itself, being some examples. Even where the term “parental responsibility” is itself found in a State’s domestic law, the interpretation given to the term in domestic law is not necessarily to be relied upon as being equivalent to its interpretation in the Convention. The Convention term should be given an autonomous Convention meaning.
- 3.20 There may be several different ways by which individuals can acquire parental responsibility under a State’s domestic law. Often the holders of parental responsibility are identified by operation of law: for example, in many States parental responsibility is granted by operation of law to married parents on the birth of their child and, in some States, this is extended to, for example, unmarried cohabiting parents. In some States the holders of parental responsibility can be identified on the completion of a particular act, such as recognition of the child by an unmarried father, the subsequent marriage of the child’s parents or a parental agreement. Parental responsibility can also be assigned by the decision of a judicial or administrative authority. The term “attribution” of parental responsibility in Article 3 a) is intended to cover all these methods of acquiring parental responsibility.
- 3.21 There may also be many different ways by which States’ domestic laws provide for the exercise, termination, restriction and delegation of parental responsibility. The broad scope of Article 3 ensures that all such methods are included within this provision, and therefore within the scope of the Convention.

■ **EXAMPLE 3 (G)** *The law of Contracting State A provides that if a parent indicates in a testamentary disposition who he / she wishes to care for the person and / or property of the child upon his / her death, this will give that person parental responsibility on the execution of the disposition. This attribution of parental responsibility falls within the scope of the Convention.⁷³*

■ **EXAMPLE 3 (H)** *In a case of severe neglect and abuse of a child, the authorities of Contracting State B take measures to remove the child from the care of his parents and to terminate their parental responsibility. This termination of parental responsibility falls within the scope of the Convention.⁷⁴*

73 Art. 3 a).

74 *Id.* It is also possible that in certain Contracting States, in cases of abuse / neglect, the child may be removed from the parent(s) or legal guardian(s) but the parental responsibility of the parent(s) or legal guardian(s) will remain, subject to certain restrictions. This “restriction” of parental responsibility will also fall within the scope of the Convention (Art. 3 a)).

(b) Rights of custody, 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, as well as rights of access / contact including the right to take a child for a limited period of time to a place other than the child's habitual residence⁷⁵

3.22 This section incorporates all measures relating to the care and upbringing of, and access to or contact with, the child. Such measures may determine with which parent, or other person, a child should live and how access to the parent with whom the child does not live, or other person, will be organised. Measures such as these are within the scope of the Convention irrespective of the titles given to them in a State's domestic law.⁷⁶ In so far as "rights of access" and "rights of custody" are defined in Article 3 *b*), the wording replicates that of Article 5 *b*) of the 1980 Convention. This is intentional and the terms "rights of custody" and "rights of access" should be interpreted consistently to ensure the complementarity of the two Conventions.⁷⁷

(c) Guardianship, curatorship and analogous institutions⁷⁸

3.23 These institutions are systems of protection, representation or assistance which are established in favour of a child when his / her parents are deceased or are no longer authorised to represent him / her.⁷⁹

(d) The designation and functions of any person or body having charge of the child's person or property, representing or assisting the child⁸⁰

3.24 In addition to a parent or guardian, the "person or body" referred to here could also be a guardian *ad litem* or a children's advocate, or a person who has authority for the child in particular circumstances (*e.g.*, "a school or a person running a vacation resort who is called upon to take medical decisions [concerning the child] in the absence of the legal representative"⁸¹).

75 Art. 3 *b*).

76 See the Explanatory Report, at para. 20, which states: "The Convention cannot claim to employ expressions which suit the linguistic particularities of all the States represented."

77 See further, *infra*, Chapter 13, paras 13.15-13.30 regarding access / contact. See also the International Child Abduction Database (INCADAT) at < www.incadat.com > for the leading domestic jurisprudence on the meaning of these terms under the 1980 Convention. These terms have autonomous meanings and should be interpreted independently of any domestic legal constraints.

78 Art. 3 *c*).

79 See the Explanatory Report, at para. 21.

80 Art. 3 *d*).

81 Explanatory Report, para. 22.

(e) The placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution⁸²

- 3.25 This paragraph refers to forms of alternative care that can be provided for children.⁸³ These usually apply where the child has been orphaned or the parents are unable to care for the child.⁸⁴
- 3.26 It should be noted that this paragraph does not refer to adoption or measures preparatory to adoption, including the placement of a child for adoption.⁸⁵ These measures are expressly excluded from the scope of the Convention by Article 4.⁸⁶
- 3.27 The institution of *kafala* is widely used in some States as a form of care for children when they cannot be cared for by their parents. Under *kafala*, children are cared for by new families or relatives but the legal link with their birth parents is generally not severed.⁸⁷ *Kafala* can take place across borders but since it is an arrangement which does not constitute an adoption it is not within the scope of the 1993 Hague Intercountry Adoption Convention. However, where used, the institution of *kafala* clearly constitutes a measure of protection in respect of a child and is therefore expressly within the scope of the 1996 Convention.⁸⁸
- 3.28 Where an authority with jurisdiction under Articles 5 to 10 of the Convention contemplates taking a measure of protection within the scope of Article 3 *e*) (*i.e.*, a measure concerning the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution) and such a placement or provision of care is to take place in another Contracting State, certain obligations arise under Article 33 of the 1996 Convention. This matter, along with the issue of the precise scope of the measures of protection which “trigger” the obligations in Article 33, is discussed, *infra*, at **Chapters 11 and 13**.⁸⁹

82 Art. 3 *e*). See also, *infra*, **Chapter 11**, paras 11.13-11.17 and **Chapter 13**, paras 13.31-13.42, concerning Art. 33 of the Convention which applies “[i]f an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State [...]”.

83 In relation to the taking of measures of protection concerning the alternative care of children, see the “Guidelines for the Alternative Care of Children”, formally welcomed by United Nations General Assembly Resolution A/RES/64/142 of 24 February 2010 (available at < http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf >). The Guidelines “set out desirable orientations for policy and practice” in relation to the alternative care of children, “with the intention of enhancing the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children deprived of parental care or who are at risk of being so [...]” (see the Preamble to the General Assembly Resolution). The Guidelines include a dedicated section on “Care provision for children outside their country of habitual residence” (Chapter VIII). This Chapter recommends that States ratify or accede to the 1996 Convention, “to ensure appropriate international cooperation and child protection in such situations” (para. 138).

84 When interpreting similar provisions of the Brussels II a Regulation, the Court of Justice of the European Union found that both the decision to remove children from their original family and the decision to place them in foster care fall within the scope of the Regulation (see Case C-435/06 of 27 November 2007 [2007] ECR I-10141 and, further, Case C-523/07 of 2 April 2009 [2009] ECR I-0000).

85 See, *infra*, para. 3.38 regarding the meaning of the word “placement” in this context.

86 See, *infra*, paras 3.32 *et seq.* regarding Art. 4 of the Convention and paras 3.38-3.39 regarding adoption. See also, *infra*, the special section on adoption in **Chapter 13** at paras 13.43-13.45. Lastly, see the Explanatory Report, at para. 28.

87 However, the rules regarding the institution of *kafala* differ as between the States in which it is found.

88 See the Explanatory Report, at para. 23.

89 See, *infra*, paras 11.13-11.17 and 13.31-13.42.

(f) The supervision by a public authority of the care of a child by any person having charge of the child⁹⁰

- 3.29 This category recognises that a public authority's involvement with a child will not always be limited to placing a child in an alternate caring environment. A public authority may also have a role in supervising the care of a child in his or her own family, or in another environment. Such measures fall squarely within the scope of the Convention since they are clearly aimed at the protection of the person of the child.

(g) The administration, conservation or disposal of the child's property⁹¹

- 3.30 This category includes all measures directed to the protection of the property of a child.⁹² It may include, for example, the appointment of a guardian *ad litem* to protect the child's interests regarding certain property within the context of specific pending litigation.
- 3.31 However, it should be noted that the Convention does not encroach on systems of property law. The Convention does not therefore cover the substantive law relating to rights over property, for example, disputes in relation to the ownership / title of property.

D WHICH MATTERS ARE NOT COVERED BY THE 1996 CONVENTION?

ARTICLE 4

- 3.32 There are certain measures that have been specifically excluded from the scope of the Convention. This list is exhaustive and any measures directed to the protection of the person or property of the child that are not covered by this list may fall within the scope of application of the Convention.

(a) The establishment or contesting of a parent-child relationship⁹³

- 3.33 This provision excludes from the scope of the Convention measures that are concerned with establishing or contesting the parentage of a particular child or children. Therefore, if an application is made to the authorities of a Contracting State to establish or contest the parentage of a particular child, those authorities will have to look to their non-Convention jurisdictional rules to assess if they have jurisdiction. Similarly, applicable law and the recognition of foreign decisions on this issue are matters left to non-Convention rules.

⁹⁰ Art. 3 f).

⁹¹ Art. 3 g).

⁹² For further discussion of the application of the Convention to measures directed to the protection of the property of the child, see, *infra*, paras 13.70-13.74.

⁹³ Art. 4 a).

3.34 This exclusion extends to the question of whether the parties to the parent-child relationship, *i.e.*, the child and the parent(s) if minor(s), require the authorisation of a legal representative to recognise the relationship. It will be for the non-Convention rules of a State to determine the answers to questions such as:

- whether a child who is recognised must consent to such recognition and must be represented for this purpose if below a certain age;
- whether a guardian *ad litem* must be designated to represent or assist the child in a lawsuit concerning the parent-child relationship; or
- whether the underage mother of a child must herself be represented in connection with any declarations of recognition or consent or any proceedings concerning her child's status.⁹⁴

However, the question as to the **identity** of the legal representative of the child concerned and as to whether, for example, the designation of that person results by operation of law or requires the intervention of an authority, falls within the scope of the Convention.⁹⁵

3.35 The exclusion in Article 4 *a*) of the Convention also extends to the status of a child born as a result of an international surrogacy agreement.

3.36 The establishment or contestation of a parent-child relationship is not dealt with by other Hague Conventions (except, as an incidental point, in the 2007 Hague Child Support Convention⁹⁶ where the question of parentage arising in the context of maintenance proceedings is covered).

3.37 Also excluded by this provision is the question as to whether the legitimation of a child, *e.g.*, by subsequent marriage or by voluntary acknowledgement, affects the status of a child.

(b) Decisions on adoption, measures preparatory to adoption, or the annulment or revocation of an adoption⁹⁷

3.38 This exclusion is very broad and applies to all aspects of the adoption process, including the placement of children for adoption.⁹⁸ It should be noted that the word “placement” in this context implies intervention by a public authority and does not refer to less formal arrangements regarding the care of the child.

3.39 However, after an adoption has taken place, no distinction is made between adopted children and others for the purposes of this Convention. The Convention rules will therefore apply to all measures of protection directed to the person and property of adopted children in the same way as they apply to all other children.

94 See the Explanatory Report, at para. 27.

95 See, *supra*, para. 3.24 on Art. 3 *d*).

96 The *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* – see Arts 6(2) *h*) and 10(1) *c*). See also Art. 1 of the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, as well as Art. 2 of the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* and Art. 3 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*.

97 Art. 4 *b*).

98 See, *infra*, paras 13.43-13.45 on adoption.

(c) The name and forenames of children⁹⁹

- 3.40 Measures relating to the names and forenames of a child are not included within the scope of the Convention since they are not considered matters concerned with the protection of the child.¹⁰⁰

(d) Emancipation¹⁰¹

- 3.41 Emancipation is the releasing of a minor from the control of his or her parents or guardians. Emancipation can occur by operation of law, for example, upon marriage, or by the decision of a competent authority. Emancipation is intended to free a child from parental authority, making it the converse to a measure of protection. This explains its exclusion from the scope of the Convention.

(e) Maintenance obligations¹⁰²

- 3.42 Maintenance obligations are the subject of a number of different international conventions, most recently the 2007 Hague Child Support Convention and its Protocol on the Law Applicable to Maintenance Obligations.

(f) Trusts or succession¹⁰³

- 3.43 Questions of private international law concerning trusts have already been dealt with in the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*.
- 3.44 Succession is the subject matter of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*.

(g) Social security¹⁰⁴

- 3.45 Social security is paid for by bodies whose determination depends upon connecting factors such as, for example, the place of work of, or the habitual residence of, the person(s) with social insurance. These connecting factors will not necessarily correspond with the habitual residence of the child. It was therefore thought that the rules of the Convention “would have been poorly adapted” to such measures.¹⁰⁵

99 Art. 4 c).

100 See the Explanatory Report, at para. 29.

101 Art. 4 d).

102 Art. 4 e).

103 Art. 4 f).

104 Art. 4 g).

105 Explanatory Report, para. 33.

(h) Public measures of a general nature in matters of education or health¹⁰⁶

- 3.46 Not all matters relating to health or education are excluded from the scope of the Convention. Only **public** measures of a **general nature** are excluded, for example, measures which require school attendance or which institute vaccination programmes.¹⁰⁷
- 3.47 In contrast, “[t]he placement of a specific child in a specific school or the decision to have him or her undergo a surgical operation, for example, are decisions falling within the scope of the Convention”.¹⁰⁸

(i) Measures taken as a result of penal offences committed by children¹⁰⁹

- 3.48 The Explanatory Report states that this exclusion allows Contracting States to take appropriate measures, whether punitive or educational, in response to the commission of penal or criminal offences by children without needing to ensure that they have jurisdiction under the Convention.¹¹⁰ It goes on to state that for this exclusion to apply it is not necessary that the child actually be subject to criminal prosecution (since often children below a certain age cannot be prosecuted under domestic criminal procedure). Instead, this exclusion requires that the act of the child was an act which is a criminal offence under a State’s penal law when committed by an individual above the age of criminal responsibility. Jurisdiction to take measures responding to these acts is not covered by this Convention and is a matter for the internal law of each State.
- 3.49 However, it should be noted that this interpretation of Article 4 *i*) is disputed. Another interpretation is that the exclusion in Article 4 *i*) should only cover measures taken as a result of penal proceedings actually instituted against the child **or taken in accordance with statutory provisions dealing with penal or criminal offences**. Under this view, when a child commits an act which amounts to a criminal offence under domestic law, but which is reacted to by the State, either exclusively or in addition to penal measures, as a child protection concern (*e.g.*, where an adolescent who is involved in prostitution / solicitation is subject to a child protection order rather than criminal prosecution), any measure of protection taken under the child protection legislation falls within the scope of the Convention.
- 3.50 There is no settled practice on this issue as yet.¹¹¹
- 3.51 Measures responding to misbehaviour which is not criminal, such as running away or refusing to attend school, are covered by the Convention.¹¹²

¹⁰⁶ Art. 4 *h*).

¹⁰⁷ Explanatory Report, at para. 34.

¹⁰⁸ *Ibid.*

¹⁰⁹ Art. 4 *i*).

¹¹⁰ Explanatory Report, at para. 35.

¹¹¹ In relation to Art. 1(3)(g) of the Brussels II a Regulation which excludes from the scope of the Regulation “measures taken as a result of criminal offences committed by children”, see *Health Service Executive v. S.C., A.C.* (Case C-92/12 of 26 April 2012), where the Court of Justice of the European Union held that the “placement [of a child in a secure care institution] accompanied by measures involving deprivation of liberty falls within the scope of the Regulation where that placement is ordered for the protection of the child, and not to punish the child” (at para. 65; see also para. 66).

¹¹² See the Explanatory Report, at para. 35.

(j) Decisions on the right of asylum and on immigration¹¹³

- 3.52 Decisions on the right of asylum and on immigration are excluded from the scope of the Convention because “these are decisions which derive from the sovereign power of States”.¹¹⁴ However, only the substantive decisions on these matters are excluded. In other words, the decision as to whether asylum or a residence permit will be granted or denied is excluded from the scope of the Convention. However, measures regarding the protection and / or representation of a child who is applying for asylum or for a residence permit will fall within the scope of the Convention.¹¹⁵

113 Art. 4 j).

114 Explanatory Report, para. 36.

115 *Ibid.*

4

*Jurisdiction to
take measures
of protection*

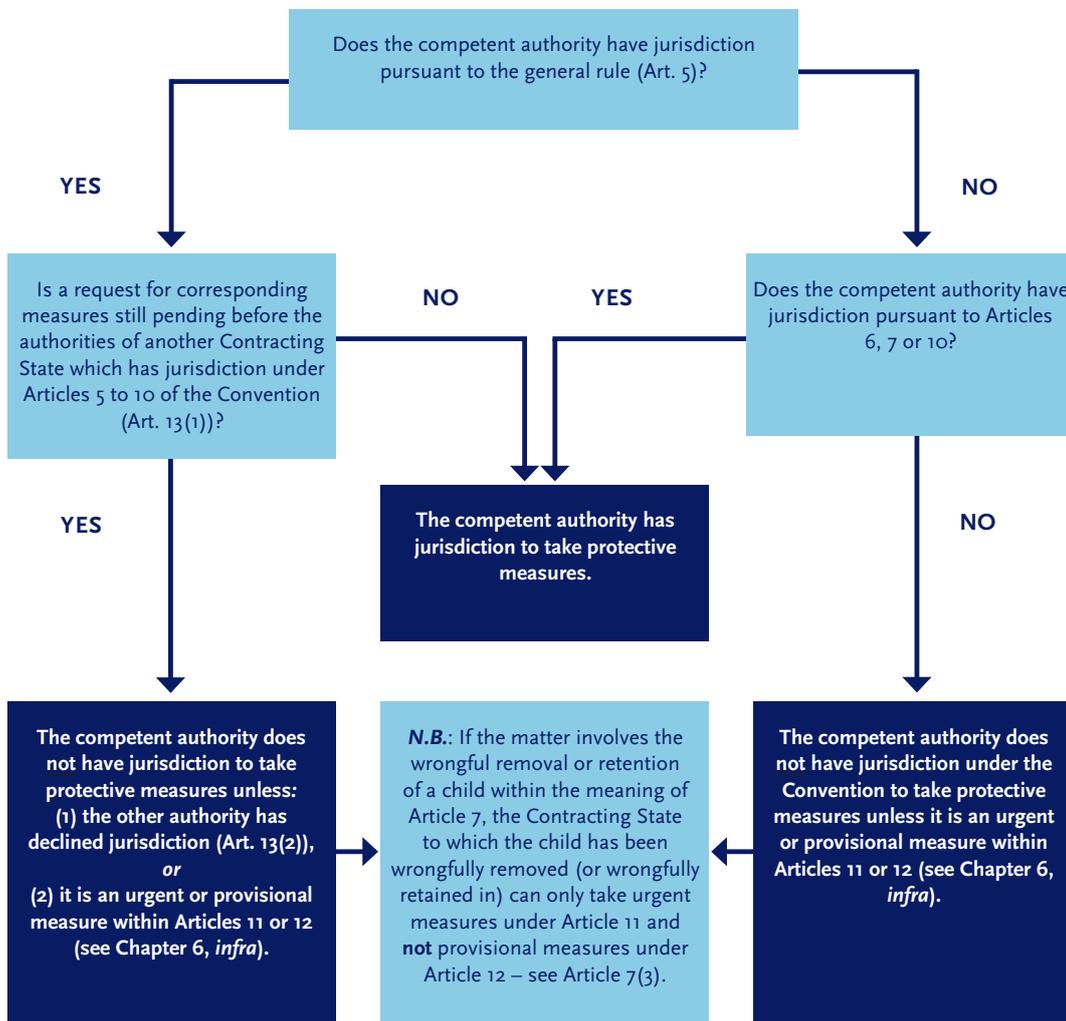
Chapter 4

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- A WHEN DO THE AUTHORITIES OF A CONTRACTING STATE HAVE JURISDICTION TO TAKE MEASURES OF PROTECTION?
 - B THE GENERAL RULE: THE AUTHORITIES OF THE CONTRACTING STATE OF THE HABITUAL RESIDENCE OF THE CHILD
 - C EXCEPTIONS TO THE GENERAL RULE
 - D WHAT HAPPENS IF THE AUTHORITIES OF TWO, OR MORE, CONTRACTING STATES HAVE JURISDICTION?

A WHEN DO THE AUTHORITIES OF A CONTRACTING STATE HAVE JURISDICTION TO TAKE MEASURES OF PROTECTION?

ARTICLES 5 TO 14

- 4.1 The rules on jurisdiction are set out in Articles 5 to 14 of the Convention. The Convention determines the Contracting State whose authorities have jurisdiction, but not the authority which is competent within that Contracting State. This question is left to domestic procedural law.
- 4.2 When an application concerning measures directed to the protection of the person or property of a child is made to a competent authority of a Contracting State, the following analysis should be carried out to determine if that competent authority has jurisdiction to take measures of protection:¹¹⁶



¹¹⁶ This chart applies only to Contracting States not bound by alternative rules agreed under Art. 52(2) of the Convention, which take precedence – see, *infra*, Chapter 12. As an example, EU Member States (excluding Denmark) will need to consider the provisions of the Brussels II a Regulation. This chart also does not deal with the situation where the child’s habitual residence changes at a time when the competent authorities of the State of the child’s original habitual residence are seized of a request for a measure of protection (see Art. 5(2) and, *infra*, paras 4.10-4.11).

- 4.3 It should be noted that the transfer of jurisdiction provisions (Arts 8 and 9 of the Convention) are not dealt with in the above schematic and may also provide a Contracting State with a method of acquiring jurisdiction in relation to an application concerning measures directed to the protection of the person or property of a child (see further **Chapter 5**, *infra*).

B THE GENERAL RULE: THE AUTHORITIES OF THE CONTRACTING STATE OF THE HABITUAL RESIDENCE OF THE CHILD

ARTICLE 5

- 4.4 The primary rule of jurisdiction in the Convention is that measures of protection in relation to children should be taken by the judicial / administrative authorities of the Contracting State of the habitual residence of the child.

(a) The meaning of “habitual residence”

- 4.5 The concept of “habitual residence”, the common primary connecting factor in all of the modern Hague Children’s Conventions, is not defined in the Convention but has to be determined by the relevant authorities in each case on the basis of factual elements. It is an autonomous concept and should be interpreted in light of the objectives of the Convention rather than under domestic law constraints.
- 4.6 There are an extensive number of cases from Contracting States to the 1980 Hague Child Abduction Convention dealing with the determination of the habitual residence of children.¹¹⁷ However, it must be remembered that since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of a child for the purposes of this Convention.
- 4.7 The concept of “habitual residence” is considered in detail in **Chapter 13** of this Handbook.¹¹⁸

(b) What happens when a child’s “habitual residence” changes?

- 4.8 Jurisdiction follows the habitual residence of the child so that when the child’s habitual residence changes to another Contracting State, the authorities of the State of the new habitual residence will have jurisdiction.¹¹⁹
- 4.9 Although the Convention does not provide for the concept of “continuing jurisdiction”, it should be remembered that a change of the habitual residence of the child does not terminate any measures already taken.¹²⁰ These measures remain in force until, if necessary, other appropriate measures are taken by the authorities of the Contracting State of the child’s new habitual residence.

¹¹⁷ For some of these decisions, see INCADAT (< www.incadat.com >).

¹¹⁸ *Infra*, at paras 13.83-13.87.

¹¹⁹ Art. 5(2).

¹²⁰ Art. 14. For further discussion on the continuation of measures, see, *infra*, **Chapter 8**.

- 4.IO Where the child's habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seized of a request for a measure of protection (*i.e.*, during pending proceedings), the Explanatory Report suggests that the principle of *perpetuatio fori* does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child's new habitual residence.¹²¹ Where it does occur, consideration might be given to use of the transfer of jurisdiction provisions (see Chapter 5, *infra*).
- 4.II Where the child's habitual residence changes from a Contracting State to a **non-Contracting** State during proceedings for a measure of protection, the principle of *perpetuatio fori* also does not apply.¹²² However, Article 5 of the Convention will cease to be applicable from the time of the change of the child's habitual residence. Nothing therefore stands in the way of a retention of jurisdiction by the authorities of the Contracting State under their non-Convention rules (*i.e.*, outside the scope of the Convention).¹²³ However, it is important to remember that in this scenario other Contracting States will not be bound by the Convention to recognise the measures which may be taken by this authority.¹²⁴

C EXCEPTIONS TO THE GENERAL RULE

- 4.I2 Articles 6, 7 and 10 set out the exceptions to the general rule, *i.e.*, the instances in which jurisdiction may lie with the authorities of a Contracting State in which the child is not habitually resident.

(a) Refugee or internationally displaced children

ARTICLE 6

- 4.I3 Jurisdiction in cases of refugee children or children internationally displaced due to disturbances occurring in their country is based on the presence of the children in a Contracting State. The use of the phrase "internationally displaced children" is intended to be sufficiently broad to surmount limits that individual States may place on the definition of "refugee".¹²⁵
- 4.I4 The children covered under this heading are those who have left their States because of conditions arising there and who may or may not be accompanied and may or may not be temporarily or permanently deprived of parental care.

121 Explanatory Report, at para. 42. Note that a different solution was reached under the Brussels II a Regulation, see Art. 8: "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized" (emphasis added).

122 See the Explanatory Report, at para. 42.

123 *Ibid.* However, it should be noted that in such a case, the Contracting State of the child's former habitual residence may still be able to take measures of protection in respect of the child **under the Convention** if, for example, Art. 11 or 12 of the Convention applies (see, *infra*, Chapters 6 and 7). See also, *supra*, para. 3.13.

124 Explanatory Report, at para. 42. See also, *supra*, paras 3.11-3.13.

125 For further discussion, see, *infra*, Chapter 13, paras 13.58-13.60.

- 4.15 This exception is not intended to apply to other children who have been internationally displaced, such as runaway or abandoned children. Other solutions under the Convention should be applied in cases involving these children.¹²⁶

■ **EXAMPLE 4 (A)** *Two children aged 6 and 8 leave Contracting State A, which is in a state of civil war, with their 18-year-old maternal aunt. Their mother was killed in the violence and their father is a political prisoner. They arrive in Contracting State B and seek asylum there. Under Article 6 of the Convention, Contracting State B has jurisdiction to take measures directed to the protection of the children, such as placing them in public care or giving their aunt parental responsibility. This does not affect the procedures in Contracting State B for assessing their claim for asylum.¹²⁷ However, the Convention will apply to the question of arranging representation for the children in any asylum claim.¹²⁸*

(b) Children whose habitual residence cannot be established

ARTICLE 6

- 4.16 When the habitual residence of a child cannot be established, jurisdiction is based on the presence of the child in the territory of a Contracting State. This is a jurisdiction of necessity. It should not be lightly concluded that a child's habitual residence cannot be established.¹²⁹
- 4.17 However, there are circumstances where it might not be possible to establish the habitual residence of a child. Such circumstances could include, for example: (1) when a child moves frequently between two or more States, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish his / her habitual residence or (3) where a child's previous habitual residence has been lost and there is insufficient evidence to support the acquisition of a new habitual residence.¹³⁰
- 4.18 This jurisdiction ceases when it is established that the child has a habitual residence somewhere.
- 4.19 The concept of "habitual residence" is considered in detail in **Chapter 13** of this Handbook.¹³¹

(c) Jurisdiction in cases of international child abduction

ARTICLE 7

- 4.20 In cases of international child abduction, the authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention retain jurisdiction for measures aimed at the protection of the person and the property of the child until a number of conditions have been met. This is to deter international child abduction by denying any jurisdictional benefit to the abducting party.

¹²⁶ For further discussion, see (*ibid.*) paras 13.61-13.64. See also the Explanatory Report, at para. 44.

¹²⁷ Art. 4 j), discussed, *supra*, at para. 3.52.

¹²⁸ *Id.*

¹²⁹ See further, *infra*, **Chapter 13**, at paras 13.83-13.87.

¹³⁰ *Id.*

¹³¹ *Infra*, at paras 13.83-13.87.

- 4.21 The definition of wrongful removal or retention used in the Convention is the same as that found in the 1980 Hague Child Abduction Convention, indicating the complementary nature of the two Conventions in this regard. This means that the interpretation and the application of the 1980 Convention provisions relating to wrongful removal and retention may offer assistance in the interpretation of these terms under this Convention.¹³²
- 4.22 There are two sets of circumstances in which jurisdiction can change and vest in the authorities of the State to which the child was wrongfully removed or in which the child was wrongfully retained.

■ **SITUATION A:**

- *The child has acquired a habitual residence in another State*
- and**
- *each person, institution or other body having rights of custody has acquiesced in the removal or retention.*

In this situation it is the fact of acquiescence, when combined with the child's acquisition of a new habitual residence, which triggers the change of jurisdiction under Article 7 of the 1996 Convention.

If the 1980 Convention is also in force between the two States concerned, Situation A may occur where either:

- *no application has been made for the return of a child under the 1980 Convention*
- or**
- *an application under the 1980 Convention has been made and compromised, i.e., the parties have reached an agreement that the child will not be returned (see paras 13.46 to 13.52, infra).*
- or**
- *an application under the 1980 Convention has been made but the authorities of the requested State have refused to return the child in accordance with Article 13 of the 1980 Convention, based upon the applicant's acquiescence in the wrongful removal or retention.*

*It should be noted, therefore, that Article 7 of the 1996 Convention does not **require** that a decision to refuse to return the child has been made under the 1980 Convention before jurisdiction moves to the State of the child's new habitual residence. As stated above, the fact of acquiescence, when combined with this acquisition of a new habitual residence, will suffice.*

The "rights of custody" referred to in Article 7 are those that have been attributed under the law of the State in which the child was habitually resident immediately before the wrongful removal or retention (Art. 7(2)).

¹³² For case law and commentary, see INCADAT (< www.incadat.com >).

■ **SITUATION B:**

- *The child has acquired a habitual residence in another State*
and
- *the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child*
and
- *no request for return lodged within that period is still pending*
and
- *the child is settled in his or her new environment.*

These conditions reflect, in part, Article 12 of the 1980 Convention which permits the requested State not to order the return of a child where the proceedings for return have been commenced after the expiration of a period of one year from the date of the wrongful removal / retention of the child and it is demonstrated that the child is settled in his / her new environment. (For case law and commentary regarding the interpretation of the term “settled” in Art. 12(2) of the 1980 Convention, see the International Child Abduction Database – INCADAT: < www.incadat.com >.)

However, the important difference between the provisions of the two Conventions in this regard arises from the fact that in the 1980 Convention the period of one year starts with the wrongful removal or retention of the child. In contrast, in the 1996 Convention, as indicated above, the period of one year commences from the date that the person, institution or body having rights of custody has or should have had knowledge of the child’s whereabouts. (See further, the Explanatory Report, op. cit. note 21, at para. 49.)

*It should be noted that the third condition does not expressly require that the pending request for return be before the authorities of a particular State. However, there are different interpretations of this provision. The view has been expressed in a comment on the draft version of this Handbook that the request for return should be pending before the State to which the child has been wrongfully removed or in which the child has been wrongfully retained. Whilst this may be the most common situation where the 1980 Convention **and** the 1996 Convention apply in a particular case, it is arguably an unjustifiable limitation on the operation of Article 7 and is particularly inapposite in a situation where the 1980 Convention does not apply in any given case (see **Example 4 (B)** below).*

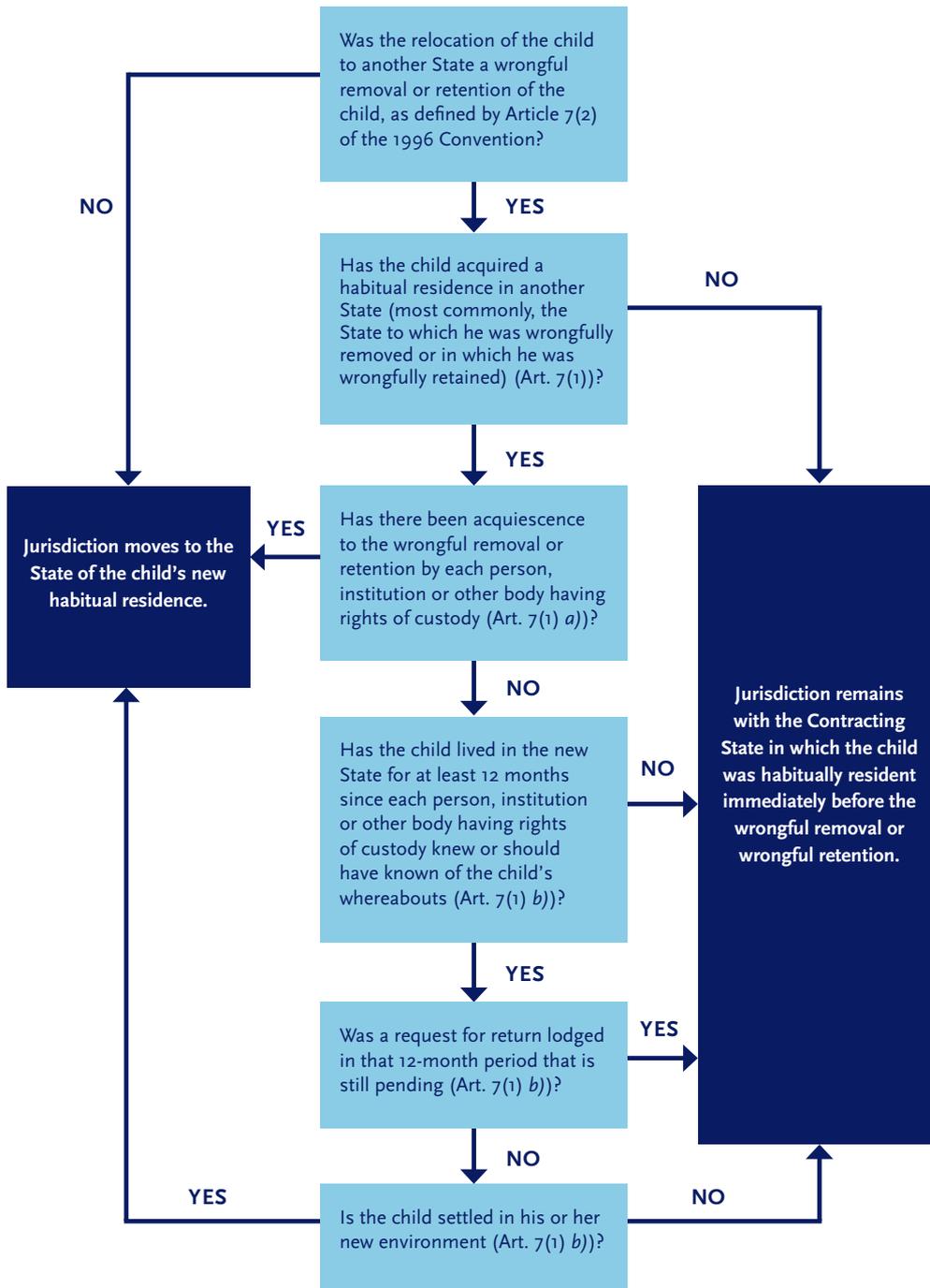
- 4.23 Whilst jurisdiction remains with the authorities of the Contracting State from which the child was wrongfully removed or retained, the authorities of the Contracting State to which the child is removed or in which he or she is retained can only take measures under Article 11¹³³ (necessary measures of protection, where the case is one of urgency) and cannot take provisional measures under Article 12.¹³⁴

¹³³ Discussed more fully, *infra*, in **Chapter 6**.

¹³⁴ Art. 7(3).

4.24 In summary, to determine which authorities have jurisdiction in a case where a child has been wrongfully removed or retained, these are the questions to be asked:

ABDUCTION CASES: OPERATION OF ARTICLE 7



4.25 The issue of international child abduction is discussed further below at paragraphs 13.1 to 13.14.

■ **EXAMPLE 4 (B)** *In the following example both States X and Y are Contracting States to the 1996 Convention. However, State X is not a Contracting State to the 1980 Convention.*

A married couple, the mother a national of State X and the father a national of State Y, reside in State Y with the child of the marriage. In August 2008, the marriage breaks down and the couple divorce. In the divorce proceedings in State Y both parents are granted rights of custody in relation to the child. However, in August 2009 the mother states that she wishes to return to her homeland, State X. The father refuses her request to relocate. In September 2009, fearing that the court will not permit relocation against the father's wishes, the mother unilaterally, and in breach of the father's rights of custody, moves with the child back to State X.

The father spends the first six months following the removal of the child attempting to trace the mother and child (he does not consult a lawyer and is unaware of the 1996 Convention and the support which may be available in this regard³⁵). Finally, he traces the mother and child. He then spends another five months attempting to negotiate custody arrangements with the mother.

The father finally decides that an agreement cannot be reached and consults a lawyer. He is advised to apply to the court in State Y for the immediate return of the child and for sole custody of the child, which he does in August 2010. The mother is served with these proceedings. In September 2010 the mother initiates proceedings in State X for sole custody of the child, conceding that she wrongfully removed the child but arguing that the court in State X now has jurisdiction as regards custody and contact issues since:

- *the child is now habitually resident in State X;*
- *the child has resided in State X for one year from the date upon which the father should have known of the child's whereabouts;*
- *the child is settled in State X; and*
- *no request for return is pending in **State X**.*

*The father appears in the proceedings in State X for the purposes of contesting jurisdiction. He states that, regardless of all other matters, a request for return is still pending in **State Y** and therefore, under Article 7 of the 1996 Convention, jurisdiction in respect of custody and contact issues for the child cannot move to State X.*

Using direct judicial communications, the court in State X confirms with the court in State Y that a request for return is still pending in State Y. Once this is confirmed, State X dismisses the mother's application on the basis that jurisdiction remains with State Y. The mother cross-applies in State Y for permission to permanently relocate with the child to State X and offers a regime of contact to the father.

In State Y, the application for the return of the child is stayed (adjourned) on the basis that it would not, at this stage, be in the child's best interests to order a return pending the outcome of the mother's relocation application which, the court determines, can, and should, be heard quickly. The father's custody application and the mother's relocation application are joined and heard by the court in State Y one month later. The court in State Y grants the mother permission to relocate with the child and a contact regime is established for the father (which will be recognised by operation of law in State X under Art. 23 of the 1996 Convention).

In both of the following examples States A and B are Contracting States to the 1980 Convention and the 1996 Convention.

EXAMPLE 4 (C)

A husband and wife live in State A with their two children. The wife wrongfully removes the children to State B in March 2008. Using the 1980 Convention, the husband seeks to have the children returned to State A. However, the authorities in State B refuse the return of the children on the ground that the children object to a return and have reached an age and degree of maturity at which it is appropriate to take account of their views (Art. 13(2) of the 1980 Convention). It is now May 2009 and the contact and custody arrangements still need to be decided.

Although the husband has not acquiesced in the removal, because the children have been in State B for more than one year from the date when the husband had knowledge of their whereabouts, the authorities of State B will have jurisdiction if the children are now both habitually resident and settled in that State.¹³⁶

EXAMPLE 4 (D)

A father wrongfully removes his child from State A to State B in January 2008. The mother brings proceedings in State B under the 1980 Convention to have the child returned to State A. The authorities in State B refuse the application for a return order in March 2008 on the basis that this would result in a grave risk of harm to the child (Art. 13(1) b) of the 1980 Convention). Immediately thereafter the mother wishes to initiate custody proceedings in State A for an order that she have sole custody of the child.

As a year has not yet passed from the date when the mother knew of the whereabouts of the child, and there is no acquiescence on the part of the mother, the authorities of State A retain jurisdiction. This is true irrespective of where the child is now considered habitually resident.

However, if the authorities in State A consider that the authorities in State B are better placed to assess the best interests of the child and that State A is a State falling within Article 8(2) of the 1996 Convention in the particular case, they can request (directly or with the assistance of the Central Authority of State A) that the authorities in State B assume jurisdiction, or they can suspend consideration of the case and invite the father (or mother) to introduce such a request before the authorities of State B. The authorities in State B can assume jurisdiction in the case if they consider that it is in the child's best interests.¹³⁷

¹³⁶ Art. 7(t) b).

¹³⁷ See further, *infra*, Chapter 5 on transfer of jurisdiction.

d) Jurisdiction in cases where there is a pending divorce or legal separation of the child's parents

ARTICLE 10

4.26 It is possible for the authorities of a Contracting State exercising jurisdiction in an application for divorce, legal separation or an annulment of the marriage of the parents of a child habitually resident in another Contracting State to take measures directed to the person and property of such a child if certain conditions are met.¹³⁸ These are:

- The child is habitually resident in another Contracting State
and
- the law of the Contracting State of the authorities exercising such jurisdiction allows them to take such measures in the circumstances
and
- at the time the proceedings commence at least one of the parents habitually resides in that Contracting State
and
- at the time the proceedings commence at least one of the parents has parental responsibility in relation to the child
and
- the jurisdiction of the authorities to take these measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child
and
- it is in the best interests of the child that jurisdiction be exercised on this basis.

4.27 This jurisdiction ceases when the divorce proceedings come to an end. The proceedings can end because they have resulted in a decision which has become final, granting or refusing the request for divorce, or because of another reason such as a withdrawal or lapsing of the request or the death of a party.

4.28 The date on which the divorce proceedings come to an end is a matter for determination by the law of the Contracting State in which they take place.

¹³⁸ Such a situation might occur, for example, where a parent lawfully relocates with a child from one Contracting State to another following the breakdown of the marriage and the other parent remains in the first Contracting State and issues proceedings for divorce in that State. Of course, it is a matter for the law of the State where proceedings are issued to determine whether it has jurisdiction to hear the divorce proceedings and to determine whether its law permits it to take such measures directed to the person and / or property of a child in these circumstances.

EXAMPLE 4 (E)

A husband and wife live in Contracting State A with their three children. They separate and the husband moves to Contracting State B with the children. Shortly afterwards the wife initiates divorce proceedings in Contracting State A, where she is habitually resident, and both parties request the authorities in those proceedings to make an order regarding custody and contact.

The law in Contracting State A allows the authorities there to take measures for the protection of children during divorce proceedings between the parents. The authorities consider that it is in the best interests of the children for them to take measures for the protection of the children. The authorities in Contracting State A therefore have jurisdiction to make an order regarding custody and contact that will be recognisable and enforceable in Contracting State B, and in all other Contracting States.

This would not be the case if the husband refused to accept the jurisdiction of the authorities of Contracting State A to take such measures, or if those authorities did not consider the taking of such measures to be in the best interests of the children.¹³⁹

Factors that the authorities in Contracting State A could take into account in coming to the conclusion that it is in the best interests of the children for them to exercise jurisdiction might include: that Contracting State A is the former habitual residence of the children, that they still spend time there with their mother, and that organising the custody and contact arrangements with the divorce proceedings is simpler and quicker than waiting for the outcome of a second set of proceedings in Contracting State B, the State of their habitual residence.

Once the divorce proceedings are concluded in Contracting State A, Contracting State B, under Article 5, as the State of the children's habitual residence, will have jurisdiction to take measures of protection in respect of the children (Art. 10(2)).

EXAMPLE 4 (F)

A husband and wife live in Contracting State C with their two children. The relationship breaks down and the couple separate. The wife commences divorce and custody / contact proceedings in Contracting State C. Under the procedural rules of Contracting State C, the same court will determine both the divorce proceedings and issues concerning custody / contact regarding the children.

Following commencement of the proceedings, the wife acquires a new job in Contracting State D and wishes to relocate with the children immediately for the purposes of starting her new job. The husband and wife agree that the wife and children may relocate to Contracting State D immediately on the condition that the court in Contracting State C will determine issues relating to contact for the children with their father.

The agreement for relocation of the children is made a provisional order of the court (pending final determination of the custody / contact issues) and the court formally records the mother's consent to the continuing jurisdiction of Contracting State C regarding custody / contact issues until the divorce proceedings are concluded.

As the divorce proceedings are still pending in Contracting State C, whether the agreement on relocation results in a change in the children’s habitual residence or not (i.e., whether or not Contracting State C “loses” its jurisdiction concerning custody / contact issues based on Art. 5, by virtue of Art. 5(2)), Contracting State C may retain jurisdiction finally to determine custody / contact issues on the basis of Article 10 of the 1996 Convention.

*However, it should be noted that, if the wife had **not** consented to the continuing jurisdiction of Contracting State C regarding custody / contact issues, Article 10 of the 1996 Convention would not apply. In such circumstances, once the habitual residence of the children changed to Contracting State D, Contracting State C would no longer have jurisdiction to determine such matters (in accordance with Art. 5(2), unless a transfer of jurisdiction under Art. 9 were to be requested by Contracting State C and successfully obtained).*

D WHAT HAPPENS IF THE AUTHORITIES OF TWO, OR MORE, CONTRACTING STATES HAVE JURISDICTION?

ARTICLE 13

- 4.29 As there may be cases where the authorities of more than one Contracting State have jurisdiction to take measures of protection in respect of a child, Article 13 provides for the resolution of possible conflicts of jurisdiction.
- 4.30 Article 13 provides that the authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of a child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, “corresponding measures” have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and those measures are still under consideration.
- 4.31 The term “corresponding measures” is not defined in the Convention but it appears that, for Article 13 to apply, the requests before both Contracting States must be the same or similar in substance.¹⁴⁰ For example, if one Contracting State is seized of custody proceedings in respect of a child and another Contracting State is requested to take measures of protection in relation to certain property of the child, this Contracting State may decide that “corresponding measures” have not been requested from the other Contracting State and it can therefore proceed to hear the request regarding the child’s property.¹⁴¹
- 4.32 Article 13 applies for as long as the proceedings in respect of the “corresponding measures” in the other Contracting State are still under consideration.
- 4.33 However, it should be noted that Article 13(1) does **not** apply if the authorities of the Contracting State initially seized have declined jurisdiction.¹⁴² The Explanatory Report states that the ability of the authorities of the Contracting State first seized to decline, or renounce, their jurisdiction enables that Contracting State to give precedence to the Contracting State **second** seized, despite Article 13(1), if it is considered a more appropriate forum.¹⁴³ In this

¹⁴⁰ See the Explanatory Report, at para. 79.

¹⁴¹ *Ibid.*

¹⁴² Art. 13(2).

¹⁴³ See the Explanatory Report, at para. 80.

way, this renunciation of jurisdiction is reminiscent of the transfer of jurisdiction provisions (Arts 8 and 9, see **Chapter 5, *infra***). However, the important differences between Article 13(2) and the transfer provisions are that, in this scenario, (1) the Contracting State **second** seized already has jurisdiction under Articles 5 to 10 of the Convention;¹⁴⁴ and (2) the renunciation of jurisdiction by the Contracting State first seized under Article 13(2) may result from a unilateral decision.¹⁴⁵ However, to ensure the protection of the child, where a Contracting State is considering declining jurisdiction under Article 13(2), it will usually be good practice for communication to take place between the two Contracting States involved (either via Central Authorities¹⁴⁶ or through direct judicial communications¹⁴⁷) to ensure that no gap in the protection of the child results (*e.g.*, from the Contracting State **second** seized refusing to exercise jurisdiction on the basis of Art. 13(1) at the same time as the Contracting State **first** seized declines jurisdiction under Art. 13(2)).

- 4.34 As is apparent from the text of Article 13(1) itself,¹⁴⁸ it does not apply to measures taken under Article 11 (cases of urgency) or Article 12 (provisional measures).¹⁴⁹
- 4.35 For an authority allegedly “second seized”, the question may arise as to how to determine whether “corresponding measures” have been requested from the authorities of another Contracting State (having jurisdiction under Arts 5-10 at the time of the request) and whether those measures are still under consideration, such that Article 13(1) is applicable. In some cases, the authority allegedly “second seized” may have clear evidence before it from the parties to the proceedings such that it can proceed to make a determination to “abstain from exercising jurisdiction” in accordance with Article 13(1). However, where evidence from the parties does not provide a clear answer as to the existence of *lis pendens* (*e.g.*, because the existence or the nature and scope of the proceedings in the other Contracting State is not clear), the authority second seized may consider it appropriate to make enquiries of the relevant authorities in the other Contracting State regarding these matters. Such enquiries

144 *Ibid.* In contrast, where a transfer of jurisdiction takes place, the basis for jurisdiction of the transferee Contracting State resides solely in the transfer – see, *infra*, **Chapter 5**.

145 *Ibid.*

146 See, *infra*, **Chapter 11**.

147 In relation to direct judicial communications, see paras 64-72 of the Conclusions and Recommendations of the 2011 Special Commission (Part I) (available at < www.hcch.net > (path indicated, *supra*, note 16)) and, in particular, para. 68 where the Special Commission gave its “general endorsement”, subject to the Permanent Bureau revising the document in light of the discussions within the Special Commission, to the *Emerging Guidance and General Principles for Judicial Communications* contained in Prel. Doc. No 3 A of March 2011 (“Emerging rules regarding the development of the International Hague Network of Judges and Draft General Principles for Judicial Communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges”). See also paras 78 and 79 of the Conclusions and Recommendations of Part II of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012), available at < www.hcch.net > (path indicated, *supra*, note 16).

148 Art. 13(1): “The authorities of a Contracting State **which have jurisdiction under Articles 5 to 10** to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State **having jurisdiction under Articles 5 to 10** at the time of the request and are still under consideration.” (Emphasis added.)

149 Discussed more fully, *infra*, at **Chapters 6 and 7**.

could be made through direct judicial communications, or with the assistance of the Central Authorities¹⁵⁰ in both Contracting States.¹⁵¹

■ **EXAMPLE 4 (C)** *Two children are habitually resident in Contracting State A with their mother. Divorce and custody proceedings are underway in Contracting State B. The father is habitually resident in Contracting State B and the mother has accepted the jurisdiction of the authorities of that Contracting State regarding these matters and those authorities consider that it is in the best interests of the children for them to hear the case.¹⁵² The proceedings in Contracting State B appear to be going unfavourably for the mother. The mother therefore commences proceedings in Contracting State A seeking an order granting her custody of the children.*

In accordance with Article 13, the authorities of Contracting State A must abstain from hearing the case, as proceedings regarding custody of the children are underway in Contracting State B.

However, if the authorities in Contracting State B had declined jurisdiction, for example because they believed that it was not in the best interests of the children for them to hear the case, then the authorities of Contracting State A could exercise jurisdiction in the matter. In such circumstances the authorities of Contracting State B may communicate their decision to decline jurisdiction to the competent authorities of Contracting State A.¹⁵³

150 In order for this aspect of the Convention to work successfully, it is necessary that Contracting States ensure that the Permanent Bureau is kept informed of the up-to-date contact details of the relevant authorities. Where there are concerns that proceedings might be underway in more than one Contracting State, this will help the parties to ascertain quickly if this is the case and whether the authorities in a particular jurisdiction can take measures for the protection of the child.

151 In the context of Art. 19(2) of the Brussels II a Regulation, the Court of Justice of the European Union has recommended such an approach. In *Purrucker v. Pérez* (Case C-296/10 of 9 November 2010) the CJEU stated (at para. 81) that information concerning the possibility of *lis pendens* could be sought from the parties but, in addition, “taking into consideration the fact that Regulation No 2201/2003 is based on judicial cooperation and mutual trust, [the court second seised] may advise the court first seised that an action has been brought before it, alert the court first seised to the possibility of *lis pendens*, and invite the court first seised to send to it information on the action pending before it and to state its position on its jurisdiction within the meaning of Regulation No 2201/2003 or to notify it of any judgment already delivered in that regard. Lastly, the court second seised will be able to approach the central authority in its Member State”. In this case, the CJEU also held that if such enquiries did not result in clarity concerning the proceedings in the court first seised and where, because of the circumstances of the case, the interests of the child required the handing down of a judgment which may be recognised in Member States other than that of the court second seised, “it is the duty of [the court second seised], after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned”.

152 Giving the authorities of Contracting State B jurisdiction (in accordance with Art. 10 of the 1996 Convention – see, *supra*, paras 4.26-4.28) to take measures directed to the protection of the children, such as making a decision on custody and contact.

153 See, *supra*, para. 4.33.

■ EXAMPLE 4 (H)

The children are habitually resident in Contracting State A. They are the subject of an application for measures of protection in Contracting State B where the requirements of Article 10 of the Convention have been fulfilled. While these proceedings are ongoing, an application is made in Contracting State A¹⁵⁴ concerning the administration of property the children have inherited from their grandparents. The authorities in Contracting State A have jurisdiction to decide on this issue once they determine that no similar request is being made to the authorities of Contracting State B.

154 On the basis of Art. 5 of the Convention.

5

Transfer of jurisdiction

Chapter 5

-
- A WHEN CAN JURISDICTION TO TAKE MEASURES OF PROTECTION BE TRANSFERRED?
 - B WHAT CONDITIONS MUST BE FULFILLED BEFORE A TRANSFER OF JURISDICTION CAN TAKE PLACE?
 - C THE PROCEDURE FOR TRANSFER
 - D CERTAIN PRACTICAL ASPECTS OF A TRANSFER

A WHEN CAN JURISDICTION TO TAKE MEASURES OF PROTECTION BE TRANSFERRED?

ARTICLES 8 AND 9

- 5.1 By way of exception to the general rules of jurisdiction,¹⁵⁵ Articles 8 and 9 provide mechanisms by which jurisdiction to take measures directed to the protection of the person and property of the child can be transferred from authorities of Contracting States which have general jurisdiction under the Convention,¹⁵⁶ to authorities of Contracting States which do not. Jurisdiction will only be transferred where certain conditions are satisfied¹⁵⁷ and only to authorities in another Contracting State with which the child has a particular connection.¹⁵⁸
- 5.2 It should be noted that under the Convention jurisdiction can only be transferred between authorities of **Contracting** States and cannot be transferred to the authorities of **non-Contracting** States.
- 5.3 A request to transfer jurisdiction can arise in two ways:
- an authority having general jurisdiction¹⁵⁹ under the Convention, if it considers that another authority without jurisdiction would be better placed in the particular case to assess the best interests of the child, can request to transfer jurisdiction to that authority (Art. 8);
 - an authority which does not have jurisdiction but believes that it is better placed in the particular case to assess the child's best interests can request that it be allowed to exercise jurisdiction (Art. 9).
- 5.4 These articles permit a transfer of jurisdiction when the authority that has jurisdiction is not the best placed to assess the best interests of the child. The best interests of the child should be assessed "in the particular case", *i.e.*, "at the moment when [the] need for protection is being felt, and for the purpose of responding to [that] need".¹⁶⁰
- 5.5 The transfer of jurisdiction can be for an entire case or for a specific part of a case. Although the Convention does not expressly state that jurisdiction for a specific part of a case can be transferred, Articles 8 and 9 do state that a Contracting State can be requested (Art. 8) or can request (Art. 9) to take the measures of protection it considers "necessary": this may, or may not, involve a transfer of jurisdiction for the entire case. This interpretation of the Convention would bring the Convention into line with other instruments such as the 2000 Hague Protection of Adults Convention or Article 15 of the Brussels II a Regulation, both of which explicitly provide for the possibility of transferring jurisdiction for a specific part of a case.

¹⁵⁵ See, *supra*, Chapter 4.

¹⁵⁶ It should be noted that whilst Art. 8 refers explicitly to a Contracting State which has jurisdiction under Art. 5 or 6 of the Convention being able to make a request to another Contracting State to transfer jurisdiction, Art. 9 suggests that another Contracting State may only request a transfer of jurisdiction from the Contracting State of the child's habitual residence (*i.e.*, only from the Contracting State having jurisdiction under Art. 5 and not from a Contracting State with jurisdiction under Art. 6). The Explanatory Report, at para. 58, states that it considers this to be an "**oversight**" (emphasis added) and that Art. 9 should be aligned with Art. 8. The Explanatory Report states: "If the authorities of the State of the child's nationality are entitled to ask those of the State of the habitual residence to authorise them to exercise protective jurisdiction, for even stronger reasons they ought to be able to ask the same of the authorities of the State to which, due to disturbances occurring in the country of the child's habitual residence, the child has been provisionally removed." However, at the current time the language of the Convention is clear and it seems that a request under Art. 9 may only be made to the Contracting State of the child's habitual residence.

¹⁵⁷ See, *infra*, para. 5.9.

¹⁵⁸ Art. 8(2).

¹⁵⁹ *I.e.*, under Art. 5 or Art. 6 of the Convention.

¹⁶⁰ Explanatory Report, para. 56.

- 5.6 Once the transfer has been agreed to by both authorities, the authorities from which jurisdiction was transferred cannot exercise jurisdiction in the particular matter which was the subject of the transfer. They must wait until the decision by the other authorities becomes final and enforceable.
- 5.7 The transfer does not, however, institute a permanent transfer of jurisdiction. “Nothing [...] allows it to be [decided] in advance that under future circumstances the authority which has jurisdiction under Article 5 or 6¹⁶¹ might not be better placed to decide in the best interests of the child.”¹⁶²
- 5.8 Once it has been decided that a request can and should be made, there are two options provided for in the Convention for the making of the request:
- the request is made by the authorities themselves to the competent authorities of the other Contracting State (this can be done directly or with the assistance of the Central Authorities);¹⁶³
 - or**
 - the parties to the proceedings can be invited to make the request before the competent authorities of the other Contracting State.¹⁶⁴

These two possibilities are placed on an equal footing and the choice between them is left to the authority making the request in the individual case.

B WHAT CONDITIONS MUST BE FULFILLED BEFORE A TRANSFER OF JURISDICTION CAN TAKE PLACE?

- 5.9 Under both Articles 8 and 9 jurisdiction may only be transferred when certain conditions are fulfilled:
- **Connection between the child and the Contracting State to whose authorities it is permissible to transfer jurisdiction**
The Contracting States whose authorities may have jurisdiction transferred to them, or who can request that jurisdiction be transferred to them, must have a connection with the child. The Contracting State must be one of the following:¹⁶⁵
 - a State of which the child is a national;
 - a State in which property of the child is located;
 - a State whose authorities are seised of an application for divorce or legal separation of the child’s parents, or for an annulment of their marriage;
 - a State with which the child has a substantial connection.

¹⁶¹ In relation to Art. 9, see note 156, *supra*.

¹⁶² Explanatory Report, para. 56.

¹⁶³ Art. 8(1), first indent, and Art. 9(1), first indent.

¹⁶⁴ Art. 8(1), second indent, and Art. 9(1), second indent.

¹⁶⁵ Art. 8(2) and Art. 9(1).

- **The best interests of the child**
The authority making the request that jurisdiction be transferred must consider that this will allow for a better assessment of the child's best interests.¹⁶⁶ The authority asked to assume or cede jurisdiction can only do so if it believes this is in the child's best interests.¹⁶⁷
 - **Agreement of the authorities of both Contracting States**
Both authorities must agree to the transfer.
 - In the case where the decision to undertake a transfer comes from the authorities of the Contracting State which has jurisdiction, the agreement of the other authorities can be indicated through assuming jurisdiction.¹⁶⁸
 - However, when the authorities of the Contracting State that does not have jurisdiction initiate the transfer by making a request, or inviting the parties to make a request, the agreement of the authorities of the Contracting State which has jurisdiction must be expressly received. Silence cannot be taken as an acceptance of the transfer.¹⁶⁹
- 5.IO There is no requirement in the 1996 Convention for the parties to the proceedings to accept or agree to a transfer of jurisdiction.¹⁷⁰ Whether and how the parties are heard regarding the issue of a transfer of jurisdiction is therefore a matter left to each Contracting State's internal procedural law. Parties might be heard on this issue, in particular since they may have relevant submissions to make as to whether such a transfer would allow for a better assessment of the child's best interests. At a minimum, parties should be kept informed regarding such matters.
- 5.II There are also no requirements in the 1996 Convention concerning the timeframe for: (1) the parties to introduce a request for a transfer of jurisdiction before the relevant authority¹⁷¹ (if this route is adopted by the "requesting" authority under Art. 8(1) or Art. 9(1)); or for (2) the "requested" authority to accept or reject a request regarding a transfer of jurisdiction.¹⁷² However, bearing in mind that time is of the essence in any proceedings related to children, the "requested" authority (under Art. 8, the court without jurisdiction under the Convention, and under Art. 9, the court with jurisdiction under the Convention)

166 Art. 8(1) and Art. 9(1).

167 This is stated explicitly in relation to the assumption of jurisdiction – see Art. 8(4). It is not stated explicitly in relation to ceding jurisdiction (see Art. 9(3), which refers only to the acceptance of the request). However, it is hard to imagine that a Contracting State would accept a request to transfer jurisdiction to another Contracting State where it did not consider it in the best interests of the child to do so.

168 Art. 8(4).

169 Art. 9(3).

170 Cf. Art. 15(2) of the Brussels II a Regulation which requires at least one of the parties to accept a transfer.

171 Cf. Art. 15(4) of the Brussels II a Regulation.

172 Cf. Art. 15(5) of the Brussels II a Regulation which requires the "requested" authority to decide within six weeks of being seised whether to accept a transfer of jurisdiction.

should make a determination regarding the transfer of jurisdiction with due expedition.¹⁷³ This will also avoid parallel proceedings arising from a request concerning a transfer of jurisdiction: *e.g.*, where a request has been made under Article 8 but the authority with jurisdiction proceeds to exercise jurisdiction and hear the case because no response has been received from the “requested” authority within what it considers a reasonable timeframe, and subsequently the “requested” authority accepts and exercises jurisdiction.

- **EXAMPLE 5 (A)** *A child is habitually resident in Contracting State A. Both his parents die when he is 10 years old and proceedings are ongoing in Contracting State A concerning his care and the administration of the property he has been left by his parents. This property includes property located in Contracting State B. An issue arises regarding the disposal of this property and the authorities in Contracting State B make a request to the authorities of Contracting State A that they be authorised to assume jurisdiction in this specific matter.¹⁷⁴ The authorities in Contracting State A may accept the request for a partial transfer of jurisdiction relating only to the protection of the property of the child located in Contracting State B.¹⁷⁵ If a partial transfer of jurisdiction is agreed between the Contracting States,¹⁷⁶ the authorities in Contracting State A may continue to take measures regarding the care of the child and regarding the property of the child, excluding the property in Contracting State B. The authorities of Contracting State B may take measures regarding the property of the child that is located in Contracting State B.*

C THE PROCEDURE FOR TRANSFER

- 5.12 There are two options regarding the transfer of jurisdiction. Where an authority in Contracting State A (“CSA”) is considering the question of a transfer to Contracting State B (“CSB”), the following analysis should be undertaken:

¹⁷³ It was suggested during the discussions at the 2011 Special Commission (Part I) that it may be good practice for the authorities to agree on a deadline for a determination concerning the issue of transfer. If such a deadline is not met, the authority with jurisdiction under the Convention will retain jurisdiction and should proceed to exercise it.

This approach would be in line with that taken under the Brussels II a Regulation – see the “Practice Guide for the application of the new Brussels II Regulation”, available at

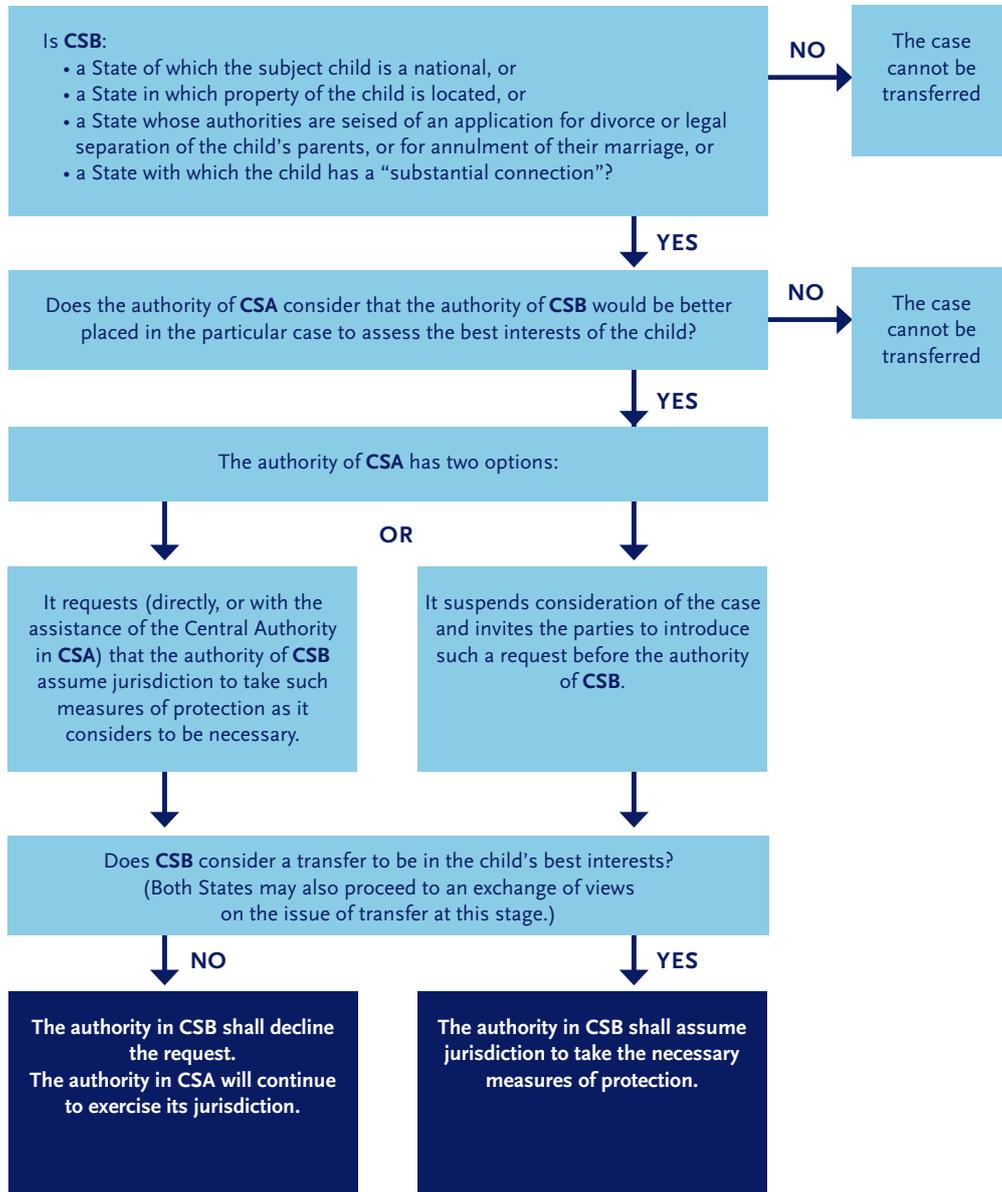
< http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf > (last consulted August 2013), at p. 19.

¹⁷⁴ Art. 9(1), as the State in which property of the child is located (Art. 8(2) *b*)). Depending on the circumstances of the case, additionally or alternatively, it may be appropriate for the authorities in Contracting State B to take provisional measures regarding the property on the basis of Art. 12, or, if the case is one of urgency, necessary measures of protection in relation to the property on the basis of Art. 11. Such measures would, however, lapse as soon as the authorities in Contracting State A had taken the measures required by the situation (see, *infra*, **Chapters 6 and 7**). Where Contracting State B wishes to take general jurisdiction in relation to the property, a transfer of jurisdiction may therefore be more appropriate (and benefits from the explicit co-operative support provided for in Art. 31 *a*), see, *infra*, **Chapter 10**).

¹⁷⁵ See, *supra*, para. 5.5 regarding the possibility for a partial transfer of a case.

¹⁷⁶ See, *infra*, paras 5.19-5.22 regarding the explicit communication which should take place between the authorities on this issue.

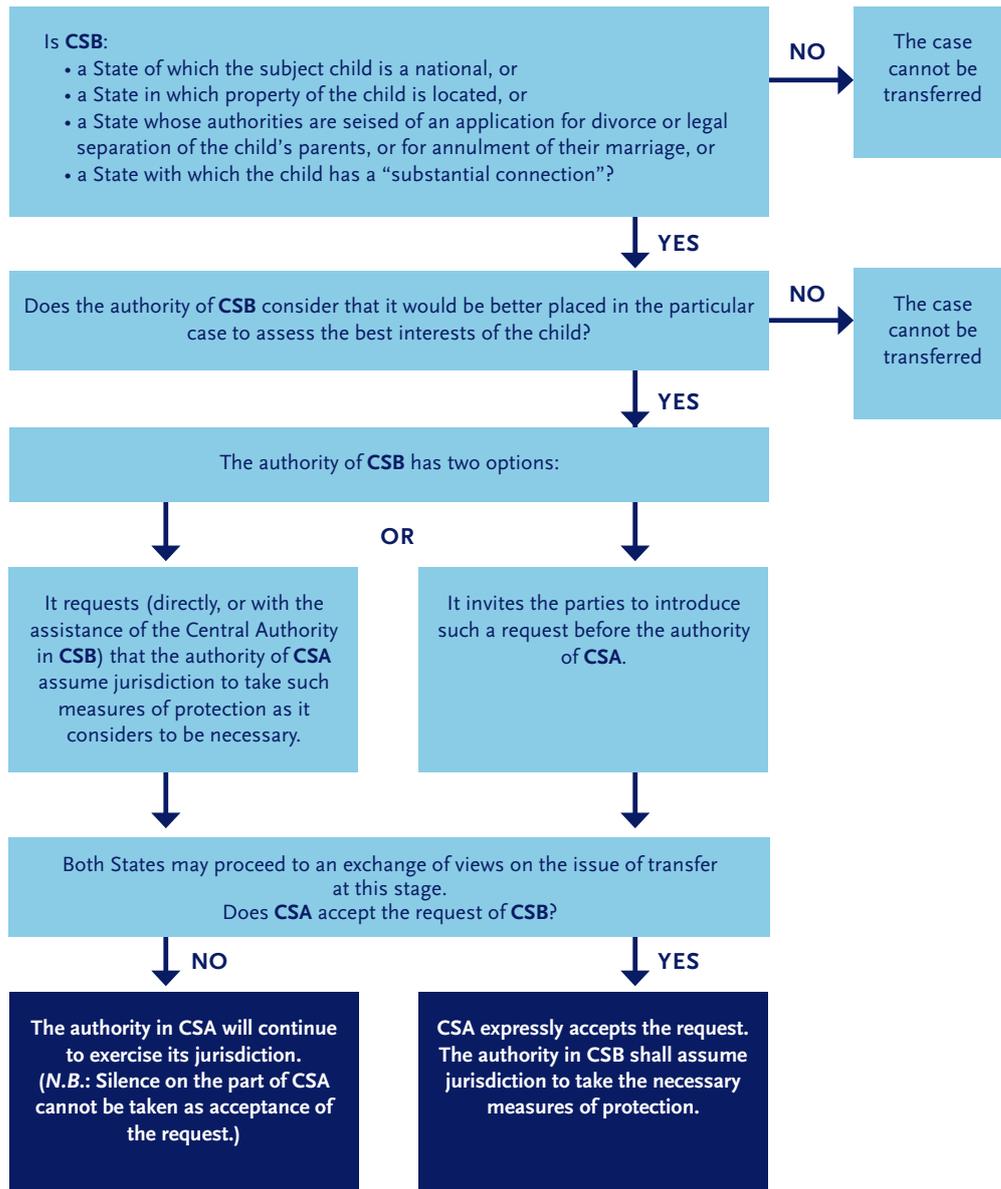
**Option 1:
REQUEST FROM, OR INITIATED BY, THE AUTHORITY OF CONTRACTING STATE A, WHICH HAS JURISDICTION UNDER ARTICLE 5 OR 6 OF THE CONVENTION, TO THE AUTHORITY OF CONTRACTING STATE B (ART. 8)**



Where the authority in Contracting State B wishes to assume jurisdiction from the authority in Contracting State A, the following analysis should be applied:

Option 2:

REQUEST FROM, OR INITIATED BY, THE AUTHORITY OF CONTRACTING STATE B TO THE AUTHORITY OF CONTRACTING STATE A, WHICH IS THE CONTRACTING STATE OF THE HABITUAL RESIDENCE OF THE CHILD (ART. 9)



D CERTAIN PRACTICAL ASPECTS OF A TRANSFER

(a) How does an authority wishing to use the transfer provisions find out to which competent authority in the other Contracting State it should address its request?

- 5.13 An important practical question facing authorities wishing to use these transfer provisions is how to locate the competent authority in the other Contracting State. This is an especially difficult question if no application has been made by the individual parties to any authorities in the other Contracting State.
- 5.14 Contracting States may decide to make a specific designation of the authorities to which requests under Articles 8 and 9 are to be addressed.¹⁷⁷ If the State concerned has made such a designation then all requests concerning the transfer of jurisdiction should be sent to the designated authorities. These designations must be communicated to the Permanent Bureau of the Hague Conference on Private International Law.¹⁷⁸ They will be placed on the Hague Conference website (< www.hcch.net >, under “Convention 34” then “Authorities”).
- 5.15 However, if no such designation has been made, there are two other routes through which the authorities may be able to obtain assistance. The first is the Central Authority of the other Contracting State, which the authorities can contact directly or through their own Central Authority. The possible role of Central Authorities in this regard is specifically mentioned in Articles 8 and 9 of the Convention and Article 31 *a*) of the Convention.¹⁷⁹ The second is the International Hague Network of Judges, if members have been appointed from both States. Members of this Network are contact points within their jurisdiction and can provide information on various aspects of the law and procedure in their jurisdiction, including assisting with locating the competent authority.¹⁸⁰ A list of the members of the International Hague Network of Judges is available on the Hague Conference website (< www.hcch.net >, under “Child Abduction Section” then “International Hague Network of Judges”).
- 5.16 Central Authorities may also be useful in helping to transmit documents between authorities, and some Central Authorities may assist with the interpretation or translation of documents or with locating such services in their State, if requested. The members of the International Hague Network of Judges may also provide a useful means to obtain information on the best way to proceed, for example regarding the information or documentation that the competent authority might require before considering the transfer.

(b) How should the authorities communicate?

- 5.17 Both Articles 8 and 9 also provide that the authorities may proceed to an exchange of views on the issue of transfer. This exchange of views will often be necessary so that the requested authority can assess whether the request should be accepted. Once again, both the Central Authorities and the International Hague Network of Judges could provide assistance in this regard.¹⁸¹

¹⁷⁷ Art. 44.

¹⁷⁸ Art. 45.

¹⁷⁹ See, *infra*, para. 11.11.

¹⁸⁰ See, *supra*, note 147.

¹⁸¹ Art. 31 *a*) requires the Central Authority of a Contracting State to take all appropriate steps, either directly or through public authorities or other bodies, to facilitate the communications and offer the assistance provided for in Arts 8 and 9. See further, *infra*, Chapter 11.

- 5.18 The two authorities involved (often two judicial authorities) can use a variety of mediums to exchange views. The contact between them could be by e-mail or telephone. If they need interpreters to be involved or require the parties, or their representatives, to be present, use could be made of telephone conference call or video conference facilities.

(c) Other matters related to transfer where communication between authorities may prove useful

- 5.19 Due to the fact that a transfer of jurisdiction does not institute a permanent transfer of jurisdiction (see para. 5.7, *supra*) and that a transfer of jurisdiction may be in relation to a specific part of a case only (see para. 5.5, *supra*), it will be important for both competent authorities involved to be as explicit as possible in their communications regarding the envisaged scope of any transfer of jurisdiction.
- 5.20 This means that any **requesting** competent authority (whether requesting to assume or transfer jurisdiction) should ensure that its request is explicit as to:
- the scope of the transfer envisaged (*i.e.*, in respect of which matters it is envisaged that jurisdiction will be transferred and in what circumstances it is envisaged that the competent authority assuming jurisdiction will continue to exercise jurisdiction in relation to such matters in future); and
 - why it is considered in the child's best interests for this transfer of jurisdiction to take place.
- 5.21 It may be useful in some cases for views to be exchanged on the envisaged scope of the transfer. If it is possible, and following the submissions of the parties where necessary, attempts should be made to conclude these matters between competent authorities and each competent authority should record this conclusion in a manner appropriate to its jurisdiction.
- 5.22 An explicit conclusion and / or record of the above terms may avoid confusion at a future date as to which authority has jurisdiction and in relation to which matters.

■ **EXAMPLE 5 (B)**¹⁸² *An unmarried couple and their children reside in, and are nationals of, Contracting State A. The couple's relationship breaks down and the mother brings proceedings in Contracting State A seeking permission to relocate to Contracting State B with the children. This application is successful and the mother relocates with the children to Contracting State B. The court in Contracting State A also orders that the children should spend their summer holidays with their father in Contracting State A on the condition that the children are not taken to see their paternal grandparents (whom the mother alleges physically abused the children).*

Following the children's return from their first period of summer holiday contact, the children divulge to their mother that the father took them to see their paternal grandparents. The mother applies to Contracting State B for a suspension of future contact. The father applies to Contracting State A for the previous contact order to be changed and the condition discharged.

¹⁸² For a discussion of the possible use of the transfer of jurisdiction provisions in an international child abduction situation where an agreement is reached between the parties following an amicable dispute resolution process, see, *infra*, paras 13.51-13.57 and, in particular, para. 13.55.

Contracting State A requests a transfer of jurisdiction (Art. 9) from Contracting State B, where the children are now habitually resident. The authorities hearing the case in each Contracting State proceed, with the assistance of the two Central Authorities, to an exchange of views on the issue of transfer. They agree that the parties will place written submissions on the issue before each of them and there will be an exchange of views via conference call with the parties present. After this exchange of views, Contracting State B determines that the conditions for transfer are fulfilled and it is in the children's best interests for the issue of contact to be dealt with in Contracting State A.¹⁸³ Both authorities in Contracting States A and B record that the transfer of jurisdiction is limited to the issue of the children's contact with their father and paternal grandparents and that they consider it to be in the best interests of the children for the authorities in Contracting State A to determine this issue because:

- the father remains resident in Contracting State A;
- contact is exercised there;
- there is an issue regarding a breach of that court's order; and
- there is an issue regarding grandparental contact and the grandparents reside in that State.

Contracting State A eventually resolves the case and decides that the children can continue to have contact with their father and paternal grandparents.

One year later the mother unilaterally suspends contact, alleging that the father is abusing the children during contact. The father brings custody proceedings in Contracting State A alleging that the mother is alienating the children from him. Contracting State A declines jurisdiction on the basis that the previous transfer of jurisdiction from Contracting State B was explicitly limited to the issue of contact. The father therefore requests that Contracting State A seek a transfer of jurisdiction on the issue of custody. Contracting State A declines on the basis that it does not consider itself better placed to assess the children's best interests on the issue of custody. It determines that the issue of custody should be dealt with according to the general rules of jurisdiction (i.e., in the State of the children's habitual residence in accordance with Art. 5 – that is, in Contracting State B).

183 Note that another approach would be for the authorities in Contracting State B to retain jurisdiction and instead invite the father to request that the authorities in Contracting State A, in accordance with Art. 35(2) of the Convention, provide a report on his circumstances (and possibly also the paternal grandparents' circumstances) and to make findings on his (or their) suitability to exercise access / contact and on the conditions under which access / contact should be exercised, for use in proceedings in Contracting State B. In accordance with Art. 35(3), Contracting State B may adjourn the proceedings pending the outcome of the father's request. For further information on Art. 35, see, *infra*, **Chapters 11 and 13**.

6

Chapter 6

*Measures of
protection
in cases of
urgency*

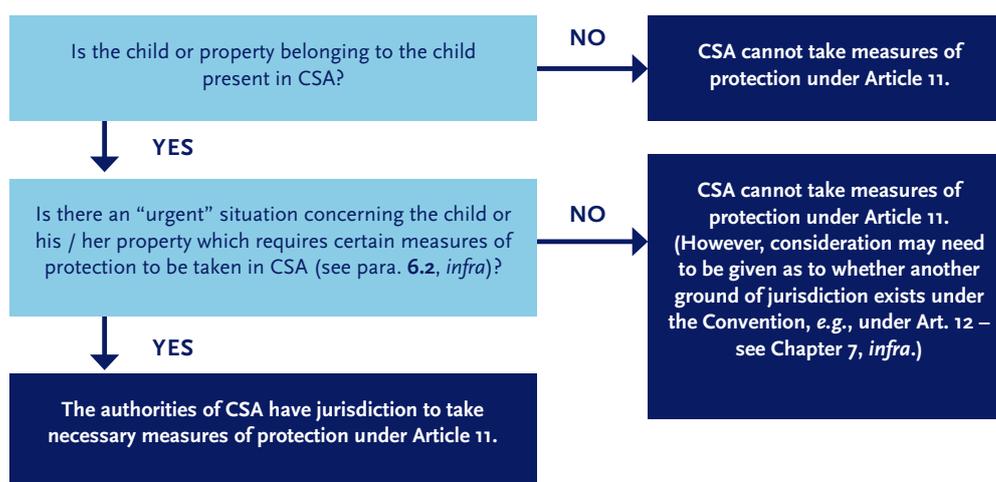
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- A TAKING NECESSARY MEASURES OF PROTECTION IN CASES OF URGENCY
 - B ARE MEASURES OF PROTECTION TAKEN UNDER ARTICLE II ENTITLED TO RECOGNITION AND ENFORCEMENT UNDER THE 1996 CONVENTION?

A TAKING NECESSARY MEASURES OF PROTECTION IN CASES OF URGENCY

ARTICLE 11

- 6.1 In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is **present** have jurisdiction to take any necessary measures of protection.¹⁸⁴

CAN MEASURES OF PROTECTION BE TAKEN IN CONTRACTING STATE A (“CSA”) UNDER ARTICLE 11?



(a) When is a case “urgent”?

- 6.2 The Convention does not provide a definition as to what constitute “cases of urgency”.¹⁸⁵ It will therefore be a matter for the judicial / administrative authorities in the Contracting State in question to determine whether a particular situation is “urgent”. The Explanatory Report states that a situation of urgency may be said to exist where, if measures of protection were only sought through the normal channels of Articles 5 to 10 (the general bases of jurisdiction), irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised.¹⁸⁶ A useful approach for authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his / her protection or interests compromised if a measure is not taken to protect the child in the period that is likely to elapse before the authorities with general jurisdiction under Articles 5 to 10 can take the necessary measures of protection.
- 6.3 It should be noted that it is the situation of “urgency” which justifies the derogation from the general rules of jurisdiction under the Convention (Arts 5 to 10). In light of this, it has been stated that the concept of “urgency” ought to be interpreted “rather strictly”.¹⁸⁷

184 Art. 11 is an almost exact reproduction of Art. 9(1) of the 1961 Hague Convention on the Protection of Minors.

185 Nor was the concept of “urgency” defined in the 1961 Hague Convention on the Protection of Minors.

186 Explanatory Report, at para. 68.

187 *Ibid.*

- 6.4 Examples of cases involving such a situation of “urgency” might include: (1) the child is outside the State of his / her habitual residence and medical treatment is required to save the child’s life (or to prevent irreparable harm occurring to the child or his interests being compromised) and parental consent cannot be obtained for the treatment; (2) the child is exercising contact with a non-resident parent outside his / her State of habitual residence and makes allegations of physical / sexual abuse against the parent such that contact needs to be suspended immediately and / or alternative temporary care found for the child; (3) it is necessary to make a rapid sale of perishable goods belonging to the child; or (4) there has been a wrongful removal or retention of a child¹⁸⁸ and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child¹⁸⁹ to the Contracting State of his / her habitual residence.¹⁹⁰
- 6.5 Whilst there is no settled practice regarding what constitutes a “case of urgency” as yet, in these circumstances it is clearly for the competent authority hearing the return application to determine whether, on the facts of the particular case before it, the case is one of “urgency” such that Article 11 can be relied upon to take measures of protection to ensure the child’s safe return. This issue is also discussed, *infra*, in **Chapter 13** at paragraphs 13.5 to 13.12.

(b) What are “necessary” measures of protection?

- 6.6 The “measures of protection” which may be taken under Article 11 of the Convention have the same material scope as the measures which may be taken under Articles 5 to 10 of the Convention, *i.e.*, they are measures directed to the protection of the person or property of the child of which a non-exhaustive list is set out in Article 3, and an exhaustive list of excluded matters is set out in Article 4.¹⁹¹
- 6.7 However, the drafters of the Convention deliberately avoided setting out what particular “necessary” measures of protection might be taken on the basis of urgency under Article 11. It was decided that the urgency should dictate in each situation the “necessary” measures.¹⁹² It will therefore be a matter for the judicial or administrative authorities in each Contracting State to determine, based upon the facts of each particular case, what measures (within the scope of the Convention) are “necessary” to deal with the urgent situation at hand.

188 See Art. 7(2).

189 In relation to example (4), it was suggested at the 2011 Special Commission (Part I) that whilst measures which facilitate the safe return of a child in the context of a return application under the 1980 Convention are extremely valuable, they may not always suggest a “case of urgency” (such that Art. 11 can be relied upon for a basis for jurisdiction to take these measures). This would particularly be the case in light of the strict interpretation of “urgency” called for in the Explanatory Report. In contrast, it was pointed out that the use of Art. 11 in such circumstances was an important addition to the “toolbox” which authorities have at their disposal to ensure the “safe return” of a child following a wrongful removal or retention. It was further suggested that a case involving the need for measures to be taken to ensure a child’s safe return to the State of his / her habitual residence would usually be a “case of urgency” such that Art. 11 can be relied upon.

In the Conclusions and Recommendations of the 2011 Special Commission (Part I) (available at < www.hcch.net > (path indicated, *supra*, note 16)), the following was noted (at para. 41): “[T]he 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.”

190 See further, *infra*, the **Examples** at the end of this Chapter. In relation to point (4), see also, *infra*, paras 13.5-13.12.

191 See, *supra*, **Chapter 3** regarding the scope of the Convention.

192 See the Explanatory Report, at para. 70.

(c) How long do measures of protection taken under Article 11 last?

- 6.8 The jurisdiction of a Contracting State based on urgency is a concurrent jurisdiction,¹⁹³ *i.e.*, concurrent with the State having **general** jurisdiction under Articles 5 to 10, but it is strictly subordinate to the latter jurisdiction. Article 11(2) and (3) ensures this by providing that the necessary measures of protection taken under Article 11 are temporally limited.¹⁹⁴ If the child is habitually resident in a **Contracting** State, the necessary measures taken under Article 11 will lapse once the authorities of the Contracting State which has general jurisdiction (usually the authorities of the State of the child's habitual residence) have taken the measures required by the situation.¹⁹⁵ If the child is habitually resident in a **non-Contracting** State, the necessary measures taken under Article 11 will lapse as soon as the measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.¹⁹⁶
- 6.9 It should be noted that if proceedings have started for measures of protection in a case of urgency in one Contracting State (under Art. 11), the competent authorities seised in another Contracting State on the basis of Articles 5 to 10 do **not** have to stay proceedings until a measure is taken.¹⁹⁷ Further, as any measures which might be taken by the first Contracting State on the basis of Article 11 will lapse as soon as the authorities with jurisdiction under Articles 5 to 10 have taken a decision (Art. 11(2)), in this situation the Contracting States should discuss together (either via Central Authorities or through direct judicial communications) the most effective way to proceed to best protect the child.¹⁹⁸

(d) Once a Contracting State has taken measures under Article 11, what other steps should it take to ensure the continued protection of the child?

- 6.10 In cases where necessary measures of protection have been taken in accordance with Article 11, the judicial or administrative authority which has taken these measures may wish to communicate and co-operate with any other State it considers necessary in order to ensure the continued protection of the child.¹⁹⁹ Such communication and co-operation may take place directly between competent authorities²⁰⁰ or, where appropriate, with the assistance of the relevant Central Authorities.²⁰¹ For example, the competent authorities in the Contracting State where the measures have been taken under Article 11 may inform the competent authorities in the State of the child's habitual residence (or, where appropriate, the Central

193 Art. 13 (*lis pendens*) does not apply where necessary measures of protection are taken under Art. 11 (see text of Art. 13 itself which refers to Contracting States with jurisdiction "under Articles 5 to 10") – see, *supra*, para. 4.34. As regards the operation of Art. 13, see further, *supra*, paras 4.29-4.35.

194 For a general discussion regarding the continuation of measures, see, *infra*, Chapter 8.

195 Art. 11(2).

196 Art. 11(3).

197 This is because the rules on *lis pendens* set out in Art. 13 of the Convention do not apply to proceedings under Art. 11. See, *supra*, note 193.

198 See further, *infra*, Chapter 11.

199 This sentence is not confined to communication and co-operation between **Contracting** States to the 1996 Convention which is in line with the philosophy behind provisions of the Convention. See, *infra*, at paras 11.18 *et seq.*

200 For judicial authorities, this may involve direct judicial communications, see, *supra*, note 147.

201 See further, *infra*, Chapter 11.

Authority of that State) of the child's situation and the measures which have been taken.²⁰² This would enable the State of the child's habitual residence to ensure that, where necessary, the situation of the child is investigated fully and any measures of protection required are taken for the long-term protection of the child.

- 6.11 Specific co-operation provisions of the Convention may also be relevant in these cases (e.g., Art. 36) and should always be carefully considered.

B ARE MEASURES OF PROTECTION TAKEN UNDER ARTICLE 11 ENTITLED TO RECOGNITION AND ENFORCEMENT UNDER THE 1996 CONVENTION?

- 6.12 Yes, measures of protection taken in cases of urgency are entitled to recognition and enforcement in accordance with Chapter IV of the Convention.²⁰³ It should be noted that Article 23(2) specifically limits the grounds of non-recognition in cases of urgency (see Art. 23(2) b) and c)).²⁰⁴

■ **EXAMPLE 6 (A)** *A child, habitually resident in non-Contracting State A, travels on a school trip to Contracting State B without his parents. He falls sick and needs urgent medical intervention, which would usually require parental consent. However, his parents cannot be contacted. The authorities of Contracting State B have jurisdiction to take the necessary measures which are permitted by their own law to ensure that the medical treatment can proceed without parental consent.*

■ **EXAMPLE 6 (B)** *Three children are habitually resident in Contracting State A where they live with their mother and have regular contact with their father. In the summer vacation the mother and children visit the maternal grandparents in Contracting State B. Whilst they are in Contracting State B, the car they are travelling in crashes and the mother is left in a coma in intensive care. The authorities in State B have jurisdiction to take an urgent measure providing that the children should be temporarily placed in the care of the maternal grandparents.²⁰⁵ A week later the mother dies. A court in Contracting State A subsequently makes an order which provides that the children shall live with their father.²⁰⁶ The order from Contracting State B therefore lapses (no longer has effect) since the measures required by the situation have now been taken by the authorities in Contracting State A.²⁰⁷*

202 The Explanatory Report provides, at para. 72, that “[t]he text [of the Convention] did not wish to impose on the authority basing its jurisdiction on urgency the obligation to inform the authorities of the State of the child's habitual residence about the measure taken, for fear of overburdening the operation of the Convention and furnishing a pretext for refusal of recognition of such measure in the other Contracting States, in the case where this information would not have been given”. However, despite the absence of an explicit obligation in the text of the Convention in this regard, it is still considered that it will usually be good practice for Contracting States to co-operate and communicate in this way to ensure the continued protection of the child where such measures have been taken.

203 Arts 23 *et seq.*

204 See further, *infra*, Chapter 10.

205 Art. 11.

206 As the Contracting State where the children are habitually resident, in accordance with Art. 5. It should be noted that a number of the co-operation provisions of the Convention may also be relevant in a case of this nature (e.g., Arts 32 and 34); see further, *infra*, Chapter 11.

207 Art. 11(2), Contracting State A being the Contracting State which has general jurisdiction over the children in accordance with Art. 5.

- **EXAMPLE 6 (C)** *Two children, habitually resident in Contracting State A, lawfully travel with their father to Contracting State B for a holiday. Whilst in Contracting State B, the father is arrested on suspicion of drug trafficking. He is subsequently charged with a criminal offence and remanded in custody pending trial. The authorities in Contracting State B have jurisdiction to take urgent measures to provide for the care of the children.*²⁰⁸
- **EXAMPLE 6 (D)** *A child is habitually resident in non-Contracting State A and owns a property located in Contracting State B. This property is in disrepair and, due to severe structural problems, will likely collapse if no action is taken to repair it. The authorities of Contracting State B take urgent measures to authorise a company to carry out the necessary repairs (estimated to take 5 to 6 months). One month after these measures have been taken by the authorities in Contracting State B, the authorities of non-Contracting State A authorise the parents of the child to sell the property in its current condition to a buyer they have already identified. The parents seek recognition in Contracting State B of non-Contracting State A's decision. The measure is recognised in Contracting State B (under its non-Convention rules²⁰⁹). The urgent measure taken by Contracting State B therefore lapses and the property can be sold.*²¹⁰
- **EXAMPLE 6 (E)** *A child is habitually resident in Contracting State A, where she lives with her parents. Her parents own a property in Contracting State B, which she is to inherit when they die. The family travel to Contracting State C on holiday. Whilst on holiday in Contracting State C, the family are involved in a serious boat accident. Both parents are killed and the child is severely injured. The child requires urgent, expensive medical treatment and the only source of funds available to finance such treatment is the property in Contracting State B. The authorities in Contracting State C contact the authorities in Contracting States A and B to inform them of the situation of the child.²¹¹ The authorities in Contracting State B, considering the case one of urgency, take measures of protection under Article 11: (1) to appoint a legal representative for the child to deal with the property in Contracting State B; and (2) to enable funds to be urgently obtained from the property (by way of re-mortgage) for the specific purpose of funding the child's medical treatment. These measures are recognised by operation of law in Contracting State C.²¹² Contracting State C, considering the case one of urgency, takes the necessary measures of protection under Article 11 to enable the child's medical treatment to proceed. Contracting States B and C communicate to inform each other, as well as Contracting State A, of the measures taken in respect of the child.*

208 Art. 11. The co-operation provisions of the Convention could also be used in this situation to quickly alert the authorities in Contracting State A to the children's situation and to provide them with all relevant information. The authorities in Contracting State A (the Contracting State of the children's habitual residence) would then be able to take measures of protection for the children (which, if the children have a mother with custody in Contracting State A, may include their repatriation to Contracting State A into the care of their mother).

209 Since it is the decision of a **non-Contracting State**.

210 Art. 11(3).

211 Art. 30(1). See further, *infra*, **Chapter 11**.

212 See, *supra*, para. 6.12.

*Contracting State A can act to take the long-term measures of protection required by the situation, at which point the measures taken under Article 11 in Contracting States B and C will lapse.*²¹³

■ **EXAMPLE 6 (F)**

A child is habitually resident in Contracting State A where he lives with his mother and father. The relationship between the parents breaks down and the mother wrongfully removes²¹⁴ the child from Contracting State A to Contracting State B. The father makes an immediate application for the return of the child under the 1980 Hague Child Abduction Convention (to which both States are Parties). The mother is not permitting any contact to take place between the child and the father and it appears that the return proceedings in Contracting State B will take a couple of months. The authorities in Contracting State A are not in a position to take measures regarding the father's interim contact in this timeframe.

Depending upon the particular facts of the case, the authorities in Contracting State B may consider that the lack of contact between the father and child will cause irreparable harm to the child or otherwise compromise the protection or interests of the child.²¹⁵ The authorities may therefore determine that this is a situation of urgency requiring measures to be taken to ensure some form of interim contact between the father and the child pending the conclusion of the return proceedings.²¹⁶

213 However, see the Explanatory Report, at para. 72, regarding the fact that any action **completed** in accordance with a measure of protection taken under Art. 11 will, of course, continue to have effect. As para. 72 states, “[i]t is obvious [...] that one cannot go back on a surgical operation or a sale of property which has already taken place”.

214 In accordance with the meaning of “wrongful removal” set out in Art. 7(2) of the 1996 Convention.

215 See, *supra*, para. 6.2.

216 See also *General Principles and Guide to Good Practice – Transfrontier Contact Concerning Children* (Jordan Publishing, 2008) (hereinafter, the “Guide to Good Practice on Transfrontier Contact”), particularly at para. 5.1, regarding contact for a left-behind parent in the context of a wrongful removal / retention. This publication is also available on the Hague Conference website at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

Whether a lack of contact between the father and child may result in irreparable harm to the child or compromise the child's interests and whether the situation is therefore one of urgency will be factual determinations for the competent authority to make based on the particular case before it. This issue was discussed at the 2011 Special Commission (Part I) where experts disagreed about whether a lack of interim contact constituted a case of urgency. Some experts expressed the view that while interim contact for the child with the left-behind parent in such circumstances is important and should be facilitated where possible, a lack of interim contact would rarely constitute a “case of urgency” such that Art. 11 could be relied upon to provide jurisdiction to take such measures, particularly bearing in mind the strict interpretation Art. 11 requires (see, *supra*, para. 6.4). However, other experts strongly disagreed, stating that whether interim contact results in a “case of urgency” depends entirely on the facts of the particular case: *e.g.*, if return proceedings are delayed for some reason, it may be that the lack of contact with the left-behind parent risks irreparably harming the child. If this is the situation, the case then is one of “urgency” and measures could, and should, be taken under Art. 11.

It should be noted that any determination made by the authority in the Contracting State where the return proceedings are pending will be without prejudice to any decision which the Contracting State of the child's habitual residence may take, as and when it is able to. Contracting State B's decision regarding the father's contact will lapse as soon as Contracting State A takes a decision regarding the matter (Art. 11(2)).

- **EXAMPLE 6 (G)**²¹⁷ *Three children are habitually resident in Contracting State A where they live with their mother and father. The relationship breaks down and the mother wrongfully removes²¹⁸ the children to Contracting State B. A return application is made by the father under the 1980 Hague Child Abduction Convention (to which both States are Parties). Allegations of sexual abuse are made against the father in the return proceedings in Contracting State B and the mother relies on Article 13(1) b) of the 1980 Convention as a defence to return.*

*The judge in Contracting State B dealing with the return application considers that, on the facts of this case, there is not a grave risk of harm to the children if returned to Contracting State A, **provided that** the children are not left alone in the care of the father pending an investigation of the allegations of sexual abuse in Contracting State A. The judge considers it necessary that any contact between the children and their father take place in a supervised environment until a decision on the merits of the custody issues, including contact, can be taken in Contracting State A.²¹⁹ The judge therefore orders the return of the children but also takes an urgent measure to protect the children by providing that the father's contact with the children must be supervised until a decision on the matter can be taken in Contracting State A.²²⁰ This urgent measure will be recognised by operation of law in Contracting State A and will be enforceable under Chapter IV of the Convention.²²¹ It will lapse as soon as Contracting State A takes the necessary measures of protection required by the situation.²²²*

²¹⁷ See, *supra*, para. 6.4, which recalls the discussion at the 2011 Special Commission (Part I) concerning in which circumstances measures which facilitate a “safe return” in the context of return proceedings brought under the 1980 Convention may be taken under Art. 11 of the 1996 Convention.

²¹⁸ In accordance with the meaning of “wrongful removal” set out in Art. 7(2) of the 1996 Convention.

²¹⁹ Contracting State A, as the Contracting State where the children were habitually resident immediately before the wrongful removal / retention of the children, retains jurisdiction to take measures of protection in respect of the children until the conditions set out in Art. 7 are met (see, *supra*, **Chapter 4**, at paras 4.20-4.25 regarding Art. 7 of the Convention and, *infra*, **Chapter 13**, at paras 13.1-13.14 on international child abduction). This means that it is Contracting State A that will determine the merits of any custody issue for the children. In this scenario, Contracting State B would be taking an interim decision in an urgent situation until Contracting State A is able to take a decision regarding the issue.

²²⁰ The co-operation mechanisms provided for in the Convention would also be of crucial importance in a case such as this (see, *infra*, **Chapter 11**). For example, if the authorities in Contracting State A wish to take a decision regarding the father's interim contact they may, under Art. 34, request the competent authorities of Contracting State B to provide them with all information regarding the allegations of sexual abuse and any other information relevant to the issue of contact.

²²¹ See, *infra*, **Chapter 10**.

²²² Art. 11(2).

7

Provisional measures

Chapter 7

-
- A** WHEN CAN PROVISIONAL MEASURES BE TAKEN?
- B** ARE PROVISIONAL MEASURES TAKEN UNDER ARTICLE 12 ENTITLED TO RECOGNITION AND ENFORCEMENT UNDER THE 1996 CONVENTION?

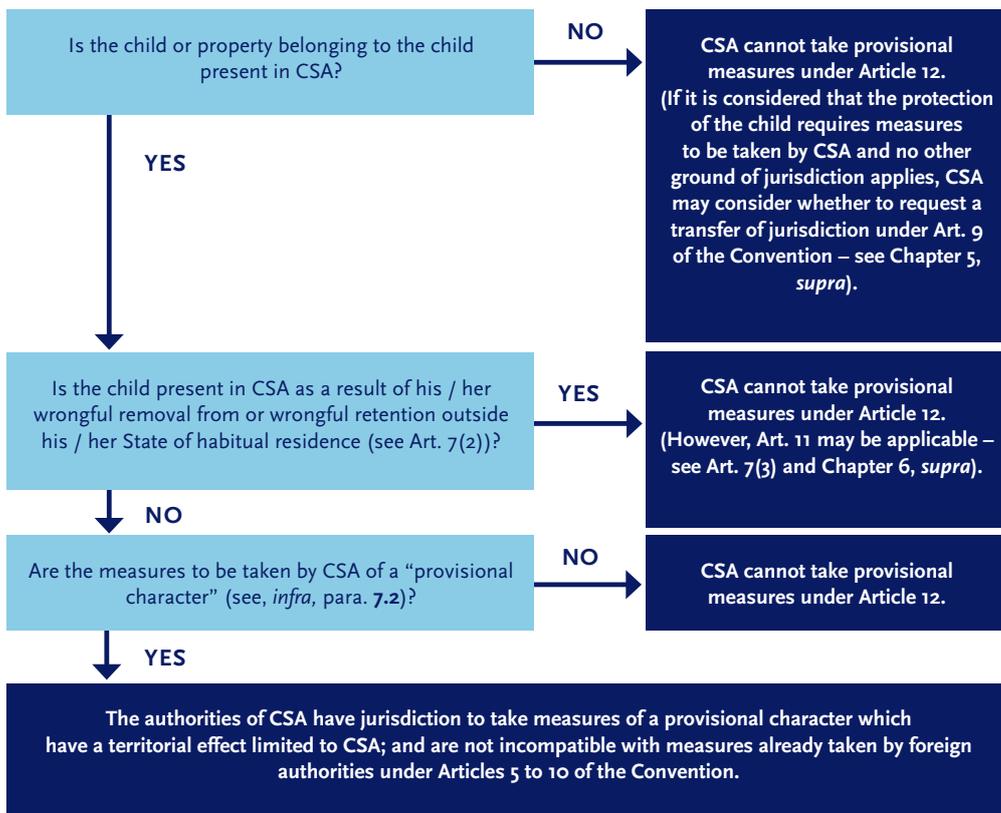
A WHEN CAN PROVISIONAL MEASURES BE TAKEN?

ARTICLE 12

7.1 Independently of cases of urgency, Article 12 provides a specific ground of jurisdiction which allows the authorities of a Contracting State in whose territory the child or property belonging to the child is **present** to take measures of a provisional character for the protection of the person or property of the child. Three points should be noted at the outset regarding these “provisional measures”:

- the effect of provisional measures taken under Article 12 is limited to the territory of the Contracting State whose authorities take these measures;²²³
- the authorities of a Contracting State can only take measures under Article 12 that are not incompatible with measures that have already been taken by the authorities which have jurisdiction under Articles 5 to 10;²²⁴
- in a case where there has been a wrongful removal or retention²²⁵ of a child, a provisional measure cannot be taken by the Contracting State to which the child has been wrongfully removed, or in which the child has been wrongfully retained, if the Contracting State from which the child was wrongfully removed or retained still has jurisdiction;²²⁶ this is expressly excluded under the terms of Article 7(3).

CAN CONTRACTING STATE A (“CSA”) TAKE PROVISIONAL MEASURES UNDER ARTICLE 12?



223 Art. 12(1).

224 Art. 12(1). In contrast, under Art. 11, the situation of urgency permits the Contracting State exercising jurisdiction, where necessary, to set aside the measures taken previously by the authorities which normally have jurisdiction.

225 In accordance with Art. 7(2) of the Convention.

226 As to whether the authority of the Contracting State from which the child was wrongfully removed (or outside which the child was wrongfully retained) still has jurisdiction, see Art. 7(1) and, *supra*, paras 4.20-4.25.

(a) What are measures of a “provisional character”?

- 7.2 The Convention provides no definition as to what may constitute measures of a “provisional character”. The Explanatory Report states that Article 12 was inspired by the need to ensure the protection of children present in a foreign State as a result of a stay of limited duration (e.g., on vacation, for short periods of schooling or for harvest, etc.).²²⁷ It states that there was concern amongst some States that in the absence, strictly speaking, of any particular urgency (such that Art. 11 was applicable), it might be desirable for the Contracting State where the child was present to be able to take measures of protection if, for example, the family with whom the child was staying became overburdened and the child needed to be placed in alternative care under the supervision of the local State authorities.²²⁸

(b) How long do provisional measures taken under Article 12 last?

- 7.3 In the same manner as Article 11, Article 12 is a concurrent, but subordinate ground of jurisdiction to the general grounds of jurisdiction provided for by Articles 5 to 10 of the Convention. Therefore, Article 12 has similar provisions regarding the lapsing of any provisional measures taken by a Contracting State. If the habitual residence of the child concerned is in a **Contracting** State, the provisional measures will lapse when the authorities of a Contracting State which has jurisdiction under Articles 5 to 10 take such measures as are required by the situation.²²⁹ If the habitual residence of the child is in a **non-Contracting** State, the provisional measures will lapse only when the measures required by the situation are taken by the authorities of the other State which has jurisdiction and these latter measures are recognised in the Contracting State where the provisional measures have been taken.²³⁰
- 7.4 It should be noted that if proceedings have started for provisional measures in one Contracting State, the competent authorities seised in another Contracting State on the basis of Articles 5 to 10 do **not** have to stay proceedings until a provisional measure is taken.²³¹ However, in this situation, as any provisional measures which might be taken by the first Contracting State will lapse as soon as the authorities with jurisdiction under Articles 5 to 10 have taken a decision (Art. 12(2)), the competent authorities of both Contracting States, where appropriate, with the assistance of the Central Authorities, may want to communicate and co-operate with each other with a view to avoiding duplication and determining the best way forward to ensure the protection of the child.²³²

²²⁷ Explanatory Report, at para. 74.

²²⁸ *Ibid.*

²²⁹ Art. 12(2).

²³⁰ Art. 12(3).

²³¹ This is because the rules on *lis pendens* set out in Art. 13 of the Convention do not apply to provisional measures. See further, *supra*, **Chapter 4**, at paras 4.29-4.35.

²³² See further, *infra*, **Chapter 11**.

(c) Once a Contracting State has taken provisional measures under Article 12, what other steps could be taken to ensure the continued protection of the child?

- 7.5 Where provisional measures under Article 12 have been taken in a Contracting State, the judicial or administrative authority which has taken these measures may wish to communicate and co-operate with the competent authorities in any other State it considers necessary to ensure the continued protection of the child.²³³ The authority may communicate, for example, the situation of the child and / or the property belonging to the child and the provisional measures which have been taken. Such communication and co-operation may be carried out directly between competent authorities²³⁴ or, where appropriate, with the assistance of the Central Authorities.²³⁵ The communication may, for example, involve the competent authorities in the Contracting State where the measures have been taken under Article 12 informing the competent authorities in the State of the child's habitual residence (or the Central Authority of that State) of the child's situation and the measures which have been taken. This would enable the State of the child's habitual residence to ensure that, where necessary, the situation of the child is investigated fully and any necessary measures of protection are taken for the long-term protection of the child.
- 7.6 Specific co-operation provisions of the Convention may also be relevant in these cases and should always be carefully considered.²³⁶

B ARE PROVISIONAL MEASURES TAKEN UNDER ARTICLE 12 ENTITLED TO RECOGNITION AND ENFORCEMENT UNDER THE 1996 CONVENTION?

- 7.7 Yes, provisional measures of protection are entitled to recognition and enforcement in accordance with Chapter IV of the Convention.²³⁷

■ **EXAMPLE 7 (A)** *A child, living with his parents in Contracting State A, is sent for two months to a ski camp in Contracting State B. Very quickly it becomes apparent that the child does not want to participate in any activities at the camp. The child refuses to ski at all and there are not enough staff members at the camp for someone to remain in the ski chalet with the child all day. Unfortunately, the child's parents are on holiday themselves and cannot travel to collect the child. They have no extended family for the child to stay with and want the child to remain at the camp. The organisation responsible for the ski camp requests the authorities in Contracting State B to arrange alternative care for the child. In accordance with Article 12, the authorities of Contracting State B can take provisional measures to have the child placed in a foster family or alternative care until the parents can come to Contracting State B to collect the child.*

233 This sentence is not confined to communication and co-operation between **Contracting States** to the 1996 Convention which is in line with the philosophy behind provisions of the Convention. See, *infra*, at paras 11.18 *et seq.*

234 For judicial authorities, this may involve direct judicial communications, see, *supra*, note 147.

235 See further, *infra*, **Chapter 11**.

236 *Id.*

237 Arts 23 *et seq.* See, *infra*, **Chapter 10**.

8

*Continuation
of measures
taken*

Chapter 8

-
- A** WILL MEASURES OF PROTECTION REMAIN IN FORCE DESPITE A CHANGE OF CIRCUMSTANCES THAT ELIMINATES THE BASIS UPON WHICH JURISDICTION WAS FOUNDED?
- B** WHAT CONSTITUTES A “CHANGE OF CIRCUMSTANCES” REFERRED TO IN ARTICLE I4?

A WILL MEASURES OF PROTECTION REMAIN IN FORCE DESPITE A CHANGE OF CIRCUMSTANCES THAT ELIMINATES THE BASIS UPON WHICH JURISDICTION WAS FOUNDED?

ARTICLE 14

- 8.1 Article 14 of the Convention ensures the continuation in force of measures taken by an authority having jurisdiction on the basis of Articles 5 to 10 of the Convention, even when the ground of jurisdiction upon which the measures were taken has subsequently disappeared as a result of a change of circumstances. The measures taken by the authority on the basis of Articles 5 to 10 will remain in force for so long as they have not been modified, replaced or terminated by measures taken by any authorities that have jurisdiction under the Convention as a result of the new circumstances.
- 8.2 Article 14 is aimed at providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made concerning the care of the child.²³⁸ Article 14 also guards against “gaps” in the protection of children resulting from factual changes in their circumstances.

B WHAT CONSTITUTES A “CHANGE OF CIRCUMSTANCES” REFERRED TO IN ARTICLE 14?

- 8.3 The exact “change of circumstances” referred to in Article 14 will depend upon the Article of the Convention on which jurisdiction was based when measures of protection were taken. Thus:
- if jurisdiction to take a particular measure was based on Article 5, a “change of circumstances” will be a change in the State of the child’s habitual residence;
 - if jurisdiction to take a particular measure was based on Article 6, it will be a change in the State in which the child is present;
 - under Article 10, the change may be the conclusion of the divorce proceedings;
 - under Articles 8 and 9, the change will be whatever connection with the child the Contracting State to which jurisdiction was transferred relied upon for that transfer, or the conclusion of the proceedings which were transferred;²³⁹
 - lastly, the terms of Article 7 itself set out what changes must occur before jurisdiction can move from the authorities of the Contracting State from which a child has been wrongfully removed or outside of which a child has been wrongfully retained.

In all instances, the measures of protection previously taken will remain in force despite this “change of circumstances”.

²³⁸ In cases of international relocation, a Contracting State to which the relocation has occurred should not allow review or variation of the contact order unless, in the circumstances, it would permit review or variation of a domestic contact order. For a further discussion of international relocation and contact under the Convention, see, *infra*, paras 13.23-13.27. In addition, see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216), particularly Chapter 8.

²³⁹ Depending upon the terms of the transfer – see, *supra*, Chapter 5 regarding the need for close co-operation and clear communication between Contracting States on this issue.

- 8.4 The maintenance in force of the previous measures of protection taken is ensured only “according to their terms” (Art. 14). This takes into account the fact that, in some cases, the duration of the measures of protection may be limited by the terms of the measures themselves. For example, a preventive measure designed to ensure that a child will be returned after a particular trip abroad with one parent may specify that the measure will cease to have effect once the child has been returned; similarly, measures designed to provide for the care of a child when a parent is ill or hospitalised may state that they will cease to have effect when the parent has regained his or her health. These measures will therefore lapse according to their own terms.²⁴⁰
- 8.5 In relation to Articles 11 and 12 dealing with cases of urgency and provisional measures, as has been discussed in **Chapters 6** and **7** above, the terms of those Articles themselves indicate the temporal scope of the measures²⁴¹ and Article 14 therefore does not apply to measures taken under these grounds of jurisdiction.²⁴²

■ **EXAMPLE 8 (A)** *A child is habitually resident in Contracting State A. The authorities in Contracting State A order that the child should have regular contact with his maternal grandparents, who also reside there.²⁴³ The child and parents move to Contracting State B and the child becomes habitually resident there. Despite the fact that the child is no longer habitually resident in Contracting State A and that there are no other grounds upon which the authorities of Contracting State A could have based jurisdiction, the measures taken by the authorities of Contracting State A will remain in force until such time as the authorities with jurisdiction under the Convention (e.g., the authorities of Contracting State B) modify, replace or terminate those orders.²⁴⁴ Therefore, in this case, after the move of the child to Contracting State B, if the order of Contracting State A is not being complied with, the maternal grandparents can seek to have the contact order enforced in Contracting State B.²⁴⁵*

²⁴⁰ See also the Explanatory Report, at para. 83.

²⁴¹ Art. 11(2) and (3) and Art. 12(2) and (3). See, *supra*, **Chapter 6** regarding taking necessary measures in cases of urgency and **Chapter 7** regarding provisional measures.

²⁴² As is clear from the wording of Art. 14 itself which refers to measures taken “in application of Articles 5 to 10” (emphasis added) of the Convention.

²⁴³ As the child is habitually resident in Contracting State A, jurisdiction to take measures of protection will be based upon Art. 5 of the Convention.

²⁴⁴ Art. 14. However, the law of the Contracting State of the child’s new habitual residence (in this case, the law of Contracting State B) will govern, from the time of the change in habitual residence, the “conditions of application” of the measures taken in Contracting State A (Art. 15(3)) – see further, *infra*, **Chapter 9**, paras 9.3-9.8.

²⁴⁵ The order will be recognised by operation of law in Contracting State B (Art. 23, provided that no grounds for non-recognition are established). If the order is not complied with, the maternal grandparents can seek enforcement of the order in accordance with Arts 26 *et seq.* See further, *infra*, **Chapter 10**.

- **EXAMPLE 8 (B)** *A child is habitually resident in Contracting State A but her parent's divorce proceedings are taking place before the authorities of Contracting State B. The requirements of Article 10 are fulfilled²⁴⁶ and the authorities of Contracting State B make a custody order. After the divorce proceedings are concluded, the authorities of Contracting State B will no longer have jurisdiction to take any measures of protection in respect of the child. However, the custody order that they have already made will remain in force, and will be recognised by operation of law and enforced in other Contracting States in accordance with Chapter IV of the Convention.²⁴⁷ The order will remain in force until such time as the authorities with jurisdiction under the Convention (e.g., the authorities of Contracting State A as the Contracting State of the child's habitual residence) modify, replace or terminate the order.*
- **EXAMPLE 8 (C)** *The mother wishes to relocate from Contracting State A to Contracting State B with the children. The father objects, but the mother receives permission to relocate from the competent authority in Contracting State A.²⁴⁸ As a condition of the relocation, the competent authority in Contracting State A makes an order setting out contact arrangements between the father and the children. This order is recognised by operation of law in Contracting State B²⁴⁹ and these contact arrangements remain in force after the move to Contracting State B and after the children become habitually resident there, until such time as the competent authority in Contracting State B modifies the arrangement.²⁵⁰*

²⁴⁶ For these requirements, see, *supra*, paras 4.26-4.28.

²⁴⁷ Art. 14 and Chapter IV of the Convention (discussed, *infra*, at Chapter 10).

²⁴⁸ Jurisdiction based upon Art. 5.

²⁴⁹ Art. 23.

²⁵⁰ See, *supra*, note 238, regarding international relocation. See also, *supra*, note 244 regarding Art. 15(3) and, *infra*, Chapter 9, paras 9.3-9.8.

9

*Law applicable
to measures of
protection*

Chapter 9

-
- A LAW APPLICABLE TO MEASURES OF PROTECTION TAKEN BY A JUDICIAL OR ADMINISTRATIVE AUTHORITY
 - B LAW APPLICABLE TO PARENTAL RESPONSIBILITY WHERE THERE HAS BEEN NO INTERVENTION BY A JUDICIAL OR ADMINISTRATIVE AUTHORITY
 - C PROTECTION OF THIRD PARTIES
 - D GENERAL PROVISIONS ON APPLICABLE LAW

A LAW APPLICABLE TO MEASURES OF PROTECTION TAKEN BY A JUDICIAL OR ADMINISTRATIVE AUTHORITY

(a) What law will be applied by the authorities of a Contracting State taking measures directed to the protection of the person or property of a child?

ARTICLE 15(1), 15(2)

- 9.1 When exercising their jurisdiction²⁵¹ to take measures directed to the protection of the person or property of the child, the authorities of Contracting States will apply their “own law” (Art. 15(1)), that is, their domestic, internal, law.²⁵² This rule applies irrespective of the ground in the Convention upon which jurisdiction is based. The rule has the advantage that the authorities of Contracting States are applying the law that they know best.²⁵³
- 9.2 However, Article 15(2) provides an exception to this general rule. Article 15(2) states that, in so far as the protection of the person or the property of the child requires, the authorities may, exceptionally, (1) apply, or (2) take into consideration, the law of another State with which the situation has a substantial connection. As an exception to the general rule, this provision “should not be utilised too easily”.²⁵⁴ The authorities should be sure that it is in the child’s best interests to apply or take into consideration foreign law.²⁵⁵

■ EXAMPLE 9 (A)

The child lives with her mother in Contracting State A and has regular contact with her father. The mother wishes to relocate with the child to Contracting State B and the father objects. The mother seeks permission to relocate. The authority deciding on this issue grants permission to relocate and wishes to make an order regulating custody and access / contact following the relocation. Although the applicable law in this case will be the law of Contracting State A,²⁵⁶ the authority notes that the terminology used for custody and access / contact in Contracting State B differs from that in Contracting State A. Under Article 15(2), the authority in Contracting State A is entitled to take into consideration the law of Contracting State B and may consider framing the order in the terminology of Contracting State B.²⁵⁷

251 It should be noted that Art. 15(1) refers to authorities exercising their jurisdiction “under the provisions of Chapter II” of the Convention. However, Art. 15 should not be interpreted restrictively. Where, for example, Art. 52(2) applies and Contracting States have entered into an agreement containing rules regarding jurisdiction in respect of children habitually resident in their Contracting States (e.g., for Member States of the EU, excluding Denmark, the Brussels II a Regulation), if jurisdiction is exercised on the basis of the agreement but the ground of jurisdiction relied upon exists in Chapter II of the Convention, Art. 15 of the Convention should be taken to apply. Avoiding a literal and overly narrow interpretation of the Convention in this regard will promote one of the overriding purposes of the Convention, as reflected in the third paragraph of the Preamble, that is: “to avoid conflicts between [...] legal systems in respect of [...] applicable law”.

252 Art. 21 makes it clear that this internal law is the law in force in a State other than its private international law rules (i.e., *renvoi* is not applicable). See further, *infra*, paras 9.23-9.24.

253 See the Explanatory Report, at para. 86.

254 *Ibid.*, at para. 89.

255 *Ibid.*: “[t]his paragraph constitutes a clause making an exception based not on the principle of proximity (the closest connection), but on the best interests of the child”.

256 Art. 15(1).

257 For a further discussion of international relocation, see, *infra*, paras 13.23-13.27.

(b) Where a child’s habitual residence changes from one Contracting State to another, what law governs the “conditions of application” of a measure of protection in the child’s new habitual residence, where the measure was taken in the child’s former habitual residence?²⁵⁸

ARTICLE 15(3)

- 9.3 We have already seen earlier in this Handbook that a change in a child’s habitual residence will result in a change of the authorities having jurisdiction to take measures of protection in respect of the child,²⁵⁹ but that the change of habitual residence will leave subsisting the measures of protection already taken in respect of the child.²⁶⁰ However, a question left unanswered by the previous provisions is what law will govern the “conditions of application” of the subsisting measure of protection in the Contracting State of the child’s new habitual residence.
- 9.4 Article 15(3) answers this question by providing that, in these circumstances, the “conditions of application” of the measure of protection will be determined by the law of the Contracting State of the child’s **new** habitual residence.
- 9.5 The Convention does not define the “conditions of application” of measures of protection. However, the Explanatory Report makes clear²⁶¹ that the “conditions of application” refer to the way the measure of protection is to be **exercised** in the Contracting State to which the child has moved.
- 9.6 The Explanatory Report refers to the difficulty in drawing a line between the existence of the measure of protection (which will subsist: Art. 14) and the “conditions of application” of the measure (which will be governed by the Contracting State of the new habitual residence and may, therefore, change: Art. 15(3)).²⁶² For example, if the measure of protection is the designation of a guardian for a child but the guardian has an obligation to ask for court authorisation regarding certain acts under the original measure of protection, is the requirement for an authorisation to act part of the measure itself or a “condition of application” of the measure such that this may change when the child moves? Further, if a measure of protection is stated to exist until the child reaches 18 years but, in the new habitual residence the measure would cease at 16 years, is the duration of the measure part of the existence of the measure or a “condition of application” of the measure?²⁶³

258 Since the measure of protection will remain in force (in accordance with Art. 14) in the Contracting State of the child’s **new** habitual residence – see, *supra*, **Chapter 8**.

259 Art. 5(2) – see, *supra*, **Chapter 4**, at paras 4.8-4.11.

260 Art. 14 – see, *supra*, **Chapter 8**.

261 *Op. cit.* note 19, at para. 90, by likening Art. 15(3) to Art. 17 as regards parental responsibility (see, *infra*, para. 9.16) and by stating “the measure taken before the change subsists after the change but the way it is ‘exercised’ is governed from the time when the change occurs by the law of the State of the new habitual residence”.

262 Explanatory Report, at para. 91.

263 *Ibid.*

- 9.7 The Explanatory Report states that such questions can only be answered on a case-by-case basis.²⁶⁴ Ultimately, if the measure appears to be impracticable to exercise in the Contracting State of the child's **new** habitual residence, or undermined by the “conditions of application” there, the authorities of this Contracting State may consider that the measure needs to be adapted or that a new measure needs to be taken (and will have jurisdiction to do so as the Contracting State of the child's habitual residence – Art. 5). In such circumstances, the co-operation provisions of the Convention may prove essential to ensure that the substance of the protection for the child which was sought by the original measure of protection is not lost.²⁶⁵
- 9.8 It should be noted that Article 15(3) does not apply if the child acquires a new habitual residence in a **non-Contracting** State. In this situation the internal private international law rules of the non-Contracting State would apply to determine if the measure of protection could be recognised in that State and the conditions under which it could be applied.²⁶⁶

■ **EXAMPLE 9 (B)**

Two children are taken into public authority care in Contracting State A due to the imprisonment of their father and drug abuse by their mother. Both parents maintain strong contact with the children and the mother successfully attends a drug addiction treatment programme. The public authority works with the mother to return the children to her care. Following the release of the father, the family wishes to move to Contracting State B to start a new life. The authorities of Contracting State A are willing to allow the relocation but only if the children remain under public authority supervision after the move abroad. The competent authorities in Contracting State A therefore, via the Central Authority in Contracting State A, communicate with the competent authorities in Contracting State B (Art. 30). They ascertain that supervision of the children by the public authorities in Contracting State B is available. Contracting State A therefore orders that the children may remain in their parents' care on the condition that this care is supervised by a public authority. The order for supervision, made under the law of Contracting State A, remains in force after the family's relocation.²⁶⁷ However, the conditions of application of the measure will be governed by the domestic law of Contracting State B.²⁶⁸

²⁶⁴ *Ibid.*

²⁶⁵ For example, if the Contracting State of the child's new habitual residence is seized of an application for the adaptation of a measure of protection previously taken, it may request information from the Contracting State of the child's former habitual residence regarding the situation of the child which led to the taking of the measure and the specific purpose the measure was designed to achieve (*e.g.*, using Art. 34; see, *infra*, **Chapter 10** for a detailed discussion of the co-operation provisions of the Convention). This may assist the Contracting State seized in reaching an outcome which remains in line with the purpose of the original measure of protection.

²⁶⁶ See the Explanatory Report, at para. 92.

²⁶⁷ Art. 14 – see, *supra*, **Chapter 8**. However, it should be noted that the Explanatory Report, at para. 83, did not consider that a measure of this sort would subsist under Art. 14. This is because the national protective body could only exercise its powers on the territory of the State to which it belongs and Art. 14 specifically states that measures will remain in force “according to their terms”. This seems to be a very restrictive interpretation of Art. 14 and “according to its terms” could be interpreted in a purposive fashion in this context to mean that the measure would subsist according to its terms if the supervision of the family / child by a public (State) authority could continue in the moved-to Contracting State.

²⁶⁸ Art. 15(3) – see, *supra*, paras 9.3-9.8.

An example of possible differences in the conditions of application between the two States could be that the public authority in Contracting State A has the power to enter the family home unannounced at all times, while the public authority in Contracting State B can only require that the parents agree to meet with its officials on a regular basis.²⁶⁹ If the measure taken by the authorities of Contracting State A appears to be impracticable or undermined in its application in Contracting State B, the authorities of Contracting State B may take a new measure.²⁷⁰

B LAW APPLICABLE TO PARENTAL RESPONSIBILITY WHERE THERE HAS BEEN NO INTERVENTION BY A JUDICIAL OR ADMINISTRATIVE AUTHORITY

(a) What law applies to the attribution or extinction of parental responsibility which occurs without any intervention by a judicial or administrative authority?

ARTICLE 16(1), 16(2)

- 9.9 The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State²⁷¹ of the habitual residence of the child.²⁷²
- 9.10 In some cases, the attribution or extinction of parental responsibility may occur as a result of an agreement or unilateral act which, again, does not require the intervention of the judicial or administrative authorities. The law applicable to this attribution or extinction of parental responsibility is the law of the State of the child's habitual residence **at the time when the agreement or the unilateral act takes effect**.²⁷³ An example of a unilateral act attributing parental responsibility might be a will or an expression of last intentions by the last parent of the child designating a guardian for the child.²⁷⁴

269 In this situation there should be close co-operation and communication between the authorities in both Contracting States **prior to** the relocation being permitted by Contracting State A to ensure that all necessary information regarding the family is exchanged and to ensure that adequate supervision of the family will continue in Contracting State B.

270 As the authorities of the Contracting State of the child's habitual residence – Art. 5. As to the use of the co-operation mechanisms of the Convention which may be used in this situation, see *supra*, note 265.

271 This does not have to be a Contracting State to the 1996 Convention since Art. 20 states that the provisions of Chapter III on applicable law apply even if the law designated by them is the law of a non-Contracting State (*i.e.*, they are universal). See, *infra*, para. 9.22.

272 Art. 16(1).

273 Art. 16(2).

274 See the Explanatory Report, at para. 103.

- 9.II It should be noted that if the attribution or the extinction of parental responsibility by agreement or unilateral act has to be reviewed or approved by a judicial or administrative authority, this review or approval will be characterised as a “measure of protection” which must be taken by the authorities with jurisdiction under Chapter II of the Convention, applying the law designated by Article 15 of the Convention.²⁷⁵ However, if the intervention of the judicial or administrative authority is a purely passive intervention, e.g., limited to registering a declaration, an agreement or a unilateral act without exercising any control over the substance of the matter, this should not be considered as an intervention amounting to a “measure of protection” and the attribution of parental responsibility will still fall within Article 16 as one arising “without the intervention of a judicial or administrative authority”.²⁷⁶

- **EXAMPLE 9 (C)** *An unmarried couple living in Contracting State A separate before the birth of their child. The father moves to Contracting State B for his work. Under the law of Contracting State B, an unmarried father does not automatically acquire parental responsibility for a child upon the birth of the child. In contrast, under the law of Contracting State A, an unmarried father does acquire parental responsibility automatically upon the birth of the child.*

When the child is born, the question as to whether the father has parental responsibility for the child is governed by the law of the State of the habitual residence of the child,²⁷⁷ in this case, the law of Contracting State A. The father therefore automatically acquires parental responsibility for the child in accordance with this law.²⁷⁸

- **EXAMPLE 9 (D)** *A teenager lives in non-Contracting State A with his father and his step-mother. The law of this non-Contracting State allocates parental responsibility by operation of law to the father but not to the step-mother. However, the law of non-Contracting State A permits parents with parental responsibility to enter into a formal agreement to share parental responsibility with certain others without the need to seek the approval of the State authorities. The father and step-mother enter into such a formal agreement in accordance with the law of non-Contracting State A.*

When travelling abroad to a summer camp in Contracting State B the teenager is arrested by the police for graffiti and causing damage to a train. His parents are requested to appear before the Youth Court of this State. The law of Contracting State B states that persons with parental responsibility for children will be held financially responsible for any damage.

In accordance with Article 16, Contracting State B will apply the law of non-Contracting State A (the State of the teenager’s habitual residence) to the question of who has parental responsibility for the teenager (by operation of law, as a result of an agreement).

Since both the father and the step-mother have parental responsibility for the teenager under the law of non-Contracting State A, they will both be financially responsible for the teenager’s activities in Contracting State B.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*, at para. 98.

²⁷⁷ Art. 16(1). This would also be the case if the child was habitually resident in **non-Contracting** State A: see Art. 20 and, *infra*, para. 9.22.

²⁷⁸ In this case, the father’s **exercise** of his parental responsibility will also be governed by the law of Contracting State A: Art. 17. See further, *infra*, para. 9.16.

(b) What happens to the attribution or extinction of parental responsibility when a child's habitual residence changes?

ARTICLE 16(3), 16(4)

- 9.12 Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of the child's habitual residence to another State.²⁷⁹ This is the case even if the State of the child's new habitual residence would not provide for parental responsibility in the same circumstances.²⁸⁰
- 9.13 The attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the child's new habitual residence.²⁸¹
- 9.14 The purpose of these rules is to secure continuity in parent-child relationships.²⁸² The result of the rules is that a change in a child's habitual residence, in and of itself, cannot result in a person **losing** parental responsibility for a child, but it can result in another person **gaining** parental responsibility for a child.
- 9.15 The co-existence of several holders of parental responsibility which may result from an application of these provisions can only work if the holders of parental responsibility generally agree.²⁸³ If there is disagreement between them, this can be resolved by a measure requested by one or more of them from the competent authority with jurisdiction (see **Chapter 4, supra**).²⁸⁴

■ **EXAMPLE 9 (E)** *A child is born in Contracting State A where both unmarried parents have parental responsibility for the child by operation of law. The mother moves with the child to Contracting State B where the law provides that an unmarried father can only acquire parental responsibility by court order. The parental responsibility of the father acquired in Contracting State A by operation of law will subsist after the move.*²⁸⁵

■ **EXAMPLE 9 (F)** *A child is born in Contracting State A. The child's parents divorce shortly after her birth. Under the law of Contracting State A, both parents retain parental responsibility for the child after the divorce. Two years later the mother re-marries and the new couple and the child move to Contracting State B. Contracting State B has a rule whereby a step-parent has parental responsibility for his or her step-children by operation of law. In this case, after the child acquires his or her habitual residence in Contracting State B, there will be three persons who have parental responsibility for her: her mother, father and step-father.*²⁸⁶

279 Art. 16(3).

280 It is also the case if the child moves from a **non-Contracting** State to a Contracting State: see Art. 20 and, *infra*, para. 9.22.

281 Art. 16(4).

282 See the Explanatory Report, at paras 105-107.

283 *Ibid.*, at para. 108.

284 *Ibid.*

285 Art. 16(3).

286 Art. 16(4).

■ **EXAMPLE 9 (G)**

A child lives in Contracting State A with her father and his second wife, the child's step-mother. The mother and father of the child agree that the step-mother should have parental responsibility for the child. Under the law of Contracting State A, it is possible for parents to attribute parental responsibility to a step-parent, in writing. The agreement does not need to receive the approval of any State authority but it must be registered with the appropriate ministry. The mother, father and step-mother register their agreement accordingly.

A year later, the father, step-mother and the child move from Contracting State A to Contracting State B. Under the law of Contracting State B, a step-parent cannot acquire parental responsibility for a child without a court order.

Since the agreement between the parties which took place in Contracting State A is one which did not require the intervention of a judicial or administrative authority (see para. 9.11, supra), Article 16(2) applies such that the attribution of parental responsibility to the step-mother is governed by the law of the State of the child's habitual residence at the time when the agreement took effect (i.e., at the time when the agreement was registered). The child was habitually resident in Contracting State A at the time the agreement was registered and hence the law of Contracting State A applies to this question.

Article 16(3) ensures that the step-mother's parental responsibility subsists in Contracting State B.

(c) What law applies to the exercise of parental responsibility?

ARTICLE 17

- 9.16 The preceding rules refer to the **attribution** or **extinction** of parental responsibility. The **exercise** of parental responsibility, however, is always governed by the law of the child's **current** habitual residence.

■ **EXAMPLE 9 (H)**

In Contracting State A a holder of parental responsibility needs the consent of all other holders of parental responsibility before he or she can arrange a non-urgent surgical procedure for the child. If the child is now habitually resident in Contracting State A, such consent is necessary even if the child was previously habitually resident in Contracting State B where the parental responsibility in respect of the child was originally attributed and where there was no such requirement.

(d) The modification or termination of parental responsibility by measures of protection taken by judicial or administrative authorities

ARTICLE 18

- 9.17 The above paragraphs set out the applicable law rules when considering parental responsibility attributed or extinguished without the intervention of a judicial or administrative authority. However, these rules do not prevent measures of protection modifying or terminating parental responsibility from being taken by the relevant judicial or administrative authority.

- 9.18 A measure taken by the judicial or administrative authority of a Contracting State providing for the termination or modification of parental responsibility is a measure directed to the protection of the person of the child falling within the material scope of the Convention and it should therefore be taken following the jurisdiction and applicable law rules of the Convention.

■ **EXAMPLE 9 (I)** *An unmarried couple and their child are habitually resident in Contracting State A. Under the law of Contracting State A, only the mother has parental responsibility for the child by operation of law. The family moves to Contracting State B and becomes habitually resident there. Under the law of Contracting State B an unmarried father will also acquire parental responsibility for his child by operation of law. An application of Article 16(4) therefore ensures that the law of Contracting State B (the child's new habitual residence) will apply to the attribution of parental responsibility by operation of law to the unmarried father (who did not previously have parental responsibility).*

The relationship breaks down and the parents are unable to agree on any decisions concerning the child. The constant arguing and tension is causing the child to become anxious and unwell. The child has recently been referred to a consultant psychiatrist with acute stress.

*The mother applies to the court in Contracting State B requesting that the father's parental responsibility be terminated. Contracting State B has jurisdiction to hear this request as the Contracting State of the child's habitual residence.²⁸⁷ It will usually apply the *lex fori* to the dispute.²⁸⁸ Further, as a result of Article 18, Contracting State B is able to terminate the father's parental responsibility even though that parental responsibility was attributed by operation of law as a result of Article 16 of the Convention.²⁸⁹*

C PROTECTION OF THIRD PARTIES

ARTICLE 19

- 9.19 If a third party enters into a transaction with a person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded, the third party cannot be held liable on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the rules of the Convention.²⁹⁰
- 9.20 This protection does not apply, however, if the third party knew or should have known that the parental responsibility was governed by the designated law. The protection also only applies if the transaction was entered into between persons present in the territory of the same State.

²⁸⁷ Art. 5.

²⁸⁸ Art. 15(1) (unless it decides that the protection of the child requires it, by way of exception, to apply or take into consideration the law of another State with which the situation has a substantial connection: Art. 15(2) – see further, *supra*, para. 9.2).

²⁸⁹ However, ultimately, whether it can do so and in what circumstances it will do so will be a matter for the *lex fori* (Art. 15(1); or any other law applied, by way of exception, under Art. 15(2)).

²⁹⁰ See, *infra*, para. 13.80 for further discussion of this provision.

- 9.21 This rule was inserted into the Convention since, “[f]rom the point where the Convention opted, in case of a change in the child’s habitual residence, for the principle of continuity of the parental responsibility attributed by operation of law by the law of the State of the preceding habitual residence, it caused third parties acting in the State of the new habitual residence to run the risk of committing an error about the person or the powers of the child’s legal representative”.²⁹¹

D GENERAL PROVISIONS ON APPLICABLE LAW

(a) Do the rules concerning applicable law apply even if the designated law is not that of a Contracting State?

ARTICLE 20

- 9.22 Yes, the rules concerning applicable law set out in the Convention are of universal application, meaning that they apply in all instances, including those where the law designated is the law of a State which is not a Contracting State to the Convention.

■ EXAMPLE 9 (i)

A child resides with her father and her step-mother in non-Contracting State A. According to the law of non-Contracting State A, the marriage of the father and step-mother resulted in the step-mother automatically acquiring parental responsibility for the child.

The father is offered a new job in Contracting State B and the family moves to this Contracting State to live. Under the law of Contracting State B, the step-mother would not have automatically acquired parental responsibility by virtue of her marriage to the child’s father.

However, by applying Articles 16(3) and 20 of the Convention, the step-mother’s parental responsibility, accorded under the law of non-Contracting State A, will subsist following the change of habitual residence of the child to Contracting State B.

(b) Does a reference to the law of another State include a reference to the private international law rules of that other State?

ARTICLE 21

- 9.23 No, *renvoi* is expressly excluded by Article 21. This means that where there is a reference to the law of another State, only the internal laws of that State are being referred to and not the private international law rules of that State.
- 9.24 There is one exception to this rule and that is if the law applicable according to Article 16 is the law of a non-Contracting State. In this case, if the private international law rules of that State designate the law of another non-Contracting State which would apply its own rules, then the law of the latter State applies. However, if the second non-Contracting State would **not** apply its own law, then the law designated by Article 16 will apply. This is designed so as not to interfere with the private international law rules that apply between non-Contracting States.

²⁹¹ Explanatory Report, para. III.

(c) Are there any circumstances where the law designated under the rules of the 1996 Convention does not have to be applied?

ARTICLE 22

- 9.25 There is a public policy exception provided for in Article 22. This means that if the application of the law designated under the rules described above is manifestly contrary to the public policy of the Contracting State, taking into account the best interests of the child, the authorities of that State can refuse to apply it.
- 9.26 It should be noted that the use of public policy to refuse the application of the designated law can only occur when the best interests of the child are taken into account.

10

Chapter 10

*Recognition
and enforcement
of a measure
of protection*

-
- A WHEN WILL A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE RECOGNISED IN ANOTHER CONTRACTING STATE?
 - B WHEN CAN RECOGNITION OF A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE REFUSED IN ANOTHER?
 - C HOW CAN A PERSON BE SURE THAT A DECISION WILL BE RECOGNISED IN ANOTHER CONTRACTING STATE? (“ADVANCE RECOGNITION”)
 - D WHEN WILL A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE ENFORCED IN ANOTHER CONTRACTING STATE?

A WHEN WILL A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE RECOGNISED IN ANOTHER CONTRACTING STATE?

ARTICLE 23

- 10.1** Measures of protection taken in one Contracting State will be recognised by operation of law in all other Contracting States.²⁹² Recognition “by operation of law” means that it is not necessary to commence proceedings for the measure to be recognised in the requested Contracting State²⁹³ and for it to produce its effects there.
- 10.2** However, in order for a measure to be recognised, its existence may need to be evidenced in the requested Contracting State. In order to avoid placing bureaucratic hurdles in the way of the protection of children, the Convention does not have any formal requirements in this regard. Usually, production of the written document incorporating the measure²⁹⁴ will be sufficient. However, in certain circumstances and particularly in cases of urgency, the authorities of the Contracting State which has taken the measure may inform the requested Contracting State of the measure by telephone.²⁹⁵ In such circumstances it may be useful to follow up with a written document evidencing the measure as soon as possible.²⁹⁶
- 10.3** Recognition of the measure of protection by operation of law will be sufficient for a measure to produce its effects in circumstances where the measure is voluntarily complied with or where there is no opposition to it.²⁹⁷

■ **EXAMPLE 10 (A)** *A family is habitually resident in Contracting State A. Following the breakdown of the parents’ relationship, the court in Contracting State A, with the agreement of the father, grants the mother sole custody of the child. A year later, the mother lawfully moves with the child to Contracting State B. Her sole custody of the child will be recognised by operation of law in Contracting State B without her taking any further action. She will not have to apply to the judicial or administrative authorities in Contracting State B for recognition of the custody order.*

■ **EXAMPLE 10 (B)** *The authorities of Contracting State A, the habitual residence of the child, appoint a legal representative to manage the child’s property. This includes property in Contracting State B. The recognition of this appointment by operation of law enables the legal representative to enter into transactions on behalf of the child in Contracting State B without having to take any other steps to have his / her appointment recognised in Contracting State B.²⁹⁸*

²⁹² However, recognition may be refused under the strict and limited grounds described, *infra*, at **section B**.

²⁹³ The terminology of “requested Contracting State” is used in this Chapter to denote the Contracting State which is requested to recognise and / or enforce the measure of protection taken in another Contracting State.

²⁹⁴ Emanating from the authority of the Contracting State which took the decision.

²⁹⁵ See the Explanatory Report, at para. 120.

²⁹⁶ *Ibid.*

²⁹⁷ Where there is no voluntary compliance with a measure, or where there is opposition to the measure, see, *infra*, **section D** on enforcement.

²⁹⁸ In this case, if Contracting State A issues certificates in accordance with Art. 40 of the Convention, it may be useful for the legal representative to obtain such certificates – see further, *infra*, **Chapter 11**.

■ **EXAMPLE 10 (c)** *A teenager is found sleeping on the streets in a city in Contracting State A. The court in Contracting State A orders that the teenager be placed temporarily in State care while enquiries are made regarding her situation.²⁹⁹ However, the teenager manages to run away from this temporary care and is known to be travelling to Contracting State B. The authorities in Contracting State A contact the authorities in Contracting State B by telephone to inform them of the urgent and dangerous situation the teenager is in and the measure that they have taken.³⁰⁰ The authorities in Contracting State A confirm that they will send the court order as soon as possible. They subsequently confirm the order by telefax.*

The measure is recognised by operation of law in Contracting State B, without any further action being required. Due to the close co-operation between the Contracting States, the authorities in Contracting State B are expecting the teenager's arrival and are able to take her immediately into temporary State care in accordance with Contracting State A's measure of protection.³⁰¹

B WHEN CAN RECOGNITION OF A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE REFUSED IN ANOTHER?

10.4 Article 23(2) provides an exhaustive list of the grounds upon which recognition may be refused. It should be noted that Article 23(2) permits the refusal of recognition on these grounds, but does not make it mandatory.³⁰² Recognition **may** therefore be refused in the following circumstances:

(a) The measure was taken by the authority of a Contracting State whose jurisdiction was not based on one of the grounds provided for in Articles 5 to 14 of the 1996 Convention³⁰³

10.5 This means that authorities in the requested Contracting State are not obliged to recognise measures that are based on the non-Convention jurisdictional rules of the Contracting State which took the measures **if** these rules are not consistent with the jurisdictional rules found in Chapter II of the Convention.

299 This order is based on Art. 11 of the Convention.

300 It should be noted that, under Art. 36 of the Convention, if the child is considered by Contracting State A to be “exposed to a serious danger”, the competent authorities of Contracting State A, as they have been informed in this case that the child's residence has changed (or is about to change) and / or the child is about to become present in Contracting State B, are **obliged** to inform the authorities in Contracting State B about the danger to the child and the measures taken by them. See further, *infra*, **Chapter 11**.

301 Contracting State B will then, if necessary and if it considers the case urgent, be able to take any further / other necessary measures of protection in respect of the teenager under Art. 11 of the Convention. It may be advisable that close co-operation continues to take place between Contracting State B, Contracting State A and the State of the child's habitual residence (if this can be identified) so that it can be determined which State has general jurisdiction in respect of this teenager to take longer-term measures of protection for her. See further, *infra*, **Chapter 11**.

302 See the Explanatory Report, at para. 121. This means that even if a ground for non-recognition under Art. 23(2) is established, the Contracting State may still decide to recognise the measure of protection.

303 Art. 23(2) *a*): this paragraph implies that the requested authority has the power to verify the jurisdiction of the authority which took the measure for the purposes of recognition. It is bound in this verification, however, by the findings of fact upon which the authority which took the measure based its jurisdiction (see Art. 25 and, *infra*, para. 10.14).

(b) The measure was taken, except in the case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of the requested Contracting State³⁰⁴

10.6 The Convention does not seek to amend national procedural rules regarding hearing children and this provision operates so as to allow a requested Contracting State to ensure that its fundamental principles in this regard will not be compromised when recognising a decision from another Contracting State. The provision is influenced by Article 12 of the UNCRC, which sets out the right of the child to be heard in proceedings that concern him or her. However, it is important to emphasise that it is only where the failure to hear the child is contrary to the **fundamental principles** of the requested Contracting State that this may justify a refusal of recognition.

10.7 This ground of refusal does not apply in cases of urgency, since it is accepted that “the requirements of procedural due process of law ought to be interpreted more flexibly” in such situations.³⁰⁵

(c) The measure was taken, except in a case of urgency, without a person who claims that the measure infringes his or her parental responsibility having been given an opportunity to be heard³⁰⁶

10.8 This ground of refusal reflects respect for the right to due process and fair procedures of any person whose parental responsibility is infringed by the measure.

(d) The recognition is manifestly contrary to the public policy of the requested Contracting State, taking into account the best interests of the child³⁰⁷

10.9 Refusal of recognition on the basis of public policy is a standard provision in private international law. However, the use of the public policy exception is rare in private international law generally and in the international family law Hague Conventions.

10.10 Under this Convention, as well as the other international family law Hague Conventions, this exception to recognition may only be used when the recognition would be “**manifestly contrary**” to public policy. Further, the best interests of the child must be taken into account when considering whether to rely on this ground.³⁰⁸

304 Art. 23(2) *b*).

305 Explanatory Report, at para. 123. See also the Conclusions and Recommendations of the 2011 Special Commission (Part I), para. 50 (available at < www.hcch.net > (path indicated, *supra*, note 16)).

306 Art. 23(2) *c*): *e.g.*, if, on the basis of Art. 18 of the Convention, the competent authority terminated an individual’s parental responsibility without hearing him / her, that individual may invoke this infringement of his / her parental responsibility in order to oppose recognition of the measure in another Contracting State.

307 Art. 23(2) *d*).

308 As in the 1993 Hague Intercountry Adoption Convention.

(e) The measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested Contracting State³⁰⁹

- 10.11** This ground of refusal gives preference to a later measure taken by the authorities of a **non-Contracting State**, where that measure has been taken in accordance with the primary principle of jurisdiction under the Convention (*i.e.*, it is the non-Contracting State of the child's **habitual residence**).
- 10.12** The measure taken by the non-Contracting State of the child's habitual residence must be later in time than the decision of the Contracting State for which recognition is being refused. It must also be capable of recognition in the requested Contracting State.

(f) The procedure provided in Article 33 has not been complied with³¹⁰

- 10.13** The procedure provided in Article 33 refers to the procedure in cross-border placements of children. This procedure requires co-operation between the authorities of all the Contracting States involved and is discussed further at paragraphs **11.13** to **11.17**, *infra*.³¹¹
- 10.14** It should be noted that, when determining whether a ground for refusal of recognition is established, the authorities of the requested Contracting State are bound by the findings of fact upon which the authority in the State where the measure was taken based its jurisdiction.³¹² For example, if jurisdiction was based on habitual residence, the requested Contracting State cannot review the factual findings upon which the authority that took the measure of protection based its assessment of habitual residence. Similarly, where jurisdiction is grounded upon a preliminary assessment of the best interests of the child,³¹³ this assessment binds the authority of the requested Contracting State. Therefore judicial or administrative authorities taking measures of protection under the Convention may wish to set down clearly, wherever possible, the findings of fact upon which their jurisdiction is based.
- 10.15** There is also to be no review of the merits of the decision beyond what is necessary for the purposes of determining whether a ground for refusal of recognition is established.³¹⁴

³⁰⁹ Art. 23(2) *e*).

³¹⁰ Art. 23(2) *f*).

³¹¹ See, *infra*, paras **11.1** and **13.31-13.42**.

³¹² Art. 25.

³¹³ See, *e.g.*, Arts 8(4), 9(1) and 10(1) *b*). See also the Explanatory Report, para. 131.

³¹⁴ Art. 27.

- **EXAMPLE 10 (D)** *The non-Convention rules of jurisdiction of Contracting State A provide that, where a child is not habitually resident in a Contracting State but is a national of Contracting State A, the authorities of Contracting State A will have jurisdiction to take measures of protection in respect of the child.³¹⁵ The authorities of Contracting State A therefore make an order in respect of a child who is a national of Contracting State A but who is habitually resident in non-Contracting State B. Whilst Contracting State A is entitled to take this measure of protection,³¹⁶ the authorities of Contracting State C (or any other Contracting State) may refuse to recognise it, since it was based upon a ground of jurisdiction not contained in the Convention.³¹⁷*
- **EXAMPLE 10 (E)** *A child, aged 11, is habitually resident in Contracting State A. The authorities of Contracting State A make an order restricting contact between the child and his father, who lives in Contracting State B. The authorities of Contracting State A do not interview the child directly when taking this measure of protection; instead, a social worker speaks **only** to the parents but neither observed nor spoke with the child. The Constitution of Contracting State B contains a provision on the rights of children, which states that children must be consulted and heard regarding decisions which concern them, provided they are of sufficient age and maturity. The authorities of Contracting State B determine that the child is of sufficient age and maturity and, according to their Constitutional rules, should have been heard regarding this decision. They may therefore refuse to recognise the measure taken in Contracting State A on the basis that the child was not given the opportunity to be heard, in violation of Contracting State B's own fundamental principles of procedure.³¹⁸*
- **EXAMPLE 10 (F)** *The authorities of Contracting State A make an order terminating the parental responsibility of the mother in respect of her two children. The mother was in Contracting State B at the time the decision was taken and was not given the opportunity to be heard before this decision was taken. Recognition of this decision may be refused in all other Contracting States.³¹⁹*
- **EXAMPLE 10 (G)** *A child and her mother are habitually resident in Contracting State B. The father is habitually resident in Contracting State A. The parents decide to divorce in Contracting State A and consent to the courts of Contracting State A dealing with all matters relating to the child's custody.³²⁰ In the course of the divorce proceedings, the court of Contracting State A decides to terminate the father's parental responsibility and to cease all contact between the father and child on the sole basis that the father is responsible for the breakdown of the marriage. The measure may not be recognised in Contracting State B on the basis that it would be manifestly contrary to Contracting State B's public policy, taking into account the best interests of the child, to recognise a measure that is not based on an assessment of the interests of the child.³²¹*

315 Obviously the authorities of Contracting State A would not be able to exercise jurisdiction on this ground in respect of a child who is habitually resident in another **Contracting State** – see, *supra*, paras 3.11-3.13.

316 See, *supra*, paras 3.11-3.13.

317 Art. 23(2) *a*).

318 Art. 23(2) *b*) (and the case was not one of urgency).

319 Art. 23(2) *c*) (provided the measure was not taken in a case of urgency).

320 Art. 10 – see further, *supra*, **Chapter 4**.

321 Art. 23(2) *d*): in these circumstances, if the authorities of Contracting State B did refuse recognition, the father could apply in Contracting State B for measures of protection in respect of the child (including custody and access / contact) since Contracting State B is the Contracting State of the child's habitual residence (Art. 5).

■ **EXAMPLE 10 (H)** *A family is habitually resident in Contracting State A. Following the breakdown of the marriage, the mother and child, with the agreement of the father, return to the State of their nationality, non-Contracting State B. The parents agree that the authorities of Contracting State A who are hearing their divorce case should also determine the custody issues relating to the child.³²² The court in Contracting State A orders that the parents shall have shared custody in respect of the child and that the child shall divide his time more or less equally between the parents.*

Two years later, following a breakdown in this arrangement, an order is made by the authorities of non-Contracting State B giving sole custody to the mother and only limited contact rights to the father.

The mother and child then move to Contracting State C. The father applies (under Art. 24 of the Convention³²³) for the recognition of the order of Contracting State A in Contracting State C. The law of Contracting State C provides that it will recognise decisions from non-Contracting States as long as certain criteria are fulfilled. The decision from non-Contracting State B fulfils these criteria. Therefore Contracting State C may refuse to recognise the decision of the authorities of Contracting State A on the basis that it is incompatible with the later decision taken by non-Contracting State B.³²⁴

C HOW CAN A PERSON BE SURE THAT A DECISION WILL BE RECOGNISED IN ANOTHER CONTRACTING STATE? (“ADVANCE RECOGNITION”³²⁵)

ARTICLE 24

- 10.16 If there is any possible doubt about whether a measure of protection taken in one Contracting State will be recognised by operation of law in another Contracting State, this issue may need to be resolved using the mechanism set down in Article 24 of the Convention.
- 10.17 Since recognition of measures from other Contracting States occurs by operation of law, it is only at the time when the measure is invoked that a possible dispute over the existence of a ground for non-recognition may be the subject of a ruling. It may cause inconvenience and hardship to have to wait until this point for a determination of whether or not an order can be recognised, and various people may have a legitimate interest in dispelling any doubt which may exist about recognition. Therefore, an interested person can apply to the competent authority of a Contracting State for a decision regarding the recognition of measures taken in another Contracting State.
- 10.18 Article 24 can be utilised, for example, by a parent whose child is relocating to another Contracting State, or by a parent whose child is travelling for a short period to another Contracting State with the other parent.³²⁶

322 Art. 10 – see further, *supra*, Chapter 4.

323 See, *infra*, paras 10.16-10.21.

324 Art. 23(2) *e*).

325 For the use of “advance recognition” in international access / contact cases, see, *infra*, paras 13.19-13.22.

326 See *ibid*.

- 10.19 This procedure permits a decision to be given regarding the recognition or non-recognition of **measures** of protection. This means that a declaration regarding the attribution or extinction of parental responsibility which has occurred without any intervention by a judicial or administrative authority (e.g., in accordance with Art. 16(3) or (4) following a change in the child's habitual residence) cannot be obtained.³²⁷
- 10.20 It is for the law of the requested Contracting State to set out the procedure that can be utilised to obtain such a decision.³²⁸
- 10.21 An effective implementation of Article 24 of the Convention will usually require a Contracting State to designate and to identify clearly the competent authority / authorities which will hear requests for “advance recognition” of measures of protection.³²⁹

■ **EXAMPLE 10 (1)** *Three children are habitually resident in Contracting State A. Their mother seeks to relocate to Contracting State B with them. The father does not object to the move on the condition that his contact with the children continues. He obtains a court order in Contracting State A which provides that the children will spend significant portions of their holidays with him. The father is concerned that the mother will not abide by this arrangement following the move and wishes to ensure that the authorities in Contracting State B will recognise the court order. Under Article 24 the father can make an application to Contracting State B to determine if the order will be recognised before the mother moves with the children to Contracting State B. If the decision is that the order will be recognised, everyone concerned knows that the recognised decision can be declared enforceable or registered for enforcement³³⁰ and enforced in accordance with the law of Contracting State B if the mother does not comply voluntarily.³³¹ If the decision is that the order will not be recognised,³³² the father will be aware of this before the move and can take steps to remedy whatever defect is in the original order made by the court in Contracting State A so that it will be recognised in Contracting State B.³³³*

327 See further, *supra*, **Chapter 9, section B**, and the Explanatory Report, at para. 129, where it states that Art. 24 “presupposes the existence of a decision in order to function”.

328 *Ibid.*, at para. 130.

329 At the 2011 Special Commission (Part I), the inclusion of a specific rule in implementing legislation for this purpose was discussed. See in this regard, *infra*, the annexed “Implementation Checklist” under Chapter IV.

330 Art. 26.

331 Art. 28, see also, *infra*, **section D**.

332 Art. 23(2).

333 On this issue, co-operation between Central Authorities of the Contracting States involved or the decision-making authorities involved (e.g., direct judicial communications) may prove useful in order to efficiently remedy any defect in the order to ensure recognition in the requested Contracting State – see further, *infra*, **Chapter 11**.

D WHEN WILL A MEASURE OF PROTECTION TAKEN IN ONE CONTRACTING STATE BE ENFORCED IN ANOTHER CONTRACTING STATE?

ARTICLES 26 AND 28

- 10.22 If a measure of protection taken by one Contracting State is not being respected in another Contracting State, it may be necessary to commence enforcement proceedings in that latter Contracting State.³³⁴
- 10.23 The procedure set down by the Convention is that an interested party must, in these circumstances, request that the measure of protection be declared enforceable or registered for the purpose of enforcement in the requested Contracting State according to the procedure provided for in the law of that State.³³⁵
- 10.24 A simple and rapid procedure must be applied to the declaration of enforceability or registration.³³⁶ Importantly, this declaration or registration can only be refused by the requested Contracting State on the grounds listed above in relation to the non-recognition of a measure.³³⁷
- 10.25 Once the declaration or registration has been made, the measures are to be enforced in the requested Contracting State as if they had been taken by the authorities of that State.³³⁸
- 10.26 Enforcement is to take place in accordance with the law of the requested Contracting State and to the extent provided by such a law, taking into consideration the best interests of the child.³³⁹ The reference to “the extent provided by the law of” the enforcing Contracting State is an acknowledgment that Contracting States will have different internal laws regarding enforcement. Enforcement can only take place to the extent permitted by their internal laws.³⁴⁰
- 10.27 The reference to “the best interests of the child” in Article 28 should not be interpreted as an invitation to a further enquiry on the merits.
- 10.28 As with the recognition of measures of protection (see para. 10.15, *supra*), there is to be no review of the merits of the measure beyond what is necessary for the purposes of determining whether the measure can be declared enforceable or registered for the purposes of enforcement.³⁴¹

334 Art. 26.

335 Art. 26(1).

336 Art. 26(2).

337 Art. 26(3).

338 Art. 28.

339 *Id.*

340 *E.g.*, the Explanatory Report, at para. 134, gives the example of a mature child who is absolutely refusing to go and live with the parent designated under the measure of protection as custodian of the child and states: “If [...] the internal law of the requested Contracting State permits in such a case that a judicial or administrative decision not be enforced, this rule may likewise be applied to a judicial or administrative decision taken in another Contracting State.”

341 Art. 27.

■ **EXAMPLE 10 (j)** *A child is habitually resident in Contracting State A. Following the breakdown of his parents' relationship, the father seeks the court's permission to move with the child to Contracting State B. The court grants the permission to move but puts in place a comprehensive regime of contact for the mother.³⁴² However, when the mother travels to Contracting State B to exercise contact with the child in accordance with the order of Contracting State A, the father will not allow the child to see the mother.*

Under Article 26 of the Convention, the mother may request that the contact order of Contracting State A be declared enforceable or registered for the purpose of enforcement in Contracting State B.³⁴³ Once the order has been declared enforceable or registered for enforcement in Contracting State B, enforcement will take place in Contracting State B in accordance with its law and to the extent provided by such law, taking into consideration the best interests of the child.³⁴⁴

■ **EXAMPLE 10 (k)** *A mother and child are habitually resident in Contracting State A; the father is habitually resident in Contracting State B. After the divorce of the parents, a court in Contracting State A grants the mother custody of the child and the father regular contact with the child. The contact with the father is to take place in Contracting State B. This decision will be recognised by operation of law in Contracting State B. However, following the first contact period in Contracting State B, the father retains the child in Contracting State B, contrary to the order of Contracting State A. The mother can request that the decision of Contracting State A be declared enforceable or registered for the purpose of enforcement in Contracting State B.³⁴⁵ Once the order has been declared enforceable or registered for enforcement in Contracting State B, enforcement will take place there in accordance with the law of Contracting State B and to the extent provided by such law, taking into consideration the best interests of the child.³⁴⁶*

342 If the mother was concerned about the recognition of the order before the father and child moved to Contracting State B, she could seek to have it recognised before they move. See, *supra*, paras 10.16-10.21.

343 Art. 26.

344 Art. 28. It should be noted that in this case, if the father were to apply to the authorities of Contracting State B for a review of the contact order, the authorities of Contracting State B would have jurisdiction (as the Contracting State of the child's new habitual residence, under Art. 5) to determine this issue. However, in such circumstances, the authorities of Contracting State B should be slow to review the contact order – see, *infra*, paras 13.23-13.27.

345 This example is particularly relevant if the 1980 Hague Child Abduction Convention does not apply to the case (*e.g.*, because one State is not a Contracting State to the 1980 Convention) because it demonstrates the possible remedy provided by the 1996 Convention in this abduction situation. However, if both States were Contracting States to the 1980 Convention in this scenario (as well as to the 1996 Convention), it would be a matter for the mother (and her legal advisers) as to whether she instituted return proceedings under the 1980 Convention in Contracting State B, or enforcement proceedings under the 1996 Convention in that State in respect of the order of Contracting State A, or both. Considerations the mother may take into account when making this decision might be: the speed of both procedures in Contracting State B and the legal costs (and any legal aid) that may be available for each procedure. For further discussion on international child abduction see, *infra*, Chapter 13, paras 13.1-13.14.

346 Art. 28.

■ **EXAMPLE 10 (L)**

A girl, aged 11, is habitually resident in Contracting State X. Her father disappeared when she was very young and recently her mother has passed away as a result of AIDS. The authorities of Contracting State X determine that the girl should live with her maternal aunt, who is willing to care for her. Two months later the girl goes missing after school. The maternal aunt immediately reports this to the authorities. The police suspect that she has been abducted by a well-known child trafficking ring and taken to Contracting State Z where girls are sold into child prostitution. Using the Central Authority to assist with locating the girl,³⁴⁷ she is eventually found in Contracting State Z. The measure of protection of Contracting State X is recognised by operation of law in Contracting State Z. However, the girl refuses to co-operate with the authorities and claims that she is living with her father (a man whom the authorities in Contracting State Z are concerned is involved in the trafficking ring). The authorities in Contracting State Z consider the girl is in immediate danger and take measures under Article 11 to take the girl into temporary State care.

The maternal aunt applies for the custody order in her favour made in Contracting State X to be declared enforceable. The aunt's application comes before the authorities in Contracting State Z and the declaration is granted. The custody order is enforced in accordance with the law of Contracting State Z and the girl is returned to her maternal aunt's care in Contracting State X.

347 Art. 31 c) and see, *infra*, Chapter 11.

11

Chapter 11

Central Authorities and co-operation

-
- A THE ROLE OF A CENTRAL AUTHORITY UNDER THE 1996 CONVENTION
 - B THE DESIGNATION AND ESTABLISHMENT OF A CENTRAL AUTHORITY
 - C WHAT ASSISTANCE MUST A CENTRAL AUTHORITY PROVIDE?
 - D SITUATIONS WHERE IT IS OBLIGATORY FOR AUTHORITIES TO CO-OPERATE / COMMUNICATE
 - E SPECIFIC INSTANCES OF CO-OPERATION
 - F THE TRANSMISSION OF PERSONAL DATA AND INFORMATION BY AUTHORITIES
 - G CENTRAL AUTHORITY / PUBLIC AUTHORITY COSTS

A THE ROLE OF A CENTRAL AUTHORITY UNDER THE 1996 CONVENTION

ARTICLES 29 TO 39

- II.1** Central Authorities will play an important role in the practical operation of the 1996 Convention. In particular, the co-operation provisions of the Convention, which are essential to the successful operation of the Convention (and therefore to realising the Convention's aim of improving the protection of children in international situations), rely on Central Authorities either to put them into effective practice directly, or to assist and facilitate the co-operation of other Convention actors. Competent, co-operative and responsive Central Authorities are therefore at the heart of this Convention.
- II.2** However, for those familiar with Central Authorities designated under the 1980 Convention, it should be noted that the Central Authority functions under the 1996 Convention have a different emphasis. Under the 1996 Convention there are far fewer responsibilities to initiate or process applications compared with the obligations placed on the Central Authorities under the 1980 Convention.³⁴⁸ Rather, one of the main functions of Central Authorities under the 1996 Convention is to facilitate communication and co-operation between the competent authorities in their respective Contracting States. In addition, they play an important role in transmitting requests and information to the appropriate competent authority / authorities in their State, as well as in transmitting requests and information to other Central Authorities.³⁴⁹ Further, as will be discussed below, there are also more possibilities under the 1996 Convention for certain Central Authority functions to be performed through other bodies.³⁵⁰ The role of the Central Authority could therefore be said to be more flexible under the 1996 Convention than under the 1980 Convention (which is explicable by the fact that the 1996 Convention has a far broader material scope than the 1980 Convention and therefore potentially concerns a far greater number of children³⁵¹).
- II.3** However, despite the difference in emphasis in the roles of the Central Authorities under the two Conventions, careful consideration should still be given to whether it is appropriate, in States which are Parties to both Conventions, to designate the same body as Central Authority under both Conventions (the reasons for this are discussed, *infra*, at para. II.6).

348 See Arts 7 and 21 of the 1980 Convention.

349 See the Explanatory Report, at para. 137, where it explains that: "The Commission opted for the institution in each Contracting State of a Central Authority which would be, in a certain way, the fixed point which could be contacted by the authorities of the other Contracting States, which could reply to their requests, but on which no obligation to take an initiative, no obligation to give information or to co-ordinate in advance the taking of measures, would in principle be imposed (Arts 29 to 32), except in one case (Art. 33)."

350 *E.g.*, see Art. 31 where the duties may be carried out directly by the Central Authority, or indirectly "through public authorities or other bodies".

351 See the Explanatory Report, at para. 136, where it explains that: "The Commission [...] saw the benefit [...] [of] a Central Authority charged with this co-operation, but it also saw the danger of excessive bureaucracy, of which the double effect would be to paralyse the protection of the child and above all to discourage the States, which would have to bear the burden, from ratifying the future Convention. This latter danger was all the more serious in that the number of children whose protection would be insured by the future Convention was completely out of proportion with the number of children concerned with the Conventions on child abduction or on intercountry adoption."

B THE DESIGNATION AND ESTABLISHMENT OF A CENTRAL AUTHORITY

ARTICLE 29

- II.4 Article 29 of the Convention obliges Contracting States to designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
- II.5 If the Contracting State is (1) a federal State, (2) a State with more than one system of law, or (3) a State having autonomous territorial units, the Contracting State is free to appoint more than one Central Authority. In this scenario, the Contracting State must designate one Central Authority to receive communications from abroad (for onward transmission to the appropriate Central Authority within that State).³⁵²
- II.6 If the Contracting State is also Party to the 1980 Hague Child Abduction Convention, consideration should be given to whether the Central Authority designated under the 1996 Convention should coincide with the Central Authority already designated under the 1980 Convention. The experiences acquired by the Central Authority under the 1980 Convention may be of real benefit when operating the 1996 Convention. Furthermore, cases of international child abduction and / or international access / contact will often involve issues arising under **both** the 1996 **and** 1980 Conventions. As a result, the Central Authorities of both Conventions may often need to be involved in the same case.³⁵³ If these two Central Authorities are to be separate bodies, at the very least they should work in close co-operation and be able to communicate quickly and effectively.
- II.7 The details of the designated Central Authority (and, where a Contracting State has designated more than one Central Authority, the designation of the Central Authority that will receive communications from abroad) must be communicated to the Permanent Bureau of the Hague Conference on Private International Law.³⁵⁴ This information will be made available on the Hague Conference website (< www.hcch.net >, under “Convention 34” then “Authorities”).
- II.8 The Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*³⁵⁵ contains many principles and practices which are also relevant under the 1996 Convention. In particular, the “key operating principles” will also apply to Central Authorities designated under the 1996 Convention:
- **Resources and powers**
Central Authorities must be given sufficient powers, qualified personnel and adequate material resources, including modern means of communication, to carry out their functions effectively.
 - **Co-operation**
Central Authorities should co-operate effectively with each other and also with other authorities within their own Contracting States.

352 See Art. 29(2).

353 Further, as a result of the overlap, if there are two separate Central Authorities, they will both need to be knowledgeable about **both** Conventions.

354 Art. 45(1).

355 Useful information on the establishment and operation of Central Authorities can be found in the Guide to Good Practice on Central Authority Practice (Jordan Publishing, 2003). Available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

- **Communication**
Central Authorities should ensure that they can be easily contacted, by ensuring that their contact details are up-to-date, that communication is clear and effective, that communications from other Central Authorities or other bodies are responded to promptly and that rapid means of communication are used when available.
 - **Consistency**
Central Authorities should apply a consistent approach when dealing with requests and / or applications.
 - **Expeditious procedures**
Although expeditious action is of particular importance under the 1980 Hague Child Abduction Convention, wherever the protection of children is concerned Central Authorities should always seek to respond to, and act on, applications in a timely manner.³⁵⁶
 - **Transparency**
Where Central Authorities are required to provide information in connection with the application of the Convention, this information should be provided in a clear, easily understandable form, for the benefit of interested parties including other Central Authorities and courts. Central Authorities should be transparent in terms of the administrative procedures they use under the Convention. This requires that interested parties have easy access to information about such procedures.
 - **Progressive implementation**
Central Authorities should review and revise their procedures to improve the operation of the Convention as they gain more practical experience with the Convention and more information about practices in other countries.
- 11.9 It should be noted that Contracting States may enter into agreements with one or more other Contracting States with a view to improving the application of the co-operation provisions of the Convention (Chapter V) between themselves. The Contracting States which have concluded such an agreement must transmit a copy to the depositary of the Convention.³⁵⁷

³⁵⁶ See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216), at para. 5.2, which recognises the distinction between a return and contact application in this regard, but which also confirms the importance of speed in contact cases, particularly where a parent-child relationship is disrupted and especially in an international case where the international character may justify treating it even more expeditiously: “Because of the additional distances and costs that may be involved in exercising contact across frontiers, the absence of speedy recourse to a tribunal may sometimes result in serious injustice and cost to the contact parent.”

³⁵⁷ Art. 39.

C WHAT ASSISTANCE MUST A CENTRAL AUTHORITY PROVIDE?

ARTICLES 30 AND 31

II.10 Central Authorities have two duties under the Convention which cannot be performed through other bodies:

- to co-operate with each other and promote co-operation amongst the competent authorities³⁵⁸ in their States to achieve the purposes of the Convention;³⁵⁹
and
- in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.³⁶⁰

II.11 Further specific duties are placed on Central Authorities by Article 31 of the Convention. In accordance with this provision Central Authorities must, **either directly or through public authorities or other bodies**, take all appropriate steps to:

- facilitate the communications and offer the assistance provided for in Articles 8 and 9 of the Convention (transfer of jurisdiction provisions³⁶¹) and in Chapter V (the co-operation provisions);³⁶²
- facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;³⁶³
- provide assistance, on the request of a competent authority of another Contracting State, in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.³⁶⁴

These particular tasks may be performed directly by the Central Authority, or indirectly, “through public authorities or other bodies”.³⁶⁵ The text of the Convention intentionally contains no qualifying language as to the identity of the public authorities or other bodies which may carry out these tasks.³⁶⁶ This is because the drafters considered that in a field as broad as international child protection it was unwise to unduly limit the scope of the bodies

358 No definition is provided in the Convention as to what constitutes a “competent authority”. However, it is clear that it is the authority which, under the law of the particular Contracting State, has competence to take the action required by the Convention.

359 Art. 30(1). This general and all-encompassing provision provides Central Authorities with a basis for co-operation whenever the co-operation will “achieve the purposes of the Convention”. It can therefore be relied upon when no specific co-operation provision of the Convention applies in a case.

360 Art. 30(2). See also the Explanatory Report, at para. 139.

361 See, *supra*, **Chapter 5**.

362 Art. 31 a).

363 Art. 31 b).

364 Art. 31 c). This provision “ought to facilitate the localisation of abducted children, runaways or, more generally, children in difficulty”: see the Explanatory Report, at para. 141. See also, *infra*, paras 13.61-13.64.

365 Compare the stricter wording of Art. 7 of the 1980 Hague Child Abduction Convention.

366 *I.e.*, there is no requirement for the Central Authorities to delegate tasks only to “bodies duly accredited”, as under the 1993 Hague Intercountry Adoption Convention (Art. 9 of the 1993 Convention).

that may be able to provide assistance.³⁶⁷ However, as the Explanatory Report points out, rejection of a qualifying criterion (e.g., accreditation) does not exclude the possibility that Central Authorities will have recourse to bodies of uncontested competence in the field, such as the International Social Service.³⁶⁸

■ **EXAMPLE 11 (A)** *The children live in Contracting State A with their mother. Their father, residing in Contracting State B, wishes to have contact with the children. The mother will not permit contact to take place since she is concerned that if the children have contact with their father, he will not adhere to any agreement and may not return them to her at the conclusion of contact. The father, whilst he does not agree that the mother has any rational basis for her fears, would like to find an agreed solution. He therefore contacts the Central Authority in Contracting State B³⁶⁹ to obtain information on the law regarding contact in Contracting State A and, in particular, the measures which may be put in place in either Contracting State to allay the mother's fears. The Central Authority in Contracting State B contacts the Central Authority in Contracting State A to ascertain information regarding the law of that State. The Central Authorities each provide helpful general information on these matters which the Central Authority of Contracting State B communicates to the father.³⁷⁰ The Central Authority in Contracting State A also suggests mediation as a possible way forward for the family and states that they are able to facilitate this in Contracting State A.*

■ **EXAMPLE 11 (B)** *A child, aged 14, runs away from his home in Contracting State A after suffering a particularly acute episode of bullying at school. The mother contacts the Central Authority in Contracting State A extremely concerned for his well-being. She states that she thinks he may be attempting to travel to a friend in Contracting State B but the friend has reported that he has not arrived and he does not know where he is. The Central Authority in Contracting State A, as well as carrying out its own enquiries to determine whether the child is still in its State, should contact the Central Authority in Contracting State B who will then come under an obligation to provide assistance (either directly or through public authorities or other bodies) in discovering the whereabouts of the child.³⁷¹ Once the child is located, the Central Authorities (and other authorities involved) communicate to discuss the appropriate way forward in the child's best interests (including whether it is necessary for Contracting State B to take necessary measures under Article 11 or whether Contracting State A can take the necessary measures promptly to return the child to his mother's care and also begin to investigate his school situation and take necessary measures in that regard).*

³⁶⁷ See the Explanatory Report, at para. 140.

³⁶⁸ *Ibid.*

³⁶⁹ There is no requirement for the father to approach the Central Authority in the Contracting State where he resides and he is free to contact the Central Authority in Contracting State A directly for information if he so wishes.

³⁷⁰ In relation to preventive measures which might be put in place in this case to allay the mother's concerns and prevent a wrongful removal / retention occurring, see the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003), available at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

³⁷¹ Art. 31 c).

D SITUATIONS WHERE IT IS OBLIGATORY FOR AUTHORITIES³⁷² TO CO-OPERATE / COMMUNICATE

II.12 In two specific situations set out in the Convention, an **obligation** to co-operate / communicate is placed on the authorities of Contracting States. It should be noted that these obligations are not placed specifically on Central Authorities, but on the particular authorities which wish to take, or which have taken (in the case of Art. 36), a certain measure of protection under the Convention.³⁷³ However, it is anticipated that the communication and co-operation required by these provisions may take place through, or with the assistance of, the relevant Central Authority / Authorities.³⁷⁴

(a) When an authority is contemplating the placement of a child abroad³⁷⁵

ARTICLE 33

II.13 Article 33 institutes a procedure for obligatory consultation when an authority with jurisdiction under Articles 5 to 10 of the Convention is contemplating the placement of a child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, where such a placement or provision of care is to take place in another Contracting State.³⁷⁶

II.14 In this scenario the authority that is considering the placement / provision of care must first consult with the Central Authority or other competent authority of the other Contracting State. It must transmit:

- a report on the child; together with
- the reasons for the proposed placement or provision of care.³⁷⁷

372 This title intentionally does not refer to Central Authorities – see, *infra*, para. II.12.

373 In Art. 33 the Convention refers to the “authority having jurisdiction under Articles 5 to 10” and in Art. 36 it refers to the “competent authorities” of the relevant Contracting State. In both instances, therefore, the reference is to the authority considering whether to take (or the authority which has already taken, in the case of Art. 36) a measure of protection in respect of the child.

374 In particular, Art. 33 specifically mentions that consultation shall be with the “Central Authority or other competent authority” of the requested Contracting State.

375 See also, *infra*, paras 13.31-13.42.

376 For a discussion as to which measures of protection fall within the scope of Art. 33, see, *infra*, paras 13.31-13.42.

377 Art. 33(1).

- 11.15 Each Contracting State may³⁷⁸ designate the authority to which requests under Article 33 should be addressed.³⁷⁹ If any such designation is made, it must be communicated to the Permanent Bureau of the Hague Conference on Private International Law. The Permanent Bureau will make this information available in the relevant section of its website (< www.hcch.net >, under “Convention 34” then “Authorities”). If no such designation is made, communications may be sent to the Central Authority of the relevant Contracting State.
- 11.16 The decision to place the child in the other Contracting State must **not** be made unless the Central Authority or other competent authority from the other Contracting State has consented to the placement or provision of care, taking into account the child’s best interests.³⁸⁰
- 11.17 If this procedure is not followed, the measure can be refused recognition under the Convention.³⁸¹

(b) Provision of information where a child is in serious danger and changes residence / presence

ARTICLE 36

- 11.18 In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child’s residence has changed to, or that the child is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.³⁸²
- 11.19 It should be noted that this obligation extends to a case where the child has become resident or present in a **non-Contracting** State.
- 11.20 It will be a matter for the relevant authorities to determine whether, in the particular case, the child concerned is “exposed to a serious danger”. The Explanatory Report lists the following possible examples: where the child has an illness requiring constant treatment or where the child is exposed to drugs or an unhealthy influence such as a sect.³⁸³ Other examples might be: where the child’s carer was under the supervision of the authorities in the first Contracting State due to allegations of neglect or abuse, or where the child is an unaccompanied minor.³⁸⁴

378 This designation is not obligatory, but may facilitate efficient communication. See, in this regard, the Court of Justice of the European Union’s decision in *Health Services Executive v. S.C., A.C.* (Case C-92/12 of 26 April 2012) where the Court held (at para. 82), in relation to Art. 56 of the Brussels II a Regulation, that: “Member States are therefore required to establish clear rules and procedures for the purposes of the consent referred to in Article 56 of the Regulation, in order to ensure legal certainty and expedition. The procedures must, inter alia, enable the court which contemplates the placement easily to identify the competent authority and the competent authority to grant or refuse its consent promptly.”

379 Art. 44. In *Health Services Executive v. S.C., A.C.* (Case C-92/12 of 26 April 2012) the Court of Justice of the European Union confirmed that, for the purposes of the Brussels II a Regulation, this must be a “competent authority, governed by public law” (ruling, para. 2). In the same vein, the use of “competent authority” in the 1996 Convention implies a public authority.

380 Art. 33(2).

381 Art. 23(2) *f*) and see, *supra*, **Chapter 10** on recognition and enforcement of measures of protection.

382 Art. 36.

383 Explanatory Report, at para. 150.

384 See also, *infra*, paras 13.61-13.64.

- II.21** Where the relevant authorities are not certain of the child's whereabouts but **suspect** the child has become resident or present in another **Contracting State**, Article 31 c) may be used³⁸⁵ to ascertain the whereabouts of the child so that the information can then be provided to the relevant State in accordance with Article 36.
- II.22** However, it must be noted that if the transmission of such information would be likely, in the opinion of the authority involved, to place the child's person or property in danger or constitute a serious threat to the liberty or life of a member of the child's family, the authority must not transmit such information.³⁸⁶

■ EXAMPLE 11 (C) *The children are habitually resident in Contracting State A. Their parents are killed in an accident. The children have no family members in Contracting State A, but their aunt and uncle in Contracting State B are willing to become foster parents to the children. The authorities of Contracting State A accept this suggestion. In compliance with Article 33, they contact the Central Authority, or other authority, of Contracting State B and send them a report about the children and the reasons for the proposed plan regarding their care. The authorities in Contracting State B consider the proposed plan and conclude that the aunt and uncle are in a position to provide care for the children and that this course of action would be in the best interests of the children. They contact the authorities of Contracting State A to consent to the proposed plan regarding care of the children. The authorities in Contracting State A then make the order placing the children in the care of their aunt and uncle. This order is recognised by operation of law in Contracting State B.*

■ EXAMPLE 11 (D) *A child is born to a young unmarried mother habitually resident in Contracting State A (but a national of Contracting State B). The father does not want anything to do with the child. The mother feels that she is too young to be able to raise the child. She has an older sister in Contracting State B who is married and who is willing to care for the child with her husband by way of kafala. In accordance with Article 33, Contracting State A consults with the Central Authority or other competent authority in Contracting State B and submits a report on the child together with the reasons for the proposed provision of care. Contracting State B considers the report, investigates the situation of the sister and her husband and consents to the proposed plan, taking into consideration the best interests of the child. The authorities in Contracting State A are therefore able to proceed to make the order providing that the child be placed with the older sister and her husband under kafala. This order will be recognised by operation of law in Contracting State B.*

■ EXAMPLE 11 (E) *A family lives in Contracting State A. The public authorities are informed by the school which the children attend that the children often arrive at school unclean, extremely tired and with bruises on their arms and legs. The parents claim that the children are naughty, will not wash or go to bed and that the bruises are from "play-fighting". The authorities undertake a preliminary investigation into the family and determine that no urgent measures of protection need to be taken. However, they wish to continue to closely monitor the family and do not discount the possibility of further intervention in the future, if necessary. The parents*

385 See, *supra*, para. II.II.

386 Art. 37.

become very concerned that the children are going to be taken from their care. The parents therefore decide to flee to neighbouring Contracting State B, where they have relatives. The public authorities of Contracting State A discover that the family has fled and that the parents may well have decided to go to relatives in Contracting State B. The Central Authority of Contracting State A therefore contacts the Central Authority in Contracting State B and requests assistance in discovering the whereabouts of the children.³⁸⁷ With the help of the Central Authority of Contracting State B, the family is located in this State. The Central Authority of Contracting State A is informed by the competent authorities in its State that they consider that the children may be exposed to serious danger as a result of the concerns regarding the parents' care and the fact the children are now in an unmonitored situation. As a result, the Central Authority of Contracting State A considers itself under an obligation to inform the Central Authority of Contracting State B about the case,³⁸⁸ the danger involved to the children, and the measures which were under consideration in Contracting State A.³⁸⁹ As a result of this information, the relevant authorities in Contracting State B decide that the case is one of urgency and that, under Article 11, they should continue the close monitoring which the authorities in Contracting State A had in process in order to assess if any further necessary measures of protection need to be urgently taken in respect of the children. In the meantime, Contracting State A determines that, at the current time, the children remain habitually resident in Contracting State A and it therefore has jurisdiction under Article 5 to take measures of protection concerning the children. In light of its previous concerns regarding the children and the parents' subsequent actions, the competent authority orders that the children must be returned to Contracting State A immediately into the temporary care of the State authorities pending a full investigation of the children's circumstances. Such a measure will be recognised by operation of law and may be enforced in Contracting State B (and Contracting State B's measure will accordingly lapse – Art. 11(2)).

■ EXAMPLE 11 (F)

Three children are habitually resident in Contracting State A with their mother, who suffers from drug and alcohol addiction. Her condition has recently deteriorated and the authorities of Contracting State A make an order removing the children from the care of the mother and putting them into foster care since they do not believe that she is in a position to safely care for them at this time. The mother abducts the children from the foster carer. The authorities in Contracting State A are made aware that the children have been taken by the mother to Contracting State B. Under Article 31 c), they request the assistance of the Central Authority in Contracting State B in discovering the whereabouts of the children. Once the children have been located in that State, under Article 36, the authorities of Contracting State A are required to inform the authorities in Contracting State B about the danger involved for the children and the measures which have been taken regarding the children.³⁹⁰ The authorities in Contracting State B can

387 Art. 31 c).

388 Art. 36.

389 The Central Authority, prior to transmitting the information, will need to ensure that Art. 37 is not applicable in the case and that transmitting the information is not likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

390 It should be noted that, under Art. 37, the authorities must abstain from transmitting any information if this information is likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

*then act on this information and ensure the immediate safety of the children.³⁹¹ Since the order made in Contracting State A will be recognised by operation of law and enforceable in Contracting State B,³⁹² the authorities in Contracting State A will then need to consider whether they wish to seek enforcement of the measure to ensure the children are returned to the foster carer in Contracting State A. However, it should also be noted that if the order placing the children in foster care gave the public authorities rights of custody in respect of the children under the law of Contracting State A **and** both Contracting States A and B are also Parties to the 1980 Convention, in this case Contracting State A may be able to rely on the 1980 Convention to seek the return of the children to that State. Which procedure is used in this situation will be a matter for Contracting State A. (Contracting State A may consider ascertaining information from the Central Authority of Contracting State B³⁹³ as regards which procedure will be more speedy and cost-effective and therefore promote the best interests of the children.)*

E SPECIFIC INSTANCES OF CO-OPERATION

II.23 In addition to the obligations set out in **sections C** and **D** above, specific instances are provided for in the Convention where co-operation between authorities³⁹⁴ is envisaged (and may be thought of as good practice), but is not mandatory. The fact that these specific instances are provided for in the Convention does not prevent co-operation in other circumstances.³⁹⁵

(a) Requesting another Contracting State to provide a report on the situation of a child, or to take measures of protection in respect of a child

ARTICLE 32

II.24 On a request made with supporting reasons by a Central Authority or other competent authority of a Contracting State with which a child has a substantial connection, the Central Authority in which the child is habitually resident and present may, either directly or through public authorities or other bodies, perform the following tasks:

- provide a report on the situation of the child;³⁹⁶
- request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.³⁹⁷

³⁹¹ This is done by applying Art. 11.

³⁹² See, *supra*, **Chapter 10** on the recognition and enforcement of measures and also **Chapter 8** on the continuation of measures.

³⁹³ Art. 30(2).

³⁹⁴ As in **section C**, *supra*, these instances of co-operation are not limited to Central Authority action. However, it is envisaged that such co-operation may take place through, or with the assistance of, Central Authorities. Indeed, Art. 34(2) permits a Contracting State to declare that requests under Art. 34(1) shall be communicated to its authorities **only through its Central Authority** (see further, *infra*, **paras 11.25-11.26**).

³⁹⁵ See the general duty to co-operate placed upon Central Authorities – Art. 30, discussed, *supra*, at **section A**.

³⁹⁶ Art. 32 *a*).

³⁹⁷ Art. 32 *b*). The competent authorities of the State of the child's habitual residence may also consider as appropriate a transfer of jurisdiction under Art. 8 of the Convention especially if the child is not present in the territory of the other State concerned. See, *supra*, **Chapter 5**.

The following points should be noted:

- The request must be made by a Central Authority or other competent authority of a Contracting State which has a “substantial connection” with the child concerned. See **Chapter 13** for commentary regarding the term “substantial connection”.
- The request must be made with supporting reasons (*i.e.*, the request should detail the reasons why it is being made and why it is felt necessary for the protection of the child concerned).
- The request has to be made to the Central Authority in the Contracting State in which the child is habitually resident and present.
- The Central Authority may carry out the task requested or may delegate this to a public authority or other body.
- This provision “**authorises** the requested Central Authority to reply to such a request, either directly or through public authorities or other bodies, but does not **oblige** it to do so”.³⁹⁸

(b) Requesting information relevant to the protection of a child when contemplating taking a measure of protection

ARTICLE 34

- 11.25** If a competent authority is contemplating taking a measure of protection and it considers that the situation of the child so requires, it may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.
- 11.26** A Contracting State may declare that such requests shall be communicated to its authorities only through its Central Authority.

The following points should be noted:

- This request for information can only be made if the competent authority is:
 - contemplating taking a measure of protection in respect of the child; and
 - considers that the situation of the child requires the request to be made.
 It will be for the requesting authority to consider the latter condition and, in its grounds in support of the request, show that this condition is fulfilled.
- The competent authority may make the request to any other Contracting State which has information relevant to the protection of the child.
- The request may be made to any authority of that Contracting State. The authorities envisaged here are “public authorities”.³⁹⁹ However, this is subject to Article 34(2) which states that a Contracting State may declare that such requests shall be communicated to its authorities **only through its Central Authority**. Such a declaration should be made to the depositary of the Convention.⁴⁰⁰ The depositary will notify States of such a declaration.⁴⁰¹ The Permanent Bureau of the Hague Conference on Private International Law will ensure such information is placed on its website (< www.hcch.net >, under “Convention 34” then “Authorities”).
- The best interests of the child should serve as a guide in relation to this provision both for the requesting authority (who, in any event, can only make the request if the situation of the child requires it), and for the requested authority.⁴⁰²

398 Explanatory Report, para. 142 (emphasis added).

399 *Ibid.*, at para. 144.

400 Art. 45(2). The depositary of the Convention is the Ministry of Foreign Affairs of the Netherlands.

401 Art. 63 d).

402 See the Explanatory Report, at para. 144.

- The requested authority is never bound to furnish the information requested, even if the conditions for making the request are fulfilled. It has its own power of discretion.⁴⁰³
- If the transmission of information would be likely, in the opinion of the authority involved, to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family, the authority must not request or transmit such information.⁴⁰⁴
- In addition, the authorities concerned must respect the general rules applicable to information gathered or transmitted provided for by Articles 41 and 42 of the Convention.⁴⁰⁵

(c) Requesting assistance to implement measures of protection abroad

ARTICLE 35(1)

- 11.27 When measures of protection have been taken under the Convention, the authorities of one Contracting State can request the authorities of another Contracting State to assist in the implementation of the measures.
- 11.28 This especially applies to securing the effective exercise of rights of access, as well as the right to maintain direct contacts on a regular basis.

The following points should be noted:

- Article 35(1) provides for mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. It therefore provides a general basis for co-operation between authorities in implementation.
- The provision explicitly applies "especially" to securing the effective exercise of rights of access, as well as the right to maintain direct contacts on a regular basis. It therefore completes and reinforces the co-operation provided for between Central Authorities of Contracting States to the 1980 Convention (see Art. 21 of the 1980 Convention).⁴⁰⁶
- The maintenance of regular and direct contacts is provided for in Article 10 of the UNCRC.

(d) Seeking / providing assistance in international access / contact cases

ARTICLE 35(2)

- 11.29 When a parent residing in a Contracting State is seeking to obtain or maintain access / contact to a child habitually resident in another Contracting State, he / she can request the authorities where he / she resides to gather information or evidence and make a finding on the suitability of him / her to exercise access / contact and on the conditions under which access / contact is to be exercised.
- 11.30 This information, evidence and finding must⁴⁰⁷ be considered by the authority which has jurisdiction to determine an application concerning access / contact to the child before reaching its decision.

⁴⁰³ *Ibid.*

⁴⁰⁴ Art. 37.

⁴⁰⁵ See further, *infra*, at paras 11.32-11.33.

⁴⁰⁶ See the Explanatory Report, at para. 146.

⁴⁰⁷ Once the information / evidence / finding(s) have been gathered in the Contracting State where the parent resides, it is **mandatory** for the Contracting State hearing the case to consider the information / evidence / finding(s).

The following points should be noted:

- The authority having jurisdiction to hear the access / contact application may⁴⁰⁸ adjourn the proceedings pending the outcome of such a request, in particular when considering an application to restrict or terminate access / contact rights granted in the State of the child's former habitual residence.⁴⁰⁹
- However, this does not prevent an authority having jurisdiction from taking provisional measures pending the outcome of the request.⁴¹⁰

(e) Providing documentation stating the powers of a person having parental responsibility or responsible for the protection of the child⁴¹¹

ARTICLE 40

11.31 The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

The following points should be noted:

- There is no requirement upon Contracting States to provide such certificates. It is therefore a matter for each Contracting State whether to do so.
- Should it decide to do so, the Contracting State in question must designate the authorities which are competent to draw up these certificates.⁴¹²
- The Contracting State competent to deliver a certificate is the Contracting State of the child's habitual residence, or the Contracting State of origin of the measure of protection.
- The certificate will usually indicate:
 - who is the holder of parental responsibility;
 - whether this results by operation of law (from the law which is applicable under Art. 16) or from a measure of protection taken by a competent authority according to Chapter II of the Convention;
 - the powers of the person having the parental responsibility;
 In a suitable case, it may indicate in the negative the powers which the person does not have.⁴¹³
- The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.⁴¹⁴ "It will therefore be possible for any interested person to contest the correctness of the indications appearing on the certificate but, in the absence of a contest, [a] third party may in all security deal with the person indicated by the certificate, within the limits of the powers which are mentioned there."⁴¹⁵

408 The authority is not obliged to adjourn the proceedings – see the Explanatory Report, at para. 148.

409 Art. 35(3).

410 Art. 35(4).

411 Art. 40 is not in Chapter V as a co-operation provision but is in Chapter VI of the Convention, "General Provisions".

412 Art. 40(3).

413 See the Explanatory Report, at para. 154.

414 Art. 40(2).

415 Explanatory Report, para. 155.

- **EXAMPLE 11 (G)** *A mother and child, aged 7, are habitually resident in Contracting State A. The father is habitually resident in Contracting State B. The mother and child relocated to Contracting State A with the agreement of the father six months ago. The child visits the father in Contracting State B for contact once a month. The father is concerned since, during the last two visits, the child has complained to his father that he is often left alone in the house at night whilst his mother goes out and that when he comes home from school there are always different men in the house. The father contacts the Central Authority in Contracting State B regarding the child's comments. He is not sure what to do since the child does have a history of making up fantastical stories for attention. The Central Authority in Contracting State B decides to contact the Central Authority in Contracting State A and requests a report on the situation of the child.⁴¹⁶ The Central Authority in Contracting State A, having been provided with the child's comments, is concerned for the welfare of the child and agrees to investigate the matter and provide such a report.⁴¹⁷*
- **EXAMPLE 11 (H)** *A family are habitually resident in Contracting State A, having relocated a year ago from Contracting State B. The maternal grandparents live in Contracting State B. The children (one boy, aged 8 and one girl, aged 10) visit their maternal grandparents regularly. The grandparents have become concerned about the children due to the fact that during the last visit the children's behaviour had changed. They were displaying sexualised behaviour and making inappropriate sexual remarks. When the grandparents challenged the children about this, the children made allegations that their father had touched them inappropriately on a number of occasions. The grandparents are afraid to challenge the parents about this behaviour since they are concerned that their contact will be stopped. Unsure what to do, the grandparents contact the Central Authority in Contracting State A. The Central Authority is concerned for the children's welfare and contacts the Central Authority in Contracting State B and requests that it (or its public authorities or other bodies) consider the need to take measures to protect the children.⁴¹⁸ The Central Authority of Contracting State B, through its relevant public authorities, immediately takes steps to investigate the situation of the children. The children are interviewed by a child psychologist and repeat the allegations regarding the father. The competent authorities of Contracting State B, having interviewed the father and mother, immediately take measures to remove the father from the home whilst the matter is investigated further and pending the initiation of any proceedings which may be necessary regarding the children.*
- **EXAMPLE 11 (I)** *A child is wrongfully removed from Contracting State A to Contracting State B. Both Contracting States are also Parties to the 1980 Hague Child Abduction Convention. An application for the return of the child is made to the authorities of Contracting State B. The application is refused on the basis of a grave risk of harm to the child. The authorities of Contracting State A still have jurisdiction to make a custody order provided that the conditions for a change of jurisdiction under Article 7 have not been met.⁴¹⁹ However, before they make any order, they want to know the reasons for the refusal of the return application. This is because this information will be crucial to any decision on the merits of the custody issues relating to the child. Under Article 34(1), the authorities of Contracting State A may request this information from the authorities of Contracting State B.⁴²⁰*

⁴¹⁶ Art. 32 a).

⁴¹⁷ In this case, the authorities in Contracting State B may also request that the authorities in Contracting State A request the competent authorities in Contracting State A to consider the need to take measures of protection in respect of the child (Art. 32 b)).

⁴¹⁸ Art. 32 b).

⁴¹⁹ See, *supra*, Chapter 4, paras 4.20-4.25.

⁴²⁰ Compare Art. 11(6) of the Brussels II a Regulation, discussed further, *infra*, at para. 13.10.

■ **EXAMPLE 11 (J)** *A child is habitually resident in Contracting State A. The mother wishes to relocate with the child to Contracting State B. The father objects but this objection is overridden by a court order. The court order sets out a specific arrangement for contact between the father and child. It envisages that contact handovers will take place at a neutral venue and in a manner such that the parents will not have to meet (due to the high levels of tension between the parents and the impact of this on the child). With the assistance of the Central Authorities in both States, the authorities in Contracting State A contact the relevant authorities in Contracting State B for assistance with the implementation of the contact arrangement.⁴²¹ The authorities in Contracting State B make supervised exchange services available to the family, so that the child can be dropped off and collected at a neutral location with a third party present so that the parents do not have to meet.*

■ **EXAMPLE 11 (K)** *Two children are habitually resident in Contracting State A with their father. Their mother resides in Contracting State B. Since the children and father moved to Contracting State A one year ago, the mother has struggled to have any contact with the children. The mother issues an application for contact before the authorities of Contracting State A.⁴²² The father resists this application alleging that it is not in the best interests of the children for them to have any contact with the mother due to her unstable mental health condition. The mother wishes to contest this claim and for the children to have contact with her at her home in Contracting State B each school holiday. She asks the authorities of Contracting State B, under Article 35(2), to gather information and evidence and make a finding showing (1) her suitability to exercise contact with her children, and (2) that such contact could take place at her home in Contracting State B. The authorities in Contracting State A, who are making the determination regarding contact, agree to adjourn proceedings until they receive a report of the findings from the authorities of Contracting State B.⁴²³ The authorities in Contracting State B write a report stating, amongst other things, that, (1) according to the mother's medical records, she does not have, and has never had, any known mental health condition; (2) as a result of a number of interviews with her they cannot determine any reason as to why she would not be fit to exercise contact with her children; and, (3) having visited her home on more than one occasion, it is a suitable environment for children and indeed the children have their own bedroom at her home. The report and supporting documentation is admitted into evidence and considered in the proceedings before Contracting State B.⁴²⁴*

■ **EXAMPLE 11 (L)** *The child's guardian was appointed in Contracting State A, where the child is habitually resident. He is responsible for the management of the child's estate and wishes to sell some of the property in Contracting State B. Potential buyers in Contracting State B are concerned that the guardian does not have the authority to sell the property on behalf of the child. If Contracting State A provides certificates under Article 40, the guardian can request a certificate from the authorities of this State indicating the capacity in which he is entitled to act and the powers that have been conferred upon him.*

⁴²¹ Art. 35(1).

⁴²² Which have jurisdiction on the basis of Art. 5 – see, *supra*, Chapter 4.

⁴²³ Art. 35(3).

⁴²⁴ Art. 35(2).

F THE TRANSMISSION OF PERSONAL DATA AND INFORMATION BY AUTHORITIES

ARTICLES 41 AND 42

- II.32 It should be noted that personal data gathered or transmitted under the Convention is to be used only for the purposes for which it was gathered or transmitted.⁴²⁵
- II.33 Further, authorities to whom information is transmitted are to ensure its confidentiality in accordance with the law of their State.⁴²⁶

G CENTRAL AUTHORITY / PUBLIC AUTHORITY COSTS

- II.34 Generally, Central Authorities and other public authorities are to bear their own costs in carrying out their tasks under the Convention.⁴²⁷ Such costs may include: the fixed costs of the functioning of the authorities, the costs of correspondence and transmissions, the costs of seeking out information regarding a child, the costs of assisting with discovering the whereabouts of a child, the costs of the organisation of mediation or settlement agreements, as well as the costs of implementation of the measures taken in another Contracting State, in particular, placement measures.⁴²⁸
- II.35 However, Article 38 recognises that the authorities of Contracting States retain the “possibility of imposing reasonable charges for the provision of services”. If such a Contracting State does impose such charges, whether the imposition is seeking reimbursement for costs already incurred or requesting the provision of funds before the service is furnished, the charge should be formulated “with a certain amount of moderation”.⁴²⁹ In addition, authorities should provide clear information about such charges in advance.
- II.36 The expression “public authorities” in Article 38 refers to the administrative authorities of Contracting States, and not to the courts.⁴³⁰ Court costs and, more generally, the costs of proceedings and lawyers are not included within Article 38.
- II.37 Any Contracting State may also conclude an agreement with one or more other Contracting State(s) concerning the allocation of charges when applying the Convention.⁴³¹ This provision may be useful, for example, in cases involving cross-border placements of children.

425 Art. 41.

426 Art. 42.

427 Art. 38(1).

428 See the Explanatory Report, at para. 152.

429 *Ibid.*

430 *Ibid.*

431 Art. 38(2).

12

Chapter 12

*Relationship
between the
1996 Convention
and other
instruments*

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- A** HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 12 JUNE 1902 GOVERNING THE GUARDIANSHIP OF MINORS?
- B** HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 5 OCTOBER 1961 CONCERNING THE POWERS OF AUTHORITIES AND THE LAW APPLICABLE IN RESPECT OF THE PROTECTION OF MINORS?
- C** HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION?
- D** HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF OTHER INSTRUMENTS?

A HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 12 JUNE 1902 GOVERNING THE GUARDIANSHIP OF MINORS?⁴³²

ARTICLE 51

- 12.1 In relations between Contracting States to the 1996 Convention, the 1996 Convention replaces the 1902 Convention.

B HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 5 OCTOBER 1961 CONCERNING THE POWERS OF AUTHORITIES AND THE LAW APPLICABLE IN RESPECT OF THE PROTECTION OF MINORS?⁴³³

ARTICLE 51

- 12.2 In relations between Contracting States to the 1996 Convention, the 1996 Convention replaces the 1961 Hague Convention on the Protection of Minors. However, this replacement is without prejudice to the recognition of measures previously taken in application of the 1961 Convention.
- 12.3 This means that if a measure was taken by a Contracting State to the 1961 Convention in accordance with Article 4 of that Convention (which gave jurisdiction to the authorities of the Contracting State of the child's nationality), this measure will have to be recognised under the 1961 Convention (Art. 7 of the 1961 Convention) by any other State which was a Party to the 1961 Convention at the time the measure was taken. This is the case even if, in the meantime, the two States concerned have become Parties to the 1996 Convention.

■ **EXAMPLE 12 (A)** *State A and State B are Contracting States to the 1961 Hague Convention on the Protection of Minors. In 2007, the 1996 Convention comes into force in State B. In 2008, the authorities of State A make an order regarding a child who is habitually resident in State C based on the child having the nationality of State A. This order fulfils the criteria for recognition under the 1961 Convention. In 2009, the 1996 Convention comes into force in State A. In 2010, recognition of the measure is sought in State B. Although not entitled to recognition under Article 23 of the 1996 Convention,⁴³⁴ the order should be recognised in State B under the 1961 Convention, by virtue of Article 51 of the 1996 Convention.*

432 As at August 2013, the Contracting States are Austria, Belgium, Italy, Luxembourg, Portugal, Romania and Spain. In relations between Contracting States to the 1961 Hague Convention on the Protection of Minors, the 1961 Convention replaced the 1902 Convention. It should be noted that all the remaining Contracting States to the 1902 Convention are EU Member States who are therefore bound by the Brussels II a Regulation, which prevails pursuant to Art. 59(1) of the Regulation.

433 As at August 2013, the Contracting States are Austria, China (the Convention applies only to the Special Administrative Region of Macao), France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland and Turkey.

434 Art. 53(2) – see, *supra*, **Chapter 3**. Even if temporal scope were not a difficulty, recognition may also be refused on the basis of Art. 23(2) a) of the Convention – see, *supra*, **Chapter 10**.

C HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION?

ARTICLE 50

- 12.4 Article 50 provides that this Convention does not affect the application of the 1980 Convention as between Parties to both Conventions. However, Article 50 also states that this does not prevent the provisions of the 1996 Convention from being invoked “for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights”. Further discussion on the interaction of these two instruments can be found, *infra*, at paragraphs 13.1 to 13.14.

D HOW DOES THE 1996 CONVENTION AFFECT THE OPERATION OF OTHER INSTRUMENTS?

ARTICLE 52

- 12.5 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the Contracting States to such instruments.⁴³⁵
- 12.6 This Convention also does not affect the possibility of one or more Contracting States concluding agreements which contain, in respect of children habitually resident in any of the Contracting States to such agreements, provisions on matters governed by this Convention.⁴³⁶ Any agreements concluded by Contracting States on matters falling within the scope of this Convention will not affect the application of this Convention between those Contracting States and other Contracting States who are not party to this agreement.⁴³⁷
- 12.7 Currently the main instrument that fits into this category is the Brussels II a Regulation⁴³⁸ which operates between the Member States of the European Union, excluding Denmark. The material scope of the Regulation and the 1996 Convention is very similar, although the Regulation does not include rules on applicable law.⁴³⁹ As concerns the relationship with the 1996 Convention, for Member States of the European Union (excluding Denmark), the Regulation will prevail where a child has his or her habitual residence in a Member State of the European Union (excluding Denmark), or where the recognition or enforcement of a decision issued by the competent authorities of a Member State (excluding Denmark) is sought in another Member State (excluding Denmark), irrespective of where the habitual residence of the child is.⁴⁴⁰

435 Art. 52(1).

436 Art. 52(2). See also the Explanatory Report, at para. 172.

437 Art. 52(3).

438 See, *supra*, note 8.

439 It should be noted that the rules on applicable law contained within the 1996 Convention apply to children habitually resident in an EU Member State. In particular, Art. 15 of the 1996 Convention will apply if the court of an EU Member State bound by the Regulation exercises jurisdiction under the rules of the Regulation (where the ground of jurisdiction is one which exists in Chapter II of the 1996 Convention) – see, *supra*, Chapter 9 at para. 9.1.

440 Art. 61 of the Regulation.

- 12.8 These rules also apply to uniform laws based on special ties of a regional or other nature between the States concerned. An example of where this provision may be used would be between the Nordic States where uniform laws have been developed.

13

Special topics

Chapter 13

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- A INTERNATIONAL CHILD ABDUCTION
 - B ACCESS / CONTACT
 - C FOSTER CARE, KAFALA AND INSTITUTIONAL PLACEMENTS ACROSS BORDERS
 - D ADOPTION
 - E MEDIATION, CONCILIATION AND SIMILAR MEANS OF AMICABLE DISPUTE RESOLUTION
 - F SPECIAL CATEGORIES OF CHILDREN
 - G PROPERTY OF THE CHILD
 - H REPRESENTATION OF CHILDREN
 - I CONNECTING FACTORS

A INTERNATIONAL CHILD ABDUCTION

- 13.1 The 1996 Convention does not amend or substitute the mechanism established by the 1980 Convention for dealing with situations of international child abduction.⁴⁴¹ Instead, the 1996 Convention supplements and strengthens the 1980 Convention in certain respects. This means that a number of its provisions can be useful as a complement to the mechanism of the 1980 Convention when the 1980 Convention does apply to a case. In addition, in States or situations where the 1980 Convention does **not** apply, the provisions of the 1996 Convention may also be a useful stand-alone source of remedies for international child abduction. These two different situations are discussed below.
- 13.2 As a general point in relation to the 1996 Convention and international child abduction, and whether the 1980 Convention applies to a case or not, it should be noted that the jurisdictional rules set out in Chapter II of the 1996 Convention create a common approach to jurisdiction which provides certainty to parties and thereby may discourage attempts at forum shopping through international child abduction. The rule in Article 5 which designates the child's habitual residence as the primary basis for the allocation of jurisdiction encourages parents to litigate (or to reach an agreement on) custody, access / contact and relocation issues in the Contracting State where the child currently lives, rather than removing the child to a second jurisdiction before seeking a determination of these issues.
- 13.3 Further, as discussed in **Chapter 4** above, Article 7 of the 1996 Convention sets out a special jurisdictional rule for cases of international child abduction.⁴⁴² The authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention retain jurisdiction for measures aimed at the protection of the person and the property of the child until a number of conditions have been met. This rule seeks to balance two ideas. The first is that a person who wrongfully removes or retains a child should not be able to take advantage of this act by securing a change in the authorities having jurisdiction to take measures relating to custody or access / contact. The second is that the change in residence of the child, if it persists, is a fact that cannot, for the most part, be ignored to such a point as to deny the jurisdiction of the authorities of the new State indefinitely.⁴⁴³ While jurisdiction remains with the authorities of the Contracting State from which the child has been wrongfully removed or retained, the authorities of the Contracting State to which the child has been wrongfully removed or in which he or she has been wrongfully retained can only take necessary measures of protection under Article 11 (where the case is considered urgent⁴⁴⁴) and may not take provisional measures under Article 12 of the Convention.⁴⁴⁵
- 13.4 The definition of wrongful removal or retention used in the 1996 Convention is the same as that found in the 1980 Convention, indicating the complementary nature of the two Conventions.⁴⁴⁶ The interpretation and the application of the 1980 Convention provisions relating to wrongful removal and retention may therefore offer assistance in the determination of jurisdiction under the 1996 Convention.⁴⁴⁷

441 This is seen clearly in Art. 50 of the 1996 Convention, referred to, *supra*, in para. 12.4.

442 This is discussed, *supra*, in paras 4.20-4.25.

443 See the Explanatory Report, at para. 46.

444 Discussed more fully, *supra*, **Chapter 6**.

445 See Art. 7(3) of the Convention and the Explanatory Report, at para. 51.

446 Art. 7(2) of the 1996 Convention and Art. 3 of the 1980 Convention. See, *supra*, para. 4.21.

447 See, *supra*, para. 4.21. For decisions on the interpretation of wrongful removal or retention, see the case law and commentary in INCADAT (< www.incadat.com >).

(a) What is the role of the 1996 Convention in situations where the 1980 Hague Child Abduction Convention is applicable to the abduction of the child?

- 13.5 The 1980 Convention will continue to apply between Contracting States to the 1996 Convention that are also Parties to the 1980 Convention.⁴⁴⁸
- 13.6 The 1996 Convention supplements and reinforces the 1980 Convention by providing an explicit framework for jurisdiction, including in exceptional cases where the return of the child is refused or return is not requested. The Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the Contracting State of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term.⁴⁴⁹ It does this by ensuring that the Contracting State of the child's habitual residence retains jurisdiction until certain conditions have been fulfilled.⁴⁵⁰
- 13.7 The 1996 Convention also contains provisions which may assist when a judicial or administrative authority wishes to order the return of a child under the 1980 Convention, but **only on the basis that** certain necessary urgent measures are put in place to ensure the safe return of the child and to ensure the child's continued protection in the requesting Contracting State (until the authorities in that Contracting State can act to protect the child). In this regard, the 1996 Convention contains a specific ground of jurisdiction which, where the case is one of urgency, enables the requested Contracting State to take "necessary measures of protection" regarding the child.⁴⁵¹ The 1996 Convention adds to the efficacy of any such measures of protection ordered by ensuring that such orders are recognised by operation of law in the Contracting State to which the child is to be returned and are enforceable in that Contracting State upon the request of any interested party (until such time as the authorities in the requesting Contracting State are able to put in place any necessary protective measures).⁴⁵²

448 Art. 50. See, *supra*, para. 12.4.

449 In relation to the 1980 Convention, see Arts 16 and 19 of that Convention, as well as paras 16 and 19 of the Explanatory Report on the 1980 Hague Child Abduction Convention, by E. Pérez-Vera, in *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, Imprimerie Nationale, 1982, pp. 425-476. The Explanatory Report states that the 1980 Convention rests implicitly on the principle that any debate on the merits of custody rights should take place before the competent authorities in the Contracting State where the child had his / her habitual residence prior to his / her wrongful removal / retention (para. 19).

450 Art. 7 – see, *supra*, paras 4.20-4.25.

451 Art. 11 – see, *supra*, Chapter 6 (and particularly, Example 6 (c)).

452 See, *supra*, para. 6.12 regarding the recognition and enforcement of measures of protection taken on the basis of Art. 11 and, more generally, the discussion at Chapter 10.

- 13.8 The 1996 Convention may also assist with questions of interim access / contact in abduction cases where return proceedings under the 1980 Convention are pending.⁴⁵³ Where the Contracting State of the child's habitual residence is not in a position to deal with interim access / contact **and** where the case is one of urgency, Article 11 of the Convention may provide a basis for the authorities of the Contracting State hearing the return proceedings to make such an order.⁴⁵⁴ This order will lapse once the authorities of the Contracting State of the child's habitual residence have taken the necessary measures of protection in this regard.⁴⁵⁵
- 13.9 The provisions regarding co-operation in the 1996 Convention may also be used to support the co-operation requirements found in the 1980 Convention. Under the 1980 Convention, the Central Authority has to provide "information of a general character as to the law of their State in connection with the application of the Convention",⁴⁵⁶ whilst under the 1996 Convention, the Central Authority has to take appropriate steps to provide, in connection with the application of the Convention, "information as to the laws of, and services available in, their States relating to the protection of children".⁴⁵⁷ This will enable another Central Authority or a parent to obtain a wider range of information about the laws of the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained.
- 13.10 Article 34 of the 1996 Convention, which permits competent authorities contemplating a measure of protection, if the situation of the child so requires, to request an authority of another Contracting State which has information relevant to the protection of the child to communicate such information,⁴⁵⁸ may be especially useful where a return order is **refused** under the 1980 Convention.⁴⁵⁹ In this situation, where an authority in the Contracting State of the child's habitual residence is seised with the custody dispute and does not already have before it the information upon which the refusal to return was based, Article 34 enables this authority to request such information from the authority which refused the return. This may prevent a situation arising where the authorities of the Contracting State of the child's habitual residence hearing the custody dispute do not have available to them the information that was considered by the authorities hearing the return application. It should be noted that

453 In this regard, see, *supra*, **Chapter 6** and, in particular, **Example 6 (F)** and the discussion at note 216. See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216), at para. 4.6.2, where, in the context of Art. 21 of the 1980 Convention, it is stated: "in some countries the view has been taken that Article 21 does not cover interim contact applications made pending a decision on return. Again this is inconsistent with the underlying principle that contact should be maintained in all circumstances where the child is not at risk. Moreover, a failure to restore contact to a left-behind parent during the course of what may sometimes be protracted return proceedings carries the risk of further harm to the child and alienation from the left-behind parent."

454 See, *supra*, paras 6.2-6.5 on when a case may be considered "urgent" for the purposes of Art. 11.

455 Art. 11(2) – see, *supra*, paras 6.8-6.9. The use of Art. 11 to provide jurisdiction to take necessary measures of protection to ensure the safe return of a child or interim access in the context of return proceedings (as mentioned herein and at para. 13.7 as well as, *supra*, in **Chapter 6**) was discussed at the 2011 Special Commission (Part I) in regard to when such situations would result in a "case of urgency" such that Art. 11 could be relied upon. As stated, *supra*, in **Chapter 6**, whether a measure can be taken on the basis of Art. 11 – whether the situation can properly be described as a case of "urgency" – will always be a matter for the competent authority to determine on the facts of the particular case before it.

456 Art. 7(2) *e*).

457 Art. 30(2).

458 Art. 34. See further, *supra*, paras 11.25-11.26.

459 Particularly if return is refused on the basis that there is a grave risk that the child's return would expose him / her to physical or psychological harm or otherwise place the child in an intolerable situation – Art. 13(1) *b*) of the 1980 Convention.

there is a distinction here between the operation of the 1996 Convention and the operation of the Brussels II a Regulation.⁴⁶⁰ Article 11(6) of the Brussels II a Regulation places an **obligation** on a court that has refused a return under Article 13 of the 1980 Convention to transmit all documents relating to the hearing to the authorities of the State of the child's habitual residence prior to the wrongful removal or retention. The 1996 Convention contains no such obligation. However, as discussed in **Chapter 11, supra**, it does provide for such co-operation and communication between authorities.⁴⁶¹

- 13.11** Article 34 of the 1996 Convention may also be of use to a **requested** Contracting State hearing return proceedings under the 1980 Convention. If information from the Contracting State of the child's habitual residence is relevant to the decision of whether to return a child or not,⁴⁶² or to any other urgent measures of protection the judicial or administrative authority in the requested Contracting State is contemplating taking (e.g., urgent measures of protection relating to the safe return of the child), the authority may use the mechanism in Article 34 to obtain such relevant information from the Contracting State of the child's habitual residence.
- 13.12** Lastly, it should be noted that neither the 1996 Convention nor the 1980 Convention states the procedure to be followed where proceedings for the return of a child are brought at the same time in the Contracting State of the child's habitual residence (under Arts 5 and 7 of the 1996 Convention) and in the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained (under Art. 12 of the 1980 Convention). Article 13 of the 1996 Convention does not solve this issue since the jurisdiction to act under the 1980 Convention is not founded upon Articles 5 to 10 of the 1996 Convention (see Art. 13 of the 1996 Convention). In such circumstances, it will be for the Contracting States concerned to communicate and co-operate (with the support of the Central Authorities and / or using direct judicial communications) as to the most appropriate way forward, taking into account the child's best interests.⁴⁶³

■ **EXAMPLE 13 (A)** *In this example, States A and B are Contracting States to both the 1996 and the 1980 Conventions.*

A child is habitually resident in State A. Following the separation of the child's parents, both parents retain custody of the child but the parents agree that the child will live in the primary care of the mother, having regular contact with her father. Three months later, the mother moves with the child to State B without the father's consent.

The father initiates return proceedings under the 1980 Convention. The mother makes allegations to the effect that the father has sexually abused the child and the courts in State B refuse the application for return on the basis that there is a grave risk that returning the child would expose him to physical or psychological harm.⁴⁶⁴

⁴⁶⁰ See, *supra*, note 8.

⁴⁶¹ Art. 34. See further, *supra*, para. 11.25-11.26. See also **Example 11 (i)**.

⁴⁶² E.g., to a defence raised under Art. 13 of the 1980 Convention. However, in relation to whether the removal or retention of a child was "wrongful" in accordance with the meaning of Art. 3 of the 1980 Convention, see the specific mechanism provided for in Art. 15 of the 1980 Convention.

⁴⁶³ One relevant factor in determining this issue may be the expeditious nature of the return proceedings under the 1980 Convention (see Arts 2 and 11 of the 1980 Convention).

⁴⁶⁴ Art. 13(1) *b*) of the 1980 Convention.

The father therefore makes an application to the authorities in State A for the return of the child (since the authorities in State A retain jurisdiction under Art. 7 of the 1996 Convention, the refusal to return under the 1980 Convention not leading, in itself, to a change in jurisdiction⁴⁶⁵). Under Article 34(1), the courts of State A can, and should if necessary, request information from the authorities of State B as to the reasons for the refusal of the return application and the information / evidence upon which the decision was based.

The authorities in State A review the case and find that there is no risk of harm to the child in being returned to State A and that the court in State B did not have all relevant facts presented to it. They make an order that the child is to be returned to State A.

State A's order must be recognised by operation of law in State B if there are no grounds for refusal under Article 23(2). The fact that a decision of non-return based on Article 13 of the 1980 Convention has been given in State B is not, of itself, a ground for refusal of recognition under Article 23. If the mother is not prepared to voluntarily comply with State A's order, the order may be enforced in accordance with Articles 26 and 28 of the 1996 Convention.⁴⁶⁶

*An alternative for the courts in State B (depending upon the facts of the particular case) may be to order the return of the child under Article 12 of the 1980 Convention, but, at the same time, to take necessary measures for the protection of the child under Article 11 to ensure the safe return of the child and the child's continued protection in State A (until the authorities there can act). These measures could provide, for example, that pending the authorities in State A being able to take the necessary measures of protection, (1) the father is not to be allowed contact with the child; and (2) that he must provide separate accommodation in State A for the child and the mother. These orders must then be recognised in State A (unless a ground for non-recognition is established – see Art. 23(2)) until the authorities in State A are able to take the necessary measures to ensure the protection of the child. State B may want to ensure the implementation of these measures of protection in State A **prior** to allowing implementation of the return order in so far as is possible (in this scenario, implementation of the accommodation requirement could be verified prior to permitting the return to take place but implementation of the “no contact” order would be a matter which State A would have to enforce, as necessary, upon the child's return to State A).*

465 See, *supra*, paras 4.20-4.25.

466 See, *supra*, paras 10.22-10.28.

(b) What is the role of the 1996 Convention in situations where the 1980 Hague Child Abduction Convention is not applicable to the abduction of the child?

- 13.13 There are a number of instances where the 1980 Convention might not apply to a case although the 1996 Convention does. For example, the 1980 Convention does not apply to children over 16 years of age, while the 1996 Convention applies to a child up to the age of 18 years.⁴⁶⁷ More importantly, the 1980 Convention will only apply to cases involving two States that are Contracting States to that Convention and between whom the Convention has entered into force. For example, if a State has acceded to the 1980 Convention, the 1980 Convention will apply only between it and another Contracting State that has **accepted** its accession.⁴⁶⁸ Two States involved in an international child abduction case may therefore both be Contracting States to the 1996 Convention, but the 1980 Convention may not be in force as between them.
- 13.14 Many of the ways in which the 1996 Convention can assist in cases of wrongful removal / retention where the 1980 Convention does **not** apply are mentioned in the previous Chapters of this Handbook. For example:
- The jurisdiction provisions, which ensure that jurisdiction remains with the Contracting State of the child's habitual residence until strict conditions have been fulfilled,⁴⁶⁹ were discussed at paragraphs 4.20 to 4.25 and also at paragraphs 13.2 to 13.4, *supra*;
 - The co-operation provisions, which ensure that a wide range of services that may assist in cases of international child abduction are provided to parents in Contracting States to the 1996 Convention, were discussed in **Chapter II**, *supra*. The main provisions that may be helpful when a child has been wrongfully removed / retained are the duties of the Central Authorities to provide assistance in discovering the whereabouts of the child and to facilitate agreed solutions for the protection of the person of the child.⁴⁷⁰
 - The provisions on recognition and enforcement, discussed at **Chapter 10**, *supra*, when combined with the jurisdictional rules, can also be used in some circumstances to ensure a child is actually returned to the Contracting State of his / her habitual residence. For example, the parent in the Contracting State of the child's habitual residence might already have an enforceable order for custody or delivery of the child or might be able to obtain one quickly in this Contracting State. This order could then be sent for recognition and enforcement under the Convention to the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained. Once declared enforceable or registered for enforcement, the order has to be enforced in the latter Contracting State as if it had been made by the authorities of that State, unless one of the grounds for refusal of recognition is established.⁴⁷¹

467 Art. 2 of the 1996 Convention; Art. 4 of the 1980 Convention.

468 See Art. 38 of the 1980 Convention.

469 Art. 7 of the 1996 Convention.

470 Art. 31 *b*) and Art. 31 *c*) – which may be performed directly by the Central Authority or indirectly, through public authorities or other bodies. See, *supra*, para. II.II.

471 On the issue of enforcement, see, *supra*, paras 10.22-10.28.

■ **EXAMPLE 13 (B)** *In this example both States A and B are Contracting States to the 1996 Convention. However, State B is not a Contracting State to the 1980 Convention.*⁴⁷²

A child is habitually resident in State A. Following the separation of the child's parents, both parents retain custody of the child but the parents agree that the child will live in the primary care of the mother, having regular contact with her father. Three months later, the mother moves with the child to State B without the father's consent.

*Under the 1996 Convention, the father can ask the Central Authority in State A to request the Central Authority in State B to provide assistance in discovering the whereabouts of the child in that State.*⁴⁷³

*He can also ask the Central Authority in State A to obtain information from the Central Authority in State B regarding the laws of, and services available in, State B relating to the protection of children.*⁴⁷⁴

*Jurisdiction to take measures of protection in relation to the child remains with the authorities in State A.*⁴⁷⁵ *On application by the father, these authorities may therefore be able to order that the child be returned to the jurisdiction of State A forthwith (either in the mother's care or, if the mother is not willing to return to State A, that the child be delivered into the father's care). This order will have to be enforced in State B upon the request of the father or any interested person.*⁴⁷⁶ *However, depending upon the facts of the case, the courts in State A may alternatively order that the child should remain in the care of the mother in State B pending a full hearing of the custody issues relating to the child (which will take place in State A), but that the child is to have interim contact with the father whilst these proceedings are ongoing.*

⁴⁷² The 1980 Convention is therefore not in force as between the two States and cannot apply in the case.

⁴⁷³ Art. 31 c). See, *supra*, para. II.II.

⁴⁷⁴ Art. 30(2): the father may ask the Central Authority in Contracting State B, his Contracting State of habitual residence, to make the request for information, or he may approach the Central Authority in Contracting State A directly. See, *supra*, para. II.IO.

⁴⁷⁵ Art. 7 of the 1996 Convention, discussed, *supra*, at paras 4.20-4.25.

⁴⁷⁶ Unless a ground for non-recognition under the Convention is established – see Art.26(3), discussed, *supra*, at para. 10.24.

B ACCESS / CONTACT⁴⁷⁷

(a) What are “rights of access”?

13.15 Article 3 *b*) states that “measures directed to the protection of the person or the property of the child” may deal, in particular, with “rights of access”. Whilst no complete definition of the term “rights of access” is given in the Convention, these rights are expressly stated to include “the right to take a child for a limited period of time to a place other than the child’s habitual residence”.⁴⁷⁸ This formulation is a reproduction of the definition of “rights of access” found in Article 5 *b*) of the 1980 Convention.⁴⁷⁹ This consistency in language in the two Conventions is intentional and the terms should be interpreted in the same autonomous⁴⁸⁰ manner in both Conventions to ensure the complementarity of the Conventions. It should be noted that the Explanatory Report to the 1996 Convention makes it clear that such “rights of access” encompass “the contacts at a distance which a parent is authorised to maintain with his or her child by correspondence, telephone or telefax”.⁴⁸¹

13.16 The examples throughout this Handbook have illustrated the importance of every Chapter of the 1996 Convention to international access / contact cases. This section pulls together some of the particularly important provisions of the 1996 Convention to these cases.

(b) Inter-State administrative co-operation⁴⁸² in international access / contact cases

13.17 In addition to the general duties of Central Authorities, some of which, such as to provide assistance in locating the child and in facilitating agreed solutions, will also be useful in ensuring the exercise of access or contact, Article 35 of the 1996 Convention is dedicated specifically to co-operation in international access / contact cases. Article 35 provides that the competent authorities of one Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.⁴⁸³

477 Further information can be found in the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216). Matters of terminology (*e.g.* “contact” and “access”) are discussed at p. xxvi.

478 Art. 3 *b*). See also, *supra*, para. 3.22 on the meaning of Art. 3 *b*).

479 The formulation of “rights of custody” found in Art. 3 *b*) of the 1996 Convention is also a reproduction of Art. 5 *b*) of the 1980 Convention.

480 This means that the terms should be given an independent interpretation, free of domestic law constraints.

481 Explanatory Report, para. 20. Today, this indirect contact would presumably also include contact via e-mail and internet communications, including video-conferencing facilities.

482 For a detailed discussion regarding the co-operation provisions, see, *supra*, Chapter 11.

483 Art. 35(1). See, *supra*, paras 11.27-11.30.

- 13.18 Article 35 also provides a mechanism for a parent who lives in a different Contracting State than the child to apply to the authorities in his or her own State for them to gather information and evidence and make a finding on the suitability of that parent to exercise access / contact and the conditions under which such access / contact is to be exercised.⁴⁸⁴ This information, evidence or finding has to be considered by the authorities who have jurisdiction when making a decision concerning access to / contact with the child. The article also gives discretion to the authorities who have jurisdiction to adjourn the access / contact proceedings pending the outcome of such a request.⁴⁸⁵ It is emphasised in the Convention that this adjournment to wait for the receipt of such information may be particularly appropriate when the proceedings are considering the restriction or termination of access / contact rights granted in the State of the child's former habitual residence.⁴⁸⁶

■ **EXAMPLE 13 (c)** *The mother and child lawfully relocated to Contracting State A from Contracting State B several years ago and the father remained in Contracting State B. Access arrangements were in place and the child and father had regular contact. The mother now wishes to reduce or terminate the access arrangements between the child and the father and initiates proceedings before the authorities of Contracting State A to this end. The father requests that the authorities of Contracting State B gather information / evidence and make a finding on his suitability to exercise access and on the conditions under which access should be exercised.⁴⁸⁷ He also requests that the authorities hearing the case in Contracting State A adjourn the proceedings pending receipt of Contracting State B's findings.⁴⁸⁸ The authorities accede to this request and the proceedings in Contracting State A are adjourned. The authorities in Contracting State B investigate the situation and produce a report which demonstrates the suitability of the father to exercise access. This report and accompanying information is admitted as evidence and considered by the authorities in Contracting State A when they are making their decision on access.⁴⁸⁹*

(c) Advance recognition⁴⁹⁰

- 13.19 Under the 1996 Convention a contact order made in one Contracting State will generally be recognised by operation of law in all other Contracting States.⁴⁹¹ The grounds on which a refusal of recognition may be based are limited and exhaustively enumerated in Article 23(2) of the Convention.⁴⁹²
- 13.20 However, the possibility for “advance recognition”, provided for by Article 24 of the Convention, is a particularly useful tool in facilitating international access / contact. This is because it may allay parental concerns that contact orders will not be respected by parties in other Contracting States. Two situations involving international access / contact illustrate this use:

484 Art. 35(2).

485 Art. 35(3).

486 *Id.*

487 Art. 35(2).

488 Art. 35(3).

489 Art. 35(2).

490 This is discussed further, *supra*, Chapter 10, paras 10.16-10.21.

491 Art. 23(1).

492 See, *supra*, paras 10.4-10.15.

- Where a child is to travel to another State for a period of contact, the primary carer(s) of a child may be concerned that the contact order will not be adhered to by the person exercising contact and that the child may not be returned to their care at the conclusion of contact. Advance recognition of both the custody and contact orders of the Contracting State of the child's habitual residence will ensure that, if the contact order is not respected in the Contracting State where contact is exercised, the return of the child to the primary carer can be enforced (in accordance with Arts 26 and 28 of the 1996 Convention). This legal certainty may encourage the primary carer to permit contact to take place;⁴⁹³
- Where a parent wishes to relocate internationally with a child, the "left-behind" parent may be concerned that any contact which may be ordered will not be adhered to by the relocating parent once the relocation has taken place. Advance recognition will reassure this parent that, if the contact order is not respected by the relocating parent, it will be enforced in the Contracting State to which the parent and child have moved as if it had been ordered there.⁴⁹⁴

13.21 A system of advance recognition can also provide the guarantee that access / contact **conditions** which are set by the authorities exercising primary jurisdiction will be enforceable from the moment the child arrives in another Contracting State for the purposes of visitation or relocation.

13.22 Where the 1996 Convention is **not** in force as between the relevant States, so-called "mirror orders" are often used as a means of ensuring that an order made in one State is able to be enforced in another State. A "mirror order" is an order made by the courts in the State, for example, where access / contact is to be exercised or in the State to which the child is to relocate, that is identical or similar to an order made in the other State. As such, the order made in the latter State becomes fully enforceable and effective in both States. However, in some States and situations parties have encountered difficulties in obtaining mirror orders. This has often been as a result of the fact that the State in question has not considered that it has jurisdiction to make the mirror order sought because the child is not habitually resident in that State (e.g., if the child will be simply visiting that State to exercise contact). The 1996 Convention therefore avoids this difficulty and provides a far simpler and quicker method by which the order of one Contracting State will be recognised and enforceable in the other Contracting State.

(d) International relocation⁴⁹⁵

13.23 The problems surrounding international relocation are increasingly being considered by the authorities in many States. "International relocation" involves a permanent move of the child, usually together with the child's primary carer, from one State to another. The result is often that the child will live at a much greater distance from the non-relocating parent and the exercise of access / contact by that parent will become more difficult and expensive.

493 If the 1980 Convention is in force as between the relevant States, the return remedy would also provide considerable reassurance to a primary carer in this situation. This is because the primary carer would know that an expedient remedy exists if the child is wrongfully retained in breach of the court order. In this way, the 1980 Convention also facilitates international access / contact.

494 However, see, *infra*, paras 13.23-13.27 in relation to international relocation and the fact that the Contracting State to which the child has moved, once the child has obtained a habitual residence there, will become the Contracting State with general jurisdiction in relation to the child (Art. 5(2); see, *supra*, paras 4.8-4.11).

495 International relocation and contact are discussed more fully in Chapter 8 of the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216).

- 13.24 It is important that the terms and conditions of an order regarding access / contact made in the context of an international relocation are given maximum respect in the State to which relocation occurs. Two reasons for this are: (1) the authorities deciding upon relocation will have been in the best position to determine what are the best interests of the child with regard to continuing access / contact with the non-relocating parent; and (2) if orders in such situations are not respected in a particular State, this may have a negative impact on judges considering whether to permit relocation to that State in the future (*i.e.*, permission to relocate may be refused because contact cannot be adequately guaranteed).
- 13.25 When an order regarding access / contact is made in the context of international relocation (by the authorities in the Contracting State where the child is habitually resident), that order is entitled, under Article 23(1) of the Convention, to be recognised by operation of law in the Contracting State to which relocation is to occur. It is entitled to be enforced in that Contracting State, according to Articles 26 and 28, as if it had been made in that Contracting State. If there is any concern that the order might not be recognised following the relocation, an application for advance recognition under Article 24 should be made.⁴⁹⁶
- 13.26 However, a concern in international relocation cases may be that, under the 1996 Convention, as soon as the child becomes habitually resident in the Contracting State to which he / she has lawfully⁴⁹⁷ relocated, primary jurisdiction to take measures of protection in respect of the child will move to the competent authorities in that Contracting State (see Art. 5(2) and paras 4.8-4.11, *supra*). The concern is therefore that the relocating parent may take advantage of this change in jurisdiction and may subsequently apply to modify, restrict or even terminate the access / contact rights of the parent who remained in the Contracting State of origin. On this issue, see Chapter 8 of the Guide to Good Practice on Transfrontier Contact for detailed guidance.⁴⁹⁸
- 13.27 As mentioned above, one possible safeguard would be for this parent to apply for “advance recognition”⁴⁹⁹ of the order regarding access / contact in the new Contracting State with a view to securing his or her access / contact rights. Once recognised, the authorities of the Contracting State of relocation would regard the order as having the same status as an order made by the authorities of that Contracting State. However, even where the order has not been the subject of “advance recognition”, the Contracting State to which the child has relocated should not allow review and variation of the order unless, in the circumstances, it would permit a review or variation of a domestic order regarding access / contact.⁵⁰⁰ Moreover, where the Contracting State to which the child has relocated is dealing with an application to review or vary an order regarding access / contact which has been made **shortly after** a court-permitted relocation, the court dealing with the review application should be very slow to disturb the arrangements concerning access / contact made by the authorities which decided upon the relocation.⁵⁰¹ In the event that it is felt necessary to take action to review or vary the order, consideration should be given to using the mechanisms provided for in the Convention in order to obtain the relevant information from the authorities in the Contracting State of the child’s former habitual residence (*e.g.*, consideration of the use of Art. 9 of the Convention to transfer jurisdiction to that Contracting State, or use of the mechanism in Art. 35).⁵⁰²

496 Discussed, *supra*, paras 13.19-13.22.

497 If the relocation was not lawful and was a wrongful removal or wrongful retention of the child, see Art. 7 and, *supra*, paras 4.20-4.25.

498 *Op. cit.* note 216, at para 8.5.4.

499 Advance recognition is further discussed, *supra*, at paras 13.19-13.21.

500 See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 216), Chapter 8 and, particularly, para. 8.5.

501 *Ibid.*, at para. 8.5.3.

502 These mechanisms may also prove useful in situations where a contact order was not made in the context of a proposed relocation, but a lawful relocation occurred shortly after a contact order was made. *Ibid.*

(e) International access / contact in cases where the 1980 Convention and 1996 Convention are applicable

- 13.28 It should be remembered that, in States and situations where the 1980 Convention is also applicable, Articles 7(2) *f*) and 21 of the 1980 Convention contain important obligations regarding access / contact.⁵⁰³ This is not the place for a detailed discussion of these provisions but reference should be made to the Guide to Good Practice on Transfrontier Contact⁵⁰⁴ (in particular, Chapter 4) and to the Guide to Good Practice on Central Authority Practice⁵⁰⁵ (in particular, Chapter 5).
- 13.29 Contracting States should bear in mind that the provisions of the 1980 and 1996 Conventions do have different emphases in relation to rights of access / contact. Article 21 of the 1980 Convention specifically provides that a Central Authority, either directly or through intermediaries, “may initiate or assist in the institution of proceedings with a view to organising or protecting these [access] rights and securing respect for the conditions to which the exercise of these rights may be subject”. Where both Conventions apply, the provisions of the 1996 Convention relating to access / contact are intended to “complete and reinforce” the co-operation in relation to access / contact rights provided for in the 1980 Convention.⁵⁰⁶
- 13.30 Where an application for international access / contact is being made in circumstances where both Conventions apply, it is suggested that, where relevant, both Conventions be mentioned in the application.⁵⁰⁷

C FOSTER CARE, KAFALA AND INSTITUTIONAL PLACEMENTS ACROSS BORDERS

- 13.31 Decisions regarding the placement of a child in a foster family or in institutional care,⁵⁰⁸ or the provision of care by means of *kafala* or an analogous institution come within the definition of measures directed to the protection of children and fall within the scope of the Convention.⁵⁰⁹ Jurisdiction to make such placements or decisions is therefore governed by the jurisdictional provisions in the Convention⁵¹⁰ and placements or decisions made in one Contracting State will have to be recognised and enforced in other Contracting States, in the absence of a ground for non-recognition.⁵¹¹

503 As stated at note 493 *supra*, it should also be remembered that the return remedy in the 1980 Convention is a very important tool in facilitating international access / contact. By providing a carer with the strongest guarantee against the wrongful retention of a child, it provides a reassuring legal framework within which international access / contact can take place.

504 *Op. cit.* note 216.

505 *Op. cit.* note 355.

506 See the Explanatory Report, at para. 146.

507 See also, *supra*, paras 11.2 and 11.6 regarding giving due consideration to designating the same Central Authority under the 1980 and 1996 Conventions where a State is Party to both Conventions. This is an example of a situation in which the designation of the same body under both Conventions may be useful.

508 In relation to the alternative care of children, see, *supra*, note 83 regarding the “Guidelines for the Alternative Care of Children”, formally welcomed by the United Nations General Assembly Resolution A/RES/64/142 of 24 February 2010.

509 Art. 3 *e*). See, *supra*, paras 3.25-3.28.

510 Arts 5-10. See, *supra*, Chapter 4.

511 Art. 23(2). See, *supra*, paras 10.4-10.15.

13.32 Importantly, the Convention also provides for co-operation between States in relation to the growing number of cases in which children placed in alternative care move abroad, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *kafala*.⁵¹²

■ **EXAMPLE 13 (D)** *The child is habitually resident in Contracting State A. The authorities of Contracting State A take a decision that the child should be cared for by her uncle and his wife through kafala. The couple and child later move to Contracting State B. As the decision taken by the authorities of Contracting State A fulfils all the requirements for recognition, the authorities of Contracting State B will recognise the kafala arrangement by operation of law.*⁵¹³

13.33 If an authority is contemplating the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, **and such care is to take place in another Contracting State**, the Convention sets down strict rules which must be complied with before this placement can be put into effect. These rules involve co-operation between the authorities of both Contracting States and ensure that the best interests of the child are secured. If these rules are not respected, the placement may not be recognised abroad under the Convention.⁵¹⁴

13.34 The rules are set out in Article 33 of the Convention.⁵¹⁵ This article applies if:

- an authority has jurisdiction under Articles 5 to 10 of the Convention; and
- the authority contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution in another Contracting State.

13.35 The authority wishing to make the placement must transmit a report to the authority in the other Contracting State with details of the child and the reasons for the proposed placement or provision of care.⁵¹⁶ The decision to place the child abroad by the authority having jurisdiction under Articles 5 to 10 may not be made unless the authority from the other Contracting State has consented to the placement or provision of care, taking into account the child's best interests.⁵¹⁷ If this procedure is not followed, it means that the measure may be refused recognition under the Convention.⁵¹⁸

13.36 Each Contracting State may⁵¹⁹ designate the authority to which requests under Article 33 should be addressed, see paragraph 11.15, *supra*.

512 As stated earlier in this Handbook, *kafala* arrangements fall outside the scope of the 1993 Hague Intercountry Adoption Convention: see, *supra*, paras 3.25-3.28.

513 Art. 23. See, *supra*, paras 10.1-10.3.

514 Art. 23(2) *f*). See, *supra*, paras 10.4-10.15.

515 See, *supra*, paras 11.13-11.17.

516 Art. 33(1).

517 Art. 33(2).

518 Art. 23(2) *f*).

519 This designation is not obligatory but may facilitate efficient communication. See, in this regard, the Court of Justice of the European Union's decision in *Health Services Executive v. S.C., A.C.* (Case C-92/12 of 26 April 2012) where the Court held (at para. 82), in relation to Art. 56 of the Brussels II a Regulation, that: "Member States are therefore required to establish clear rules and procedures for the purposes of the consent referred to in Article 56 of the Regulation, in order to ensure legal certainty and expedition. The procedures must, inter alia, enable the court which contemplates the placement easily to identify the competent authority and the competent authority to grant or refuse its consent promptly." See further, *infra*, paras 13.31-13.42.

- 13.37 There is some question about which measures of protection fall within the scope of Article 33 of the Convention (and thus require the procedure in Art. 33 to be undertaken).⁵²⁰ In particular there is a question as to whether a measure of protection taken by a competent authority determining that a child should reside in another Contracting State with extended family members (e.g., grandparents or an aunt or uncle) falls within the scope of Article 33. There is no definitive answer to this question provided in the Proceedings of the Eighteenth Diplomatic Session. The idea behind Article 33 was originally suggested in Working Document No 59 submitted by the Netherlands, suggesting by explanation that: “Whenever the child’s placement outside its family of origin involves its removal to another Contracting State, a procedure similar to that provided for by the Convention of 29 May 1993, should be followed.”⁵²¹ However, this leaves open the question as to whether the phrase “family of origin” was intended to refer simply to the child’s “nuclear” family with which he / she had been previously residing, or more broadly intended to include any familial relatives.⁵²²
- 13.38 During the 2011 Special Commission (Part I) there was some discussion of the scope of Article 33. Some experts expressed concern that including such measures of protection within the purview of Article 33 would create unnecessary hurdles when placing children with relatives in other Contracting States. Other experts expressed concern that, should such measures fall outside the scope of Article 33, there would be no obligatory safeguards in place to ensure that the Contracting State in which the child is to be placed is aware, in advance, of the child’s relocation to that State and to ensure that matters such as immigration issues or access to public services have been considered and resolved in advance of the child’s move.⁵²³ Further, the relevant public authorities in the Contracting State in which the child is to reside may remain unaware of important matters such as the background of the child (e.g., any child protection concerns which led to the alternative care) and the nature of the placement – matters which may necessitate the ongoing monitoring of the child’s situation.⁵²⁴ There is no settled practice on this issue as yet.
- 13.39 It should be noted that the Convention itself does not provide the exact details of how the procedure under Article 33 is to operate in practice, but rather gives only basic rules. It is for the Contracting States themselves to establish a procedure to implement these basic rules. They may want to consider establishing clear and efficient rules and procedures, which may, in particular, enable the authority contemplating the placement to identify easily the competent authority in the other Contracting State to whom the request for consent must be addressed.

520 In this regard, it should be noted that there is an important difference between the wording of Art. 33 of the Convention and Art. 56 of the Brussels II a Regulation. Art. 56 of the Regulation states that it applies where a court “contemplates the placement of a child in institutional care or with a foster family”. Art. 33 of the Convention on the other hand states that it applies where a competent authority “contemplates the placement of the child in a foster family or institutional care, **or the provision of care by *kafala* or an analogous institution**” (emphasis added).

521 See *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, at p. 249, *op. cit.* note 19.

522 In the discussion found in Minutes No 16 of the *Proceedings of the Eighteenth Session* concerning the more developed Work. Doc. No 89 (submitted by the Netherlands, Spain, Ireland, Switzerland, Belgium, Luxembourg and Sweden), the precise scope of the suggested article was not discussed.

523 See the Explanatory Report, at para. 143, where it states that Art. 33 gives the receiving State “a power to review the decision” and “allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure”.

524 Again, because there would be no **obligation** (as under Art. 33) for communication between the Contracting States in this regard. However, it should be noted that other co-operation provisions in the Convention may provide methods by which information can be obtained from the Contracting State in which it is sought to place the child (e.g., Art. 34), as well as methods by which information can be communicated to this Contracting State. However, these provisions operate on a non-obligatory basis. See further, *supra*, **Chapter 11**.

- 13.40 While the 1996 Convention expressly excludes adoption from its material scope, the 1993 Hague Intercountry Adoption Convention provides a similar procedure in intercountry adoption cases that may assist with the understanding (and / or implementation) of Article 33 of the 1996 Convention. Further, although the legal effects and requirements differ as between adoption and other forms of care, the co-operation mechanisms and some of the general principles of the 1993 Convention may still prove useful in relation to the cross-border provision of care. The Guide to Good Practice on the 1993 Hague Intercountry Adoption Convention⁵²⁵ gives a clear explanation of these mechanisms and principles.
- 13.41 One example in which the procedure in the 1993 Hague Intercountry Adoption Convention provided some guidance in terms of establishing rules regarding the operation of Article 33 of the 1996 Convention is the implementing legislation of the Netherlands, which devotes a chapter to setting out the procedure involved in cases where a child from the Netherlands is to be placed in another Contracting State, or a child from another Contracting State is to be placed in the Netherlands.⁵²⁶ Under these rules, the Central Authority of the Netherlands is the competent authority to make the decision to place a child habitually resident in the Netherlands in a foster family or in institutional care or otherwise provide the child with care in another Contracting State. Before this decision is made it must transmit a reasoned application, accompanied by a report on the child to the Central Authority, or other competent authority, of the Contracting State where the placement or provision of care should take place. The Central Authority must then enter into consultation with this other authority. Before making the decision, the Central Authority must receive:
- a written declaration of consent from the persons with whom, or the institution with which, the placement is to be made or by whom or which the care is to be provided;
 - if desired, a report drawn up by the Central Authority or other competent authority in the country of placement showing the suitability of the foster parent to provide foster care for the child;
 - the consent of the Central Authority or other competent authority in the other State;
 - if applicable, documents showing that the child has or will receive permission to enter the other Contracting State and has been or will be granted residence rights in that Contracting State.
- 13.42 If the placement in the Netherlands is of a child from outside the Netherlands, it is for the Dutch Central Authority to give the consent required. Before giving this consent, the Central Authority has to have received a reasoned request, accompanied by a report on the child. It also has to have gathered the equivalent documents mentioned above and transmitted them to the competent authority of the country of origin of the child. The Dutch legislation also provides what is to happen if this procedure is not complied with. The public prosecutor or Central Authority may apply to the children's judge for provisional guardianship of the child to be awarded to a foundation as provided in other legislation. In general, this provisional guardianship will last for six weeks while the Child Protection Board obtains a ruling on the custody of the child.

525 *Op. cit.* note 2, Guide No 1, in particular Chapter 7, at pp. 79 *et seq.*

526 International Child Protection Implementation Act, 16 February 2006, Chapter 3.

- **EXAMPLE 13 (E)** *A child is habitually resident in Contracting State A with his parents who are killed in a car accident. The child's closest relatives, his mother's cousin and his wife, live in Contracting State B. The authorities of Contracting State A wish to place the child in the care of this couple by way of kafala.*

As the authorities of Contracting State A have jurisdiction to take measures directed to the protection of the child and are considering the provision of care by kafala in Contracting State B, they must transmit a report to the authorities of Contracting State B with details of the child and the reasons for the proposed provision of care.⁵²⁷ The authorities in Contracting State B must then consider whether or not to consent to the proposed measure, taking into account the best interests of the child.⁵²⁸ If the authorities of Contracting State B consent to the proposed measure, the authorities of Contracting State A can proceed to make the order. If the authorities of Contracting State B refuse the proposed measure or if the authorities in Contracting State A fail to use this procedure, any decision they take regarding the provision of care by the mother's cousin and his wife in Contracting State B may be refused recognition in Contracting State B (and all other Contracting States) under the Convention.⁵²⁹

- **EXAMPLE 13 (F)** *A child, 16 months old, is habitually resident in Contracting State C. The competent authorities have recently taken the child into State care because the separated parents were unable or unwilling to continue caring for him. The father has been previously assessed as an unsuitable carer for the child due to mental health difficulties. The mother was caring for the child under the close supervision of the State authorities but has been convicted of a violent offence and will have to serve five years in prison. She has stated she does not want to care for the child any longer.*

When considering possible alternative care solutions for the child,⁵³⁰ the competent authorities in Contracting State C become aware of a maternal great-aunt, who resides in Contracting State D and who wishes to be considered as a long-term carer for the child.

Under the 1996 Convention, there is a clear, transparent and efficient procedure in place which is as follows:

- (1) *The authorities in Contracting State C have jurisdiction to take measures of protection concerning the child under Article 5 (as the Contracting State of the child's habitual residence) and are considering placing the child for long-term care in Contracting State D. Both Contracting States are aware of the obligations in Article 33.*

527 Art. 33(1). See, *infra*, para. 13.39 regarding the need for clear and efficient rules and procedures in this regard.

528 Art. 33(2). *Id.*

529 Art. 23(2)f).

530 In relation to the alternative care of children, see, *supra*, note 83 regarding the "Guidelines for the Alternative Care of Children", formally welcomed by United Nations General Assembly Resolution A/RES/64/142 of 24 February 2010.

- (2) *In accordance with Article 44 of the Convention, Contracting State D has communicated to the Permanent Bureau of the Hague Conference on Private International Law that a request under Article 33 should be made to its Central Authority. The authorities in Contracting State C therefore, with the assistance of their Central Authority, contact the Central Authority in Contracting State D to inform them of the proposed placement. They transmit a detailed report on the child to the Central Authority in Contracting State D with the reasons for the proposed placement (in particular, stating why they consider the placement to be in the child's best interests and providing all relevant information they have concerning the proposed carer).*
- (3) *The authorities of both Contracting States agree that the authorities in Contracting State D meet with the maternal great-aunt to verify her living conditions. The authorities in Contracting State D provide a report of the assessment to the authorities in Contracting State C and thereafter confirm their consent to the proposed placement.*
- (4) *The authorities in both Contracting States will subsequently co-operate concerning the details of the child's move and any requirements (e.g., immigration) which need to be fulfilled prior to the move. They will also include any contact arrangements which may be put in place by Contracting State C for the child (e.g., contact with his parents through letters and telephone calls).*
- (5) *Under the Convention, the decision concerning the placement of the child with his maternal great-aunt and any decisions concerning contact with his parents are recognised by operation of law in Contracting State D and all other Contracting States.*

If the authorities of Contracting State D do not consent to the proposed placement or if the authorities in Contracting State C fail to use the procedure mandated by Article 33, any decision taken regarding the provision of care by the maternal great-aunt in Contracting State C may be refused recognition in Contracting State D (and all other Contracting States) under the Convention.⁵³¹

If the placement succeeds, it will be Contracting State D in the future which has jurisdiction to take measures for the protection of the child in accordance with Article 5(2).

D ADOPTION

13.43 As mentioned in **Chapter 3**, *supra*, decisions on adoption, measures preparatory to adoption, or the annulment or revocation of an adoption are all excluded from the scope of the 1996 Convention.⁵³² However, it should be noted that once an adoption has been **completed**, measures for the protection of the person and property of the child fall within the scope of the Convention in the same way as for any other child.

■ **EXAMPLE 13 (G)** *The child is adopted by the adoptive parents in Contracting State A, where both the child and adoptive parents are habitually resident. Six years later, the parents separate and the mother moves to live in Contracting State B with the child. Before the move, the authorities in Contracting State A make an order stating that the mother is to have day-to-day care of the child but there is to be regular contact between the child and the father. This measure will be recognised by operation of law in Contracting State B under the Convention.*

13.44 Further, there are certain situations involving an **intercountry** adoption where the provisions of the 1996 Convention may prove useful.⁵³³ One example of a rather rare situation is where, a short time after the completion of the intercountry adoption, the adoption order is declared void or revoked in the receiving Contracting State. In this situation, measures need to be taken regarding the provision of care for the child. However, the Contracting State of origin of the child may still have a significant interest in the protection of the child. A possible mechanism to enable the involvement of the authorities of the Contracting State of origin would be the transfer mechanism under the 1996 Convention (Arts 8 and 9⁵³⁴). A transfer of jurisdiction could be effected upon the request of the authorities of the Contracting State of the habitual residence of the child (Art. 8), which will usually be the receiving Contracting State in these circumstances, or upon the request of the authorities of the Contracting State of origin (Art. 9). Of course, the requirements relating to a transfer of jurisdiction under the 1996 Convention would have to be satisfied (see **Chapter 5**, *supra*). This transfer of jurisdiction would mean that the authorities of the Contracting State of origin would have jurisdiction to take measures regarding the future care of the child and such measures would be recognised by operation of law in the receiving Contracting State.⁵³⁵

13.45 The co-operation provisions of the 1996 Convention may also, occasionally, prove of use following an intercountry adoption. For example, in the very rare situation where the authorities of the child's State of origin are gravely concerned that the child may be at risk with his / her new parents, Article 32 could be used to ask the receiving State (where the child is now habitually resident and present) to consider taking protective measures in relation to the child (see Art. 32 *b*). Another example might be where the receiving State is considering taking a measure of protection in relation to the child and the State of origin has information relevant to the protection of the child. If the situation of the child so requires, the receiving State could use Article 34 to request that the State of origin communicate such information.⁵³⁶

532 Art. 4 *b*). See also, *supra*, paras 3.38-3.39.

533 Of course, where both States involved are Contracting States to the 1996 Convention, as well as to the 1993 Convention. References in this paragraph to "Contracting States" are referring to the 1996 Convention.

534 For a detailed explanation of the transfer provisions, see, *supra*, **Chapter 5**.

535 Art. 23(1) – see further, *supra*, **Chapter 5**, regarding the transfer of jurisdiction provisions.

536 See further, *supra*, para. 11.25-11.26, regarding the operation of Art. 34.

E MEDIATION,⁵³⁷ CONCILIATION AND SIMILAR MEANS OF AMICABLE DISPUTE RESOLUTION

(a) The facilitation of agreed solutions for the protection of the person or property of the child in situations to which the 1996 Convention applies

ARTICLE 31 B)

- 13.46 The 1996 Convention places an obligation on Central Authorities, either directly or through public authorities or other bodies, to take all appropriate steps to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies.⁵³⁸
- 13.47 Mediation has become an increasingly used means of dispute resolution in family matters. It is seen as beneficial in situations where the parties need to have an ongoing relationship, which is often the case in family disputes involving children. It also enables parties to craft solutions tailored to their particular needs, places the responsibility for decision-making on the parties and may help to lay some foundation for future co-operation and reduce the level of conflict between the parties.
- 13.48 The use of mediation in **cross-border** family disputes is growing but it poses some particular challenges. Different languages, different cultures and geographical distance add new and difficult dimensions that need to be taken into account when considering the methodology of mediation. Additionally, the involvement of more than one State and more than one legal system means that consideration must be given to ensuring that the mediation and the resulting agreement satisfy the legal requirements of, and conditions for, enforceability in the relevant State or States.⁵³⁹
- 13.49 Where the States concerned are Parties to the 1996 Convention, the Convention may be particularly helpful in this regard. Due to its provisions regarding the recognition and enforcement of measures of protection, it will generally be sufficient to transform a mediated agreement into a court order in one Contracting State,⁵⁴⁰ since the enforceability in the other Contracting State will be secured (in so far as the matters in the order fall within the material scope of the Convention – see para. 13.50 below). To dispel doubts about the existence of a ground for non-recognition, “advance recognition” of a measure of protection may be sought.⁵⁴¹

537 On mediation, see the Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Mediation (hereinafter, the “Guide to Good Practice on Mediation”). The Guide is available on the Hague Conference website at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”. For further work mediation as part of the Malta Process, see the “Principles for the Establishment of Mediation Structures in the context of the Malta Process” and the accompanying Explanatory Memorandum, available at < www.hcch.net > under “Child Abduction Section” then “Cross-border family mediation”.

538 Art. 31 b). This obligation must be carried out directly by the Central Authority or indirectly, through public authorities or other bodies – see further, *supra*, para. 11.11.

539 In this regard, reference should be made to Chapters 12 and 13 of the Guide to Good Practice on Mediation (*op. cit.* note 537).

540 The Contracting State with jurisdiction under Chapter II of the Convention.

541 Under Art. 24, see, *supra*, paras 10.16-10.21.

- 13.50 It is important to note that mediated agreements in family matters may also contain measures which do not relate to the protection of the person or property of the child and which therefore do not fall within the scope of the 1996 Convention.⁵⁴² These other measures may regulate, for example, arrangements between the parents relating to their relationship, such as an application for a divorce, financial provision post-divorce or agreements regarding maintenance. Where a mediated agreement contains such provisions and is turned into a court order, the provisions of the 1996 Convention will not apply to the parts of the court order which are not within the material scope of the Convention. However, any parts of the court order which do constitute a measure of protection within the scope of the Convention must still be recognised and enforced according to the provisions of the Convention.

■ **EXAMPLE 13 (H)** *A mother relocated with two children from Contracting State A to Contracting State B two years ago and contact arrangements were put in place for the children and their father. The parents have now realised that the current arrangements are impracticable due to the cost of travel between the States. While the mother agrees that the father should have contact with the children, the parents are finding it difficult to arrive at a satisfactory new arrangement. Mediation may assist the parents in negotiating a workable contact arrangement.*

Any agreement reached concerning these contact issues may be able to be turned into a court order in Contracting State B, where the children are habitually resident.⁵⁴³ If so, such a court order will constitute the taking of “measures of protection” under the 1996 Convention (by the judicial authorities in Contracting State B) and, as such, will be recognised by operation of law and enforceable in all Contracting States under the provisions of Chapter IV of the 1996 Convention, including in Contracting State A.⁵⁴⁴

(b) Mediation in cases of international child abduction

- 13.51 Mediation is fast developing as an important mechanism for dealing with applications under the 1980 Hague Child Abduction Convention. For a detailed discussion of good practices relating to mediation in international child abduction cases, reference should be made to the Guide to Good Practice on Mediation.⁵⁴⁵
- 13.52 A very important principle to be observed when mediation is used in these cases is that mediation should not impede or delay any return proceedings brought under the 1980 Convention.⁵⁴⁶

542 See, *supra*, Chapter 3, section C, regarding the material scope of the Convention.

543 Art. 5. Whether this is possible will depend upon the domestic law of Contracting State B regarding rendering mediated agreements legally binding and enforceable.

544 See, *supra*, Chapter 10. See also para. 297 of the Guide to Good Practice on Mediation (*op. cit.* note 537).

545 *Ibid.*

546 See further the Guide to Good Practice on Mediation (*ibid.*).

■ **EXAMPLE 13 (I)** *In this example, States A and B are Contracting States to both the 1980 and 1996 Conventions.*

A child is wrongfully removed by her mother from Contracting State A to Contracting State B. The left-behind father institutes proceedings in Contracting State B under the 1980 Convention for the return of the child. It appears that the father might be willing to agree to the mother relocating to Contracting State B with the child provided that he has sufficient guarantees concerning his contact with the child. In the context of the Hague return proceedings, and without their suspension, the mother and father enter into mediation.

The mediation leads to an agreement that the child may relocate to Contracting State B in the custody of the mother and it includes detailed provisions for contact between the father and the child.

- 13.53 In this example, the mother and father need to be sure that the agreement reached will be respected in both Contracting States A and B. One way to achieve this may be to have the agreement approved or otherwise formalised by a court or other competent authority.⁵⁴⁷ However, if such approval or formalisation is to be sought, it will be important for the parties to consider whether such an application should be made to the authorities of Contracting State A or Contracting State B.
- 13.54 The easiest solution might appear to be for the authorities in Contracting State B, with the consent of the parties, to render the agreement legally binding in accordance with their domestic procedures⁵⁴⁸ because the return proceedings and the mediation have been conducted in Contracting State B. However, both the 1980 and 1996 Conventions are premised on the idea that, in a child abduction situation, the authorities in the Contracting State to which the child was abducted (the “requested State”) shall have the competency to decide on the question of the return of the child but **not** on the merits of custody issues.⁵⁴⁹ The court seized with Hague return proceedings in the requested State may therefore have difficulties turning a mediated agreement into a court order if this agreement also covers, besides the question of return, matters of custody or other matters on which the court seized with the Hague proceedings lacks (international) jurisdiction (as in **Example 13 (H)**, *supra*). Under the 1996 Convention, whether Contracting State B has jurisdiction to turn a mediated agreement dealing with custody and access / contact issues into a court order (thereby taking measures of protection within the scope of the 1996 Convention) in an international child abduction case will depend upon whether the requirements of Article 7 have been fulfilled.⁵⁵⁰ In circumstances such as those given in **Example 13 (I)**, *supra*, where a mediated agreement has been reached, careful consideration ought to be given to whether the conditions of Article 7(1) *a*) have been met. For example, if, (1) the child is found to have acquired a habitual residence in Contracting State B, and (2) the mediated agreement is considered to be evidence in Contracting State B of the fact that the parties, **strictly subject to the agreement being successfully formalised in a court order**, have acquiesced in the wrongful removal of

547 Domestic law provisions in each State will determine exactly how a mediated agreement may be rendered legally binding and enforceable in that State.

548 Guide to Good Practice on Mediation (*op. cit.* note 537).

549 See Art. 16 of the 1980 Convention; Art. 7 of the 1996 Convention.

550 See, *supra*, paras 4.20-4.25. See also Chapter 13 of the Guide to Good Practice on Mediation (*op. cit.* note 537) on the jurisdictional issues related to rendering mediated agreements legally binding in cases of international child abduction.

the child (by agreeing to the child's relocation),⁵⁵¹ jurisdiction will have moved to Contracting State B.⁵⁵² This interpretation of Article 7 would enable the authorities of Contracting State B, where the court is seised of the return proceedings and where the mediation has been undertaken, to have jurisdiction to turn the mediated agreement into a court order which will be recognised and enforceable in Contracting State A.

- 13.55 However, if it is determined that the requirements of Article 7 for a change in jurisdiction are **not** fulfilled in the particular case (*e.g.*, because the child cannot be said to have acquired a habitual residence in Contracting State B), the agreement may be submitted to the authorities of Contracting State A, who have general jurisdiction to take measures of protection in relation to the child (Art. 5(1)). A decision by these authorities to approve or otherwise formalise the mediated agreement will be entitled to be recognised and enforced in Contracting State B. However, the parties may wish to consider the possibility of using the transfer of jurisdiction provisions of the 1996 Convention. In this case, the authorities of Contracting State A may consider the possibility of transferring jurisdiction to the authorities of Contracting State B under Article 8 of the Convention, or the authorities of Contracting State B could request the transfer of jurisdiction under Article 9.⁵⁵³ This would enable the mediated agreement to be submitted to the court in Contracting State B for approval.⁵⁵⁴ The Central Authorities designated under the Convention in Contracting States A and B should co-operate to help the parents make these arrangements **if** it is considered in the best interests of the particular child.⁵⁵⁵
- 13.56 Despite the fact that the 1980 and 1996 Conventions do not regulate the modalities of how (and by whom) mediation, conciliation or similar means of amicable dispute resolution should be conducted,⁵⁵⁶ it is evident that these services need to be capable of facing the specific challenges posed by **cross-border** family disputes concerning children. It should be noted that the Guide to Good Practice on Mediation⁵⁵⁷ elaborates in detail on recommended safeguards and measures to meet these challenges. Although the Guide to Good Practice is drawn up with a focus on mediation and similar processes to bring about agreed solutions in international child abduction cases falling under the 1980 Hague Child Abduction

551 It will be very important in this case for any acquiescence by the left-behind parent to be wholly **conditional** upon a successful formalisation of the agreement in a court order (*i.e.*, the left-behind parent would only be acquiescing to the wrongful removal **on the basis that** the agreement is successfully rendered legally binding and enforceable in both jurisdictions concerned). This is because, if the formalisation process subsequently failed and the acquiescence had not been made conditional in this way, the abducting party could then rely on the agreement in any subsequent return proceedings as evidence of acquiescence. This may deter left-behind parents from entering into mediation.

552 Art. 7(1) *a*).

553 Of course, the requirements for a transfer of jurisdiction would need to be fulfilled – see, *supra*, **Chapter 5**.

554 On the requirements for a transfer of jurisdiction to take place, see, *supra*, **Chapter 5**.

555 Such co-operation may be said to fall within Art. 31 *b*), *i.e.*, to facilitate agreed solutions for the protection of the child in situations to which the Convention applies. See, *supra*, para. 11.11.

556 See Art. 7(2) of the 1980 Convention: “In particular, either directly or through any intermediary, they shall take all appropriate measures [...] *c*) [...] to bring about an amicable resolution of the issues”; see Art. 31 of the 1996 Convention, which states that mediation can be facilitated by “[t]he Central Authority of a Contracting State, either directly or through public authority or other bodies [...]”. In fact the mediation schemes in the context of the 1980 Convention differ immensely from Contracting State to Contracting State: in Argentina, for example, the Central Authority directly engages in mediation; the French MAMIF programme was performed by a public authority established within the Ministry of Justice in France but has recently been absorbed into the French Central Authority; the English Reunite pilot project is conducted by a non-governmental organisation; the German Federal Ministry of Justice both proposes and backs mediation in Convention cases, but the mediation itself is performed by professional mediators from non-governmental organisations.

557 *Op. cit.* note 537.

Convention, much of its content is applicable to mediation in international family disputes concerning children in general. However, it must be remembered that not all cases are suitable for mediation and similar processes. An initial assessment of the suitability of the individual case for mediation before attempting mediation is crucial to identify such cases.⁵⁵⁸

(c) Involvement of children in the mediation process

- 13.57 Lastly, the 1996 Convention places importance on hearing the child in proceedings concerning him / her by providing that not hearing the child may be a ground upon which to refuse recognition to a measure of protection taken in respect of that child.⁵⁵⁹ While mediation procedures are not subject to the same formalities as court proceedings, consideration should be given to the involvement of children in the mediation process.⁵⁶⁰

F SPECIAL CATEGORIES OF CHILDREN

(a) Children who are refugees, internationally displaced or without a habitual residence

- 13.58 For refugee children and children who, due to disturbances in their country, are internationally displaced, the Contracting State on whose territory the child is present will have jurisdiction to take measures directed to the person or property of the child.⁵⁶¹ This also applies to children whose habitual residence cannot be established.⁵⁶² It should be noted that Article 6 does not provide jurisdiction on an urgent or provisional basis: in this situation, the authorities of the Contracting State on whose territory the child is present have **general** jurisdiction to take measures of protection regarding the long-term care of the child.
- 13.59 The United Nations High Commissioner for Refugees (UNHCR) and other international bodies have noted that some countries, particularly when faced with large flows of internationally displaced persons, have tended to restrict the definition of “refugee” or used other methods to deny refugees the standards of treatment associated with recognition of refugee status.⁵⁶³ The application of Article 6 to children who, due to disturbances occurring in their country, are “internationally displaced” is intended to ensure a broad application of this Article.

558 Guide to Good Practice on Mediation (*op. cit.* note 537).

559 Where the measure is not taken in a case of urgency – see Art. 23(2) *b*) and, *supra*, paras 10.4-10.15.

560 On hearing the child in the mediation process, see the Guide to Good Practice on Mediation (*op. cit.* note 537).

561 For guidelines on making arrangements regarding intercountry adoption for internationally displaced children, see “Recommendation concerning the application to refugee children and other internationally displaced children of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption”, Annex A to the Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Permanent Bureau, 1994). This document is available at < www.hcch.net > under “Intercountry Adoption Section” then “Special Commissions” and “Previous Special Commissions”. For further information on the operation of the 1993 Intercountry Adoption Convention, see the Guides to Good Practice on the 1993 Hague Intercountry Adoption Convention (*op. cit.* note 2).

562 Art. 6. See, *supra*, paras 4.13-4.18.

563 See, for example, UN High Commissioner for Refugees, Note on international protection, 13 September 2001, A/AC.96/951, available at: < <http://www.unhcr.org/refworld/docid/3bb1c6cc4.html> > (last consulted August 2013), para. 85 and “Report of the Working Group [of April 1994] to study the application to refugee children of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption”, 1994, para. 12, available at < www.hcch.net > (path indicated, *supra*, note 561).

13.60 In the case of children without a habitual residence (Art. 6(2)), if it is later established that the child **does** have a habitual residence somewhere, the jurisdiction of the Contracting State where the child is present will become limited, under the Convention, to the operation of Articles 11 and 12.⁵⁶⁴

■ **EXAMPLE 13 (J)** *Thousands of people are displaced following a natural disaster in Contracting State A. Among those who arrive in Contracting State B are a 10-year-old boy and his 8-year-old sister who have been orphaned. Article 6 allows Contracting State B to exercise jurisdiction to take long-term measures directed to the protection of these children. However, before long-term measures of protection are taken, the authorities in both Contracting States A and B co-operate in an attempt to find out as much information as possible regarding the background of the children and to see if other family members can be located.⁵⁶⁵ Whilst such enquiries are ongoing, Contracting State B takes measures of protection it considers appropriate to ensure the protection of the children. When the enquiries have been concluded, depending upon their outcome, Contracting State B may, for example, consider giving parental responsibility to a relative residing in a third State or place the children in long-term foster care. Under the Convention, the measures taken will have to be recognised and enforced in all other Contracting States.*

■ **EXAMPLE 13 (K)** *An 11-year-old boy arrives unaccompanied in Contracting State A. He states that he has had to leave Contracting State B because of the civil war there in which his parents and siblings were killed. According to the laws of Contracting State A, in order to apply for refugee status, the child requires a guardian. Under Article 6(1), the authorities of the Contracting State where the child is present, in this case Contracting State A, have general jurisdiction in relation to the child. This includes jurisdiction to appoint a guardian for the child. The authorities in Contracting State A can also take other measures to provide for the care and protection of the child.*

■ **EXAMPLE 13 (L)** *A child arrives, unaccompanied, in Contracting State A and the State of the child's habitual residence cannot be determined. Under Article 6(2), the authorities in Contracting State A take measures of protection providing for the child's care. A month later, it is established that the child's habitual residence is in non-Contracting State B and the child's departure from that State did not result from an international displacement or refugee scenario. Despite this discovery, the measures of protection previously taken in respect of the child under Article 6 continue in force even though a change of circumstances has eliminated the basis upon which jurisdiction was founded.⁵⁶⁶ If the authorities of non-Contracting State B take a decision in respect of the child, the non-Convention rules of Contracting State A concerning the recognition and enforcement of foreign decisions will apply to determine the effect of the foreign decision.*

⁵⁶⁴ See, *supra*, paras 4.16-4.19 and the Explanatory Report, at para. 45.

⁵⁶⁵ Art. 30.

⁵⁶⁶ Art. 14.

In the future, since the State of the child's habitual residence has now been determined, the authorities of Contracting State A do not have jurisdiction to take further measures of protection in respect of the child on the basis of Article 6(2). Instead, under the Convention, they will only be able to take measures of protection based upon Articles 11 and 12 of the Convention.⁵⁶⁷ However, see paragraphs 3.11 to 3.13, supra, as regards the fact that, since the child has been established as being habitually resident in a non-Contracting State, Contracting State A may take measures of protection based upon its non-Convention rules of jurisdiction. However, if it does so, such measures will not be recognised and enforceable under the Convention.

(b) Runaway, abandoned or trafficked children

- 13.61 It may be that a child's habitual residence can be established for the purposes of Article 5 of the Convention but it is still necessary for the Contracting State on whose territory the child is present to take measures in respect of the child under Articles 11 and 12. This may be the case, for example, where a child has run away, been abandoned or been trafficked across borders.⁵⁶⁸
- 13.62 Jurisdiction based on Article 11 or 12 implies that the measures will be in force for a limited time and that the authorities of the State of the child's habitual residence are ultimately responsible for ensuring the care of the child.⁵⁶⁹ The authorities of the Contracting State where the child is present should work with the authorities of the State of the child's habitual residence to determine the most appropriate long-term arrangements for the child.
- 13.63 It should be noted that if the authorities in the State of the child's habitual residence are not in a position to take measures of protection relating to the child, a longer-term solution will have to be designed by the Contracting State on whose territory the child is present. Until measures of protection are taken by the State of the child's habitual residence, jurisdiction to protect these children rests, on an urgent or provisional basis,⁵⁷⁰ with the authorities of the Contracting State where the child is present. In addition, and depending on the situation, the authorities of the Contracting State where the child is present may consider the possibility of requesting a transfer of general jurisdiction according to Article 9 of the Convention. This, of course, will only be possible where the State of the child's habitual residence is another **Contracting State** and the other conditions for a transfer of jurisdiction are fulfilled.⁵⁷¹
- 13.64 The Convention also provides for co-operation between authorities of Contracting States in locating children in need of protection.⁵⁷²

567 If measures of protection are taken by Contracting State A in future under Art. 11 or 12, they will be recognised by operation of law and enforceable in all other Contracting States. Whether they are recognised / enforceable in **non-Contracting State B** will, of course, depend on non-Contracting State B's own private international law rules.

568 See, *supra*, note 3, regarding the complementary nature of the provisions of the 1996 Convention and the provisions of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (New York, 25 May 2000).

569 See, *supra*, **Chapters 6 and 7**.

570 *I.e.*, under Art. 11 or 12 of the Convention.

571 See, *supra*, **Chapter 5** regarding the transfer of jurisdiction provisions – the provisions only operate between two **Contracting States**. See also the requirement in Art. 9(1) that the Contracting State requesting a transfer of jurisdiction must be one of the Contracting States listed in Art. 8(2).

572 Art. 31 c) and see, *supra*, **Chapter 11**.

■ **EXAMPLE 13 (M)** *A 14-year-old girl from Contracting State B is found in Contracting State A having been trafficked into the country and forced to work. The authorities in Contracting State A have jurisdiction to take measures under Articles 11 and 12 in respect of the child, such as appointing a temporary guardian and arranging for her immediate care, but should make contact with, and co-operate with, the authorities in Contracting State B to determine what arrangements will be made for the long-term care of the child.⁵⁷³*

■ **EXAMPLE 13 (N)** *A 13-year-old boy runs away from his family home in Contracting State A and arrives in Contracting State B. His father suspects that the child may be in Contracting State B as some family members in Contracting State B have reported seeing him. The parents approach the Central Authority of Contracting State B for assistance.⁵⁷⁴ The Central Authority provides information on the laws and services in Contracting State B that may help the parents.⁵⁷⁵ The Central Authority also provides assistance in discovering the whereabouts of the child.⁵⁷⁶*

Once the child is located, Contracting State B takes a necessary measure of protection in relation to the child, placing the child in temporary State care.⁵⁷⁷ The parents wish to travel to Contracting State B to collect the child. Before this occurs, the authorities of Contracting States A and B should engage in close co-operation on this issue to ensure that this is a safe and appropriate option for the child. Indeed, depending on the circumstances of the case, it may be that the return of the child should only take place once the authorities of Contracting State A (the authorities with general jurisdiction in the case) have taken measures of protection to ensure that the child will be safe upon his return.⁵⁷⁸

■ **EXAMPLE 13 (O)** *A 13-year-old girl runs away from her home in Contracting State A accompanied by her 20-year-old boyfriend. The girl and her boyfriend initially travel to Contracting State B to start a life together. However, in Contracting State B the boyfriend gets into trouble with the police and the couple flee to Contracting State C.*

In the meantime, the girl's parents in Contracting State A have reported her missing. They are concerned for her well-being since they know that her boyfriend has a criminal record. The parents contact the Central Authority in Contracting State A for assistance in locating the girl.⁵⁷⁹ Due to the fact that the parents have very limited information as to where the girl may be, the enquiries initiated by the Central Authority in Contracting State A to locate the girl progress slowly.

573 Art. 30.

574 In this example, the parents go directly to the Central Authority of Contracting State B where they think the child is. It would also be perfectly possible for the parents to approach the Central Authority in Contracting State A where they reside for assistance. This Central Authority would then transmit the requests to the Central Authority of Contracting State B.

575 Art. 30(2).

576 Art. 31 c).

577 Art. 11.

578 In the case of a runaway child, hearing the child and, in particular, ascertaining the reasons why he / she ran away, will often be particularly important when considering what measures of protection should be taken in relation to the child, whether on an urgent or long-term basis (see, in this regard, the requirements of Art. 12 of the UNCRC). Close co-operation between the authorities of both Contracting States will also be extremely important to discover, for example, whether previous child protection concerns have been raised in relation to the child or whether the public authorities in the Contracting State of the child's habitual residence have been previously involved with the family.

579 Art. 31 c).

After a month in Contracting State C, the boyfriend gets into trouble with the police there and the girl comes to the attention of the authorities. The authorities make enquiries and, considering the girl to be in a dangerous situation, they take necessary measures of protection on the basis of Article 11 and place her in temporary foster care. The authorities contact the Central Authority in Contracting State A and inform them of the girl's presence in their jurisdiction and of the measures of protection taken.

However, the girl manages to escape from her foster care and, with her boyfriend, quickly moves on to Contracting State D. In accordance with Article 36, the authorities of Contracting State C (having ascertained that the girl has travelled to Contracting State D), inform the authorities in Contracting State D of the danger the girl is in and of the measures they took in respect of her. These measures will be recognised by operation of law in Contracting State D and all other Contracting States. The authorities of Contracting State C also, as a matter of good practice, inform Contracting State A of the girl's departure from their State and of her presence in Contracting State D.

In this case, each Contracting State in which the girl becomes present has jurisdiction to take measures of protection in respect of her on an urgent or provisional basis (under Arts 11 and 12 of the Convention). However, whilst the girl's "habitual residence" remains in Contracting State A, that is the only Contracting State which may take long-term measures of protection in respect of the girl (Art. 5). In this example, the authorities in Contracting State D may therefore either recognise and enforce the measure of protection taken by Contracting State C or, if they consider it necessary, may take another measure of protection for the girl under Article 11.

In the case of a child "on the run" for a considerable length of time, if, on the facts of the case, the situation develops so that the child is in a position where she can no longer be said to have a "habitual residence", the Contracting State where the child is present may decide that it has general jurisdiction to take long-term measures of protection for the child in accordance with Article 6(2) of the Convention. However, it should not be determined lightly that a child no longer has a habitual residence.⁵⁸⁰

■ EXAMPLE 13 (P)

A child, aged 11, is habitually resident with her parents in Contracting State E. Unbeknown to the public authorities in this Contracting State, the child is sent by her parents to Contracting State F to live, on a long-term basis, with her paternal aunt in order to help the aunt and to get an education. The child travels on a 6-month visitor visa. The aunt does not attempt to regularise the child's immigration status and does not send her to school – the child is in effect in a situation of domestic servitude.

Four years after the child's arrival in Contracting State F, the authorities learn of this situation from a new neighbour of the aunt. The competent authorities, after an assessment of the situation, take immediate measures to put the child into State care. Pending further investigations, the child is placed with a foster family. Under Article 5 of the 1996 Convention the authority considers that the child is now habitually resident in Contracting State F.

⁵⁸⁰ See, *supra*, paras 4.16-4.19 and, *infra*, paras 13.83-13.87.

In accordance with Article 32, the competent authority in Contracting State F, with the assistance of its Central Authority, contacts the Central Authority in Contracting State E in order to obtain any information available about the child and her family. The competent authority in Contracting State F wishes to assess whether returning the child to her parents in Contracting State E might be a possible long-term care option for the child (e.g., if the parents were entirely unaware of her circumstances and were lied to by the paternal aunt). The competent authority in Contracting State E communicates that the parents do not want the child to return to their care. The authority further reports that there are no other extended family members in State E who could be considered as potential carers for the child. As a result of this information, the competent authority in Contracting State F is able to start considering long-term measures of protection for the child.

(c) Children moving from one State to another when public authorities have been involved

13.65 There are increasing incidences of parents moving their children across international borders which may be to avoid child protection concerns and procedures in the State of the child's habitual residence.⁵⁸¹ This section provides information on how the 1996 Convention may be of assistance in these circumstances. There are two different scenarios to consider:

13.66 (1) Where a measure of protection has already been taken:

Where a competent authority of a Contracting State of the child's habitual residence has already taken a measure of protection concerning a child (e.g., there is an existing order that the child be placed in State care), and the parents subsequently move the child to another Contracting State, for example to avoid compliance with this measure, the 1996 Convention provides both Contracting States with considerable assistance in order to resolve the situation. First, the measure of protection may be recognised and enforced under the 1996 Convention in the Contracting State to which the child has been removed.⁵⁸² This may enable the child to be returned swiftly to the care of the competent authorities in the Contracting State of the child's habitual residence. In order for the recognition and enforcement of the measure of protection to take place promptly and efficiently and with all relevant information before the competent authorities, the co-operation provisions of the 1996 Convention are also of use.⁵⁸³ In addition, if the case is one of urgency, the 1996 Convention provides a ground of jurisdiction for the Contracting State to which the child has been removed to take necessary measures to protect the child while the child is present in this State (Art. 11).⁵⁸⁴

581 Some examples illustrating this phenomenon are: the English case of *Tower Hamlets London Borough Council v. MK and others* [2012] EWHC 426 (Fam) and the European Court of Justice cases: Case C-435/06 of 27 November 2007 and Case C-523/07 of 2 April 2009.

At the Special Commission (Part I), the International Social Service ("ISS") noted that there is a "growing phenomenon" of parents moving their children across international borders to avoid child protection concerns and procedures in the State of the child's habitual residence.

582 With regard to the operation of the recognition and enforcement provisions of the 1996 Convention, see, *supra*, **Chapter 10**.

583 In this regard, see further, *supra*, **Chapter 11**.

584 In this regard, see further, *supra*, **Chapter 6**.

If both relevant States are Parties to the 1980 Hague Child Abduction Convention and this Convention has entered into force as between them,⁵⁸⁵ it may also be possible, depending upon the particular facts of the case, for the competent authority in the Contracting State of the child's habitual residence to seek the child's return under the 1980 Convention if the conditions of that Convention are satisfied.

- 13.67 (2) Where child protection concerns are being investigated, but no measure of protection has yet been taken and no proceedings have been started:⁵⁸⁶

In this situation, there is no existing measure of protection to be recognised and enforced under the 1996 Convention by the Contracting State to which the child has been removed. Further, although dependent upon the particular facts of the case and the exact steps taken by the competent authority up to the time of removal, even if both relevant States are Parties to the 1980 Hague Child Abduction Convention, it may be unlikely that the authority's investigations are enough to provide it with "rights of custody" (within the autonomous meaning of the 1980 Convention) such that a return can be sought under this Convention.⁵⁸⁷

- 13.68 The 1996 Convention remains highly significant in these circumstances and may provide important assistance to both Contracting States to resolve the child's situation. For example:

- **The co-operation provisions**⁵⁸⁸

Article 36 of the Convention places an obligation on Contracting States which have taken or are considering taking measures of protection concerning a child, where they consider a child to be "exposed to a serious danger" and if they are informed that the child's residence has changed or the child is present in another State,⁵⁸⁹ to inform the authorities of that other State about the "danger involved and the measures taken or under consideration". This provision will usually oblige the Contracting State from which the child was removed to inform the State to which he / she was removed of the child's situation. This will alert this latter State to the potential need to locate the child⁵⁹⁰ and determine whether further action is necessary to protect the child.

Another provision which may be of assistance is Article 34 of the Convention. If either of the Contracting States concerned is considering taking a measure of protection in respect of the child (which is likely to be necessary in this situation to ensure the continued protection of the child), they may request the competent authorities of the other Contracting State to provide them with information relevant to the protection of the child. For example, the Contracting State to which the child has been removed may need information concerning the child's background and the history of the family in order for the authorities to assess whether the case is one of urgency and whether any measures of protection are necessary.

585 See Art. 38 of the 1980 Convention concerning the procedure necessary for the 1980 Convention to enter into force as between Contracting States where one Contracting State has acceded to the Convention.

586 See, *supra*, **Example 11 (E)**.

587 See the commentary in the "Case Law Analysis" section of INCADAT (< www.incadat.com >) regarding when a public authority may be said to have "rights of custody" concerning a child under the 1980 Convention such that the return remedy is available to it.

588 In this regard, see, *supra*, paras 11.18-11.22.

589 For the purposes of Art. 36, this need not be a Contracting State to the 1996 Convention: see, *supra*, paras 11.18 *et seq.*

590 In accordance with Art. 31 c), there may also be a direct request from the other Contracting State in this regard.

On a more general level, it will be very important that the relevant competent authorities in each Contracting State, where appropriate with the assistance of their Central Authorities, communicate clearly and effectively with each other and co-ordinate their actions so as to provide the continuous protection of the child.⁵⁹¹

- **The jurisdiction provisions**

The jurisdiction provisions of the Convention include clear and uniform rules as to the Contracting State which has jurisdiction concerning the child. The Convention establishes that it is the authorities in the Contracting State of the child's habitual residence which have general jurisdiction to take measures of protection concerning the child.⁵⁹² In the factual scenario described here, the child often is considered to remain habitually resident in the Contracting State from which the child was taken by the parents. If this is the case, jurisdiction to take long-term measures of protection concerning that child remains with this Contracting State which can therefore take such measures of protection (and such measures will have the benefit of being recognised and enforceable in the other Contracting State under the Convention). In addition, however, the Contracting State in which the child is present will have jurisdiction to take any necessary measures to protect the child in the interim if the case is considered one of urgency. Any such measures taken will lapse once the Contracting State of the child's habitual residence has acted – Art. 11(2).

Lastly, in this scenario, Article 7 of the 1996 Convention will also have to be considered by both Contracting States.⁵⁹³

- **The recognition and enforcement provisions**

These provisions of the 1996 Convention remain relevant because they ensure that when measures of protection are taken by one Contracting State, they will be recognised by operation of law in the other Contracting State and may be enforced there.

13.69 Finally, it should be noted that in these cases, at all stages it will be important that both Contracting States act with clarity, efficiency and expedition to ensure that the situation is resolved as quickly as possible and in the child's best interests.

■ **EXAMPLE 13 (Q)** *A mother and father live in Contracting State A with their child. Due to their inability to care for the child as a result of drug abuse, the child is removed from the care of his parents and placed for adoption in Contracting State A.*

Two years later, the mother becomes pregnant with a second child. The parents claim to have successfully recovered from their addictions and wish to care for the expected child. The competent authority in Contracting State A is investigating their situation but before a decision is rendered, the mother gives birth prematurely to the child. The couple, fearing that the child will be taken into State care, immediately flee to neighbouring Contracting State B.

591 See Art. 30(1). Direct judicial communications may also play an important role in this regard: see, *supra*, note 147.

592 Habitual residence is a factual concept, see, *infra*, paras 13.83 *et seq.*

593 For further detail on the operation of Art. 7, see, *supra*, Chapter 4 and, in particular, paras 4.20-4.25.

In accordance with Article 36, the authorities of Contracting State A (with the assistance of their Central Authority) immediately inform the competent authorities in Contracting State B (where they suspect the parents have fled) of the possible danger the newborn child is in and the measures of protection the authorities of Contracting State A were considering. They also request, in accordance with Article 31 c), that the relevant body in Contracting State B (either the Central Authority or the body this function is delegated to in this State) assist in discovering the whereabouts of the family.

The newborn child is located in Contracting State B and is found to be living with her parents in a hostel. The authorities in Contracting State B communicate this information to the authorities in Contracting State A. Contracting State B decides that it is necessary to take urgent measures (under Art. 11) to protect the child by taking the child into State care in Contracting State B. It communicates this information to Contracting State A. The authorities in Contracting State A, agreeing with Contracting State B that the child is still considered to be habitually resident in Contracting State A, seek an order (under Art. 5) for the child to be placed in the care of the State authorities in Contracting State A, pending an investigation into the long-term future of the child. This measure is recognised by operation of law in Contracting State B and enables the authorities of both Contracting States to co-ordinate a handover of the child to the competent authorities of Contracting State A (Contracting State B's urgent measure thus lapsing in accordance with Art. 11(2)).

G PROPERTY OF THE CHILD

- 13.70 Article 1 of the Convention states that measures directed to the protection of the **property** of the child are within the scope of the Convention. The aim of the Convention in this regard was to establish “precise rules concerning the designation and the powers of the child’s legal representative to administer the child’s property located in a foreign State”.⁵⁹⁴ It was thought that this may be particularly useful where it is necessary to take legal measures in respect of an estate which has passed to the child.⁵⁹⁵
- 13.71 Article 3 g) provides that the measures of protection directed to the protection of the child’s property may, in particular, deal with “the administration, conservation or disposal of the child’s property”. “This very broad formulation encompasses all the operations concerned with the [child’s] property, including acquisitions, considered as investments or as assignments disposing of the property transferred in consideration of the acquisition.”⁵⁹⁶ Measures of protection directed to the protection of the child’s property may cover, for example, the required authorisations or approvals for the sale or purchase of the child’s property.

594 Explanatory Report, para. 10.

595 *Ibid.* It should be noted that whilst the designation of the child’s representative and the extent of the representative’s powers would be matters falling within the scope of the Convention, the substantive matter of the settlement of the estate would not be within the scope of the Convention. The issue of succession is outside the scope of the Convention (Art. 4 f)). See further, *supra*, **Chapter 3, section C**, regarding the material scope of the Convention.

596 Explanatory Report, para. 25.

- 13.72 It is important to note that the Convention does not encroach on systems of property law and does not cover the substantive law relating to the content of rights over property, such as disputes in relation to ownership / title of property.⁵⁹⁷ For example, if there are requirements relating to the sale or purchase of land or buildings that are imposed by a Contracting State generally on all vendors or purchasers of certain land (e.g., special authorisation or approval for the sale or purchase of lands or buildings with special status due to their cultural or historical importance, or which are part of aboriginal reserves; or for the sale or purchase of lands or buildings by a foreigner) and have nothing to do with the fact that property is being bought or sold by a child's representative, granting these authorisations for sale will not fall within the material scope of the Convention.
- 13.73 Article 55 of the Convention allows Contracting States to make a twofold reservation in relation to the property of a child situated on its territory. First, under Article 55(1) *a*), a Contracting State may reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory, **irrespective** of where the child is habitually resident. It should be noted that such a reservation will not prevent the authorities of another Contracting State from having jurisdiction under the Convention to take measures of protection regarding that property. However, secondly, according to Article 55(1) *b*), a Contracting State may also reserve the right not to recognise under the Convention any parental responsibility or measure of protection in so far as it is incompatible with any measure taken by its authorities in relation to that property.
- 13.74 These reservations may be limited to certain categories of property, the most likely being that of immovable property.
- 13.75 Any reservation under Article 55 must be made in accordance with the procedure set down in Article 60 and will be notified to the depositary of the Convention. The reservation will be noted on the "status table" of the 1996 Convention published on the Hague Conference website (< www.hcch.net >, under "Conventions", "Convention 34" then "Status Table").

■ **EXAMPLE 13 (R)** *The child is habitually resident in Contracting State A and owns property in Contracting State B. A guardian is appointed in Contracting State A to deal with the child's property and is made responsible for managing some land in Contracting State B on behalf of the child. The order appointing the guardian is recognised by operation of law in all Contracting States. If Contracting State A delivers certificates of capacity to act (in accordance with Art. 40 of the Convention), it may be useful in this situation for the guardian to obtain such a certificate.*⁵⁹⁸

⁵⁹⁷ See, *supra*, paras 3.30 and 3.31. In this context, the fact that any measure concerning trusts is expressly excluded from the scope of the Convention should also be noted; see Art. 4 *f*) discussed, *supra*, at para. 3.43.

⁵⁹⁸ See, *supra*, para. 11.31.

- **EXAMPLE 13 (s)** *The child, habitually resident in Contracting State A, travels to Contracting State B for a holiday. While she is in Contracting State B she is injured in a car accident. After her recovery she returns home to Contracting State A. Legal proceedings commence in Contracting State B and the child is awarded a significant amount of money in compensation for the injuries she sustained in the car accident. However, the competent authority cannot locate someone in Contracting State B to act as a guardian for the child to receive the money on her behalf. In this situation, the competent authority may exercise jurisdiction under Article 12 of the Convention and order that a guardian be appointed in Contracting State B to manage the money on behalf of the child on a provisional basis. This order would lapse once such a guardian has been appointed by the authorities in Contracting State A. Otherwise, the competent authority in Contracting State B may make a request under Article 9 that a competent authority in Contracting State A agree to the court in Contracting State B assuming jurisdiction in respect of the appointment of the child's guardian. If the competent authority in Contracting State B receives a favourable response, then it may make an order appointing a guardian to manage the money on behalf of the child.*

H REPRESENTATION OF CHILDREN

- 13.76 The representation of children is often required due to a child's legal incapacity. "Representation" of a child generally involves acting on behalf of, or in the name of, a child vis-à-vis third parties. Situations in which this may occur include court proceedings involving the child, as well as property or financial transactions and consent to medical treatment.
- 13.77 Decisions regarding the representation of children are clearly within the scope of the Convention. Article 3 d) provides that measures of protection may, in particular, deal with the designation and functions of any person or body representing or assisting the child. In addition, the use of the term "powers" of the parents, guardians or other legal representatives in the definition of parental responsibility refers to the representation of children.⁵⁹⁹
- 13.78 This means that if the authorities of a Contracting State are taking a decision regarding the representation of a child, they must ensure that they have jurisdiction under the Convention to do so. However, where the authorities do not have jurisdiction under the Convention, if they consider that they are better placed in the particular case to assess the child's best interests in relation to this issue, they may consider whether to request a transfer of jurisdiction (where the requirements of Art. 9 are fulfilled).⁶⁰⁰ There may also be situations where it will be appropriate for a Contracting State **with** jurisdiction to consider the possibility of transferring jurisdiction to another Contracting State, e.g., where a legal representative has to be appointed for a child in legal proceedings in that other Contracting State.⁶⁰¹
- 13.79 Once taken, these measures of protection must be recognised and enforced in all other Contracting States, according to the rules of the Convention.

⁵⁹⁹ Art. 1(2). See further, *supra*, paras 3.18-3.24.

⁶⁰⁰ Art. 9. See further, *supra*, Chapter 5.

⁶⁰¹ Art. 8. *Id.*

13.80 Where “parental responsibility”⁶⁰² encompasses the representation of the child, the rules found in Articles 16 and 17 apply. Article 16 of the Convention sets out how to determine the **holders** of parental responsibility.⁶⁰³ Article 17 provides that the **exercise** of parental responsibility is governed by the law of the State of the child’s habitual residence. This means that the rules of the State of the child’s habitual residence which relate to the representation of the child by persons who have parental responsibility will determine the nature, powers and responsibilities of such representation.

■ **EXAMPLE 13 (T)** *Under the law of State A, parents acting as legal representatives have the authority to act individually to initiate a civil suit on behalf of the child. Under the law of Contracting State B, both parents have to agree before an application for such proceedings can be made. The family lives in State A. The mother and the child travel to Contracting State B. The child is involved in an accident in Contracting State B and the mother wishes to initiate proceedings there. The mother can do so without the agreement of the father because the law of State A does not require his agreement and State A is the State of the child’s habitual residence.*

13.81 The different laws involved may lead to some uncertainty about the nature or extent of the capacity or powers of the person responsible for the care of the person or property of the child. Article 40 of the Convention therefore provides for the possibility of delivering a certificate to the holder of parental responsibility, or the person entrusted with the protection of the child, which would resolve this uncertainty. This certificate may be delivered by the authorities⁶⁰⁴ of the Contracting State of the child’s habitual residence, or of the Contracting State where a measure of protection has been taken. It should indicate the capacity in which the person is entitled to act and the powers conferred upon him or her. The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.⁶⁰⁵

13.82 Article 19 of the Convention also provides some protection for third parties entering into transactions with a child’s legal representative. This protection is designed for those third parties who cannot be expected to realise that the rules of the State where the transaction takes place determining who can act as a child’s legal representative do not apply to a particular child as a result of the applicable law rules of the Convention. Therefore, if a transaction fulfils certain criteria, its validity cannot be contested, and the third party cannot be held liable on the sole ground that the other person was not entitled to act as the child’s legal representative under the law designated by the Convention. The criteria which must be fulfilled are:

- the transaction was entered into by a person who would be entitled to act as the child’s legal representative under the law of the State where the transaction was concluded;
- the third party did not know or should not have known that the parental responsibility was governed by the law designated by the Convention; and
- the transaction was entered into between persons present in the territory of the same State.⁶⁰⁶

602 Art. 1(2).

603 Discussed, *supra*, Chapter 9.

604 Art. 40(3) provides that Contracting States delivering such certificates must designate the authorities that are competent to draw up the certificate.

605 See the discussion of Art. 40, *supra*, at para. 11.31.

606 Art. 19(2).

- **EXAMPLE 13 (U)** *In Contracting State A, both parents can act as the child’s legal representatives in all circumstances, unless there is a decision of a competent authority to the contrary. In Contracting State B, an unmarried father cannot act as a child’s legal representative unless certain criteria are fulfilled.*

The child is born in Contracting State B to unmarried parents. He resides there with his mother. The criteria allowing the father to act as the child’s legal representative under the law of Contracting State B are not fulfilled. The child’s father is a national of Contracting State A and resides there and the child visits him frequently.

The paternal grandfather dies, leaving the child his rare book collection. The father enters into a contract in Contracting State A with a third party, who is also resident in Contracting State A, to sell the collection.

Provided that there was no reason for the third party to know that the question of the parental responsibility of the child was governed by the law of Contracting State B, the validity of the contract to sell the collection cannot be questioned and the buyer cannot be held liable on the sole ground that the father, who acted as the child’s legal representative, was not entitled to do so under the law designated by the Convention.

I CONNECTING FACTORS

(a) Habitual residence

- 13.83 Habitual residence is the main connecting factor and basis for jurisdiction used in the 1996 Convention.⁶⁰⁷ The use of habitual residence is a factor common to all the modern Hague Children’s Conventions.⁶⁰⁸ None of these Conventions contain a definition of “habitual residence”, which has to be determined by the relevant authorities in each case on the basis of factual elements. It is an autonomous concept and should be interpreted in light of the objectives of the Convention rather than under domestic law constraints.
- 13.84 The determination of habitual residence is of particular importance under the 1980 Convention and the 1996 Convention. It should be noted that the 1996 Convention uses the term habitual residence in a different context to the 1980 Convention. In the 1980 Convention, the determination that a child is habitually resident in the requesting State is necessary in order for the remedies of the 1980 Convention to apply, and is part of the larger enquiry as to whether there has been a wrongful removal or retention of a child. The role of habitual residence in the 1996 Convention is generally to assess which Contracting State’s authorities have jurisdiction to take measures of protection and whether their decisions should be recognised and enforced in other Contracting States. Since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of a child for the purposes of the 1996 Convention.

⁶⁰⁷ Art. 5, discussed, *supra*, paras 4.4 *et seq.*

⁶⁰⁸ The other Conventions are the 1980 Child Abduction Convention, the 1993 Intercountry Adoption Convention and the 2007 Child Support Convention and its Protocol. For the full text of these Conventions, see the Hague Conference website at < www.hcch.net > under “Conventions”.

13.85 A small number of trends can be noted in the international jurisprudence relating to the concept of “habitual residence”. As indicated above, they may be relevant for the factual determinations in either the 1980 or the 1996 Convention. First, where there is clear evidence of an intention to commence a new life in another State, then an existing habitual residence will usually be lost and a new one acquired.⁶⁰⁹ Secondly, where a move is open-ended, or potentially open-ended, the habitual residence at the time of the move may also be lost and a new one acquired relatively quickly.⁶¹⁰ However, where a move is time-limited, even if it is for an extended period of time, it has been accepted in a number of jurisdictions that an existing habitual residence can be maintained throughout.⁶¹¹ This could especially be the case if the parents have made an agreement for the child to have a temporary stay in another country.⁶¹² Assessments of other situations tend to follow one of two approaches. The “parental intention” approach looks at the shared intention of the parents regarding the nature of the move.⁶¹³ The “child-centred” approach instead emphasises the factual reality of the child’s life.⁶¹⁴ This factual reality includes elements such as education, social interaction, family relationships and generally refers to the focus of the child’s life. There have also been cases which mix both approaches, with reference to both the parental intentions and the child’s life.⁶¹⁵ In deciding which approach to follow, some courts take into consideration the age of the child involved; the older the child, the more likely the court will pay closer attention to the focus of his or her life.

609 Usually the relevant intention here will be the **parental** intention. See, e.g., *DeHaan v. Gracia* [2004] AJ No 94 (QL), [2004] ABQD 4 [INCADAT Reference: HC/E/CA 576]; *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 [INCADAT Reference: HC/E/UK 2]; *Re F. (A Minor) (Child Abduction)* [1992] 1 FLR 548, [1992] Fam Law 195 [INCADAT Reference: HC/E/UK 40]. It should be noted that it is possible, in rare situations, for a habitual residence to be lost by a child and no new habitual residence to be acquired (in which case, under the 1996 Convention, Art. 6(2) would be applicable). However, such a determination should be avoided where possible – see, *supra*, paras 4.16-4.19.

610 See *Al Habtoor v. Fotheringham* [2001] EWCA Civ 186 [INCADAT Reference: HC/E/UK 875]; *Callaghan v. Thomas* [2001] NZFLR 1105 [INCADAT Reference: HC/E/NZ 413]; *Cameron v. Cameron*, 1996 SC 17, 1996 SLT 306, 1996 SCLR 25 [INCADAT Reference: HC/E/UKs 71]; *Moran v. Moran*, 1997 SLT 541 [INCADAT Reference: HC/E/UKs 74]; *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3rd Cir. 2006) [INCADAT Reference: HC/E/USf 879].

611 See *Re H (Abduction: Habitual Residence: Consent)* [2000] 3 FCR 412 [INCADAT Reference: HC/E/UK 478]; *Morris v. Morris*, 55 F. Supp 2d 1156 (D. Colo., Aug. 30, 1999) [INCADAT Reference: HC/E/USf 306]; *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) [INCADAT Reference: HC/E/USf 301].

612 See *Denmark Ø.L.K.*, 5 April 2002, 16. *afdeling*, B-409-02 [INCADAT Reference: HC/E/DK 520].

613 See *Re B (Minors Abduction)* [1993] 1 FLR 993 [INCADAT Reference: HC/E/UK 173]; *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) [INCADAT Reference: HC/E/USf 301]; *Holder v. Holder*, 392 F.3d 1009, 1014 (9th Cir. 2004) [INCADAT Reference: HC/E/USf 777]; *Ruiz v. Tenorio*, 392 F.3d 1247, 1253 (11th Cir. 2004) [INCADAT Reference: HC/E/USf 780]; *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp.2d 1045 (E.D. Wash. 2001) [INCADAT Reference: HC/E/USf 482]; *Gitter v. Gitter*, 396 F.3d 124, 129-30 (2d Cir. 2005) [INCADAT Reference: HC/E/USf 776]; *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006) [INCADAT Reference: HC/E/USf 878]. It should be noted that within the *Mozes* approach the 9th Circuit did acknowledge that given enough time and positive experience a child’s life could become so firmly embedded in the new country as to make it habitually resident there notwithstanding lingering parental intentions to the contrary.

614 *Friedrich v. Friedrich*, 983 F.2d 1396, (6th Cir. 1993) [INCADAT Reference: HC/E/USf 142]; *Robert v. Tesson* (6th Cir. 2007) [INCADAT Reference: HC/E/US 935]; *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887.

615 The key judgment is that of: *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995) [INCADAT Reference: HC/E/USf 83]. See also: *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3rd Cir. 1995) [INCADAT Reference: HC/E/USf 879]. In this case a distinction was drawn between the situation of young children, where it was held that heavy reliance would be placed on shared parental intention, and that of older children where parental intention would have a more limited role to play. *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) [INCADAT Reference: HC/E/USf 530].

- 13.86 The temporary absence of the child from the place of his or her habitual residence for reasons of vacation, of school attendance or of the exercise of access / contact rights will not, in principle, change the habitual residence of the child.
- 13.87 The concept of habitual residence has been discussed by the Court of Justice of the European Union⁶¹⁶ (hereafter, the “CJEU”) in the context of the Brussels II a Regulation.⁶¹⁷ The CJEU has stated that the habitual residence of a child must be established taking into account all the circumstances specific to the individual case. In particular, the concept “must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory [...] and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration”.⁶¹⁸

(b) Presence

- 13.88 There are a number of instances where the presence of a child (or property of a child) is used as a connecting factor in the 1996 Convention.⁶¹⁹ The concept of “presence” denotes a physical presence in the territory of the Contracting State concerned. The concept does not require proof of residence of any sort: the mere physical presence of the child in the territory is sufficient.

(c) Nationality

- 13.89 This connecting factor does not stand alone in the 1996 Convention, but is instead a factor in the transfer of jurisdiction mechanism found in Articles 8 and 9.⁶²⁰ The authorities of a Contracting State of which the child is a national can request that jurisdiction be transferred to them, and can also be requested to accept a transfer of jurisdiction. The nationality of the child alone is not sufficient, and the authorities of that Contracting State must also be felt to be the best placed to assess the best interests of the child involved. A number of children have more than one nationality. Any of the Contracting States of which the child has the nationality may come within the conditions set out in Articles 8 for a transfer of jurisdiction.
- 13.90 Article 47 deals with the situation of Contracting States which have a number of territorial units that apply different laws and explains that any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection.

⁶¹⁶ Prior to 1 January 2011, the “Court of Justice of the European Communities”.

⁶¹⁷ Case C-523/07, A, 2 April 2009. See also the decision of the CJEU, *Barbara Mercredi v. Richard Chaffe* (C-497/10 PPU), 22 December 2010, which endorses this approach.

⁶¹⁸ Case C-523/07, A, 2 April 2009, paras 37-39. Of course, if the factors set out therein point to two or more different States as the possible State of the habitual residence of the child, it will ultimately be a matter for the judicial / administrative authority hearing the case to determine which factors are the most significant in the particular case at hand.

⁶¹⁹ See, e.g., Arts 6, 11 and 12, discussed, *supra*, in **Chapters 4, 6 and 7**.

⁶²⁰ Discussed, *supra*, at paras 5.9-5.12. However, in the 1961 Hague Convention on the Protection of Minors, nationality is used as a connecting factor. Art. 4 allows the State of which the child is a national to exercise jurisdiction to take measures for the protection of the person or the property of the child, if it considers that the interests of the child so require and after having informed the authorities of the State of the habitual residence of the child.

(d) Substantial connection

- 13.91 Where there is a “substantial connection” between a child and a Contracting State, the authorities of that Contracting State can either request a transfer of jurisdiction (to be able to take measures directed to the protection of the person or property of a child – Art. 9), or can be requested to **receive** such a transfer of jurisdiction (Art. 8). This applies if it is felt that the authorities of that Contracting State are the best placed to assess the best interests of the child involved.⁶²¹
- 13.92 In addition, Article 32 of the Convention enables the Central Authority or other competent authority of any Contracting State with which the child has a “substantial connection” to request a report on the situation of the child or to consider the need for taking measures of protection by the Central Authority of the Contracting State of the habitual residence of the child.⁶²²
- 13.93 Finally, the “substantial connection” test may also be used in the context of the 1996 Convention to apply a law that differs from that of the forum under Article 15(2).⁶²³
- 13.94 However, there is a slight difference in emphasis between Article 15 and Articles 8, 9 and 32 in relation to the test to be applied in this regard. In Article 15, the Contracting State exercising jurisdiction may exceptionally apply or take into consideration the law of another State with which **the situation** has a substantial connection. In the transfer provisions and in Article 32, the substantial connection of the Contracting State receiving / making a request for transfer (Arts 8 and 9) or making a request for a report or for measures of protection (Art. 32) must be **with the child**.
- 13.95 Whether a child, or a situation, has a “substantial connection” with a State must be assessed on a case-by-case basis. Examples of States with whom a child may have a “substantial connection” are: the State of the former habitual residence of the child, the State in which members of the child’s family live who are willing to look after him or her, the State in which the access parent having access / contact rights is living when the parents are separated, or the State in which the child has extended family members who he or she regularly visits.

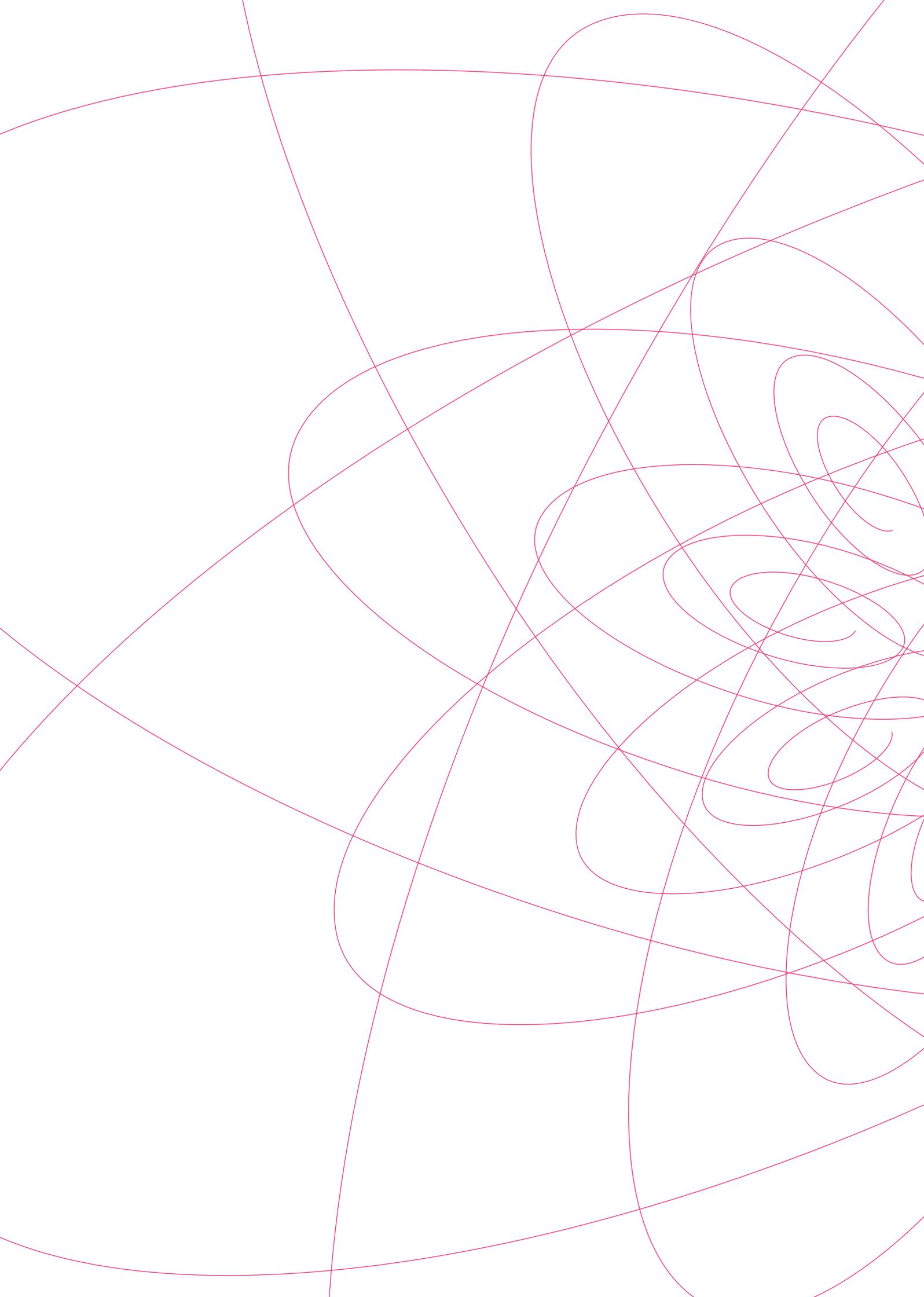
■ **EXAMPLE 13 (v)** *The authorities in Contracting State A are seised of a divorce application. The criteria set out in Article 10 are fulfilled and the authorities have jurisdiction to take measures regarding the children of the divorcing parents. The children are habitually resident in Contracting State B and it is agreed that they should remain residing there. The fact of habitual residence is a “substantial connection” in this case and the authorities of Contracting State A may use this in order to apply the law of Contracting State B to the decision.*⁶²⁴

⁶²¹ See, *supra*, **Chapter 5** for a detailed discussion regarding the transfer of jurisdiction provisions.

⁶²² Discussed, *supra*, at para. 11.24.

⁶²³ Discussed, *supra*, at para. 9.2.

⁶²⁴ Art. 15(2), discussed, *supra*, at para. 9.2.



Annex I

*Text of the Hague Convention of
19 October 1996 on Jurisdiction,
Applicable Law, Recognition, Enforcement
and Co-operation in Respect of Parental
Responsibility and Measures for the
Protection of Children*

34. CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

(Concluded 19 October 1996)

The States signatory to the present Convention,

Considering the need to improve the protection of children in international situations,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,

Recalling the importance of international co-operation for the protection of children,

Confirming that the best interests of the child are to be a primary consideration,

Noting that the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* is in need of revision,

Desiring to establish common provisions to this effect, taking into account the *United Nations Convention on the Rights of the Child* of 20 November 1989,

Have agreed on the following provisions –

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

- (1) The objects of the present Convention are –
- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
 - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
 - c) to determine the law applicable to parental responsibility;
 - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
 - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
- (2) For the purposes of this Convention, the term “parental responsibility” includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 2

The Convention applies to children from the moment of their birth until they reach the age of 18 years.

Article 3

The measures referred to in Article 1 may deal in particular with –

- a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b) rights of custody, 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, as well as rights of access

including the right to take a child for a limited period of time to a place other than the child's habitual residence;

- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- f) the supervision by a public authority of the care of a child by any person having charge of the child;
- g) the administration, conservation or disposal of the child's property.

Article 4

The Convention does not apply to –

- a) the establishment or contesting of a parent-child relationship;
- b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- c) the name and forenames of the child;
- d) emancipation;
- e) maintenance obligations;
- f) trusts or succession;
- g) social security;
- h) public measures of a general nature in matters of education or health;
- i) measures taken as a result of penal offences committed by children;
- j) decisions on the right of asylum and on immigration.

CHAPTER II – JURISDICTION

Article 5

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
- (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

Article 6

- (1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
- (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

Article 7

- (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
 - a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
 - b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

- (2) 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.
- (3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

Article 8

- (1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either
- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
 - suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.
- (2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are
- a) a State of which the child is a national,
 - b) a State in which property of the child is located,
 - c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
 - d) a State with which the child has a substantial connection.
- (3) The authorities concerned may proceed to an exchange of views.
- (4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

- (1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either
- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
 - invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.
- (2) The authorities concerned may proceed to an exchange of views.
- (3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Article 10

- (1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if
 - a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
 - b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.
- (2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Article 11

- (1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.
- (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.
- (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

- (1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.
- (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.
- (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 13

- (1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.
- (2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

CHAPTER III – APPLICABLE LAW

Article 15

- (1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.
- (2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.
- (3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Article 16

- (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child.
- (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.
- (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.
- (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Article 19

- (1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this Chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.
- (2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Article 21

- (1) In this Chapter the term “law” means the law in force in a State other than its choice of law rules.
- (2) However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

CHAPTER IV – RECOGNITION AND ENFORCEMENT

Article 23

- (1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
- (2) Recognition may however be refused –
 - a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
 - b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
 - c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
 - d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
 - e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
 - f) if the procedure provided in Article 33 has not been complied with.

Article 24

Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Article 26

- (1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
- (2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
- (3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

CHAPTER V – CO-OPERATION*Article 29*

- (1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.
- (2) Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

Article 30

- (1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.
- (2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

- a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
- b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;
- c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

- a) provide a report on the situation of the child;
- b) request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.

Article 33

- (1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.
- (2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Article 34

- (1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.
- (2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Article 35

- (1) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.
- (2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.
- (3) An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.
- (4) Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Article 36

In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

Article 38

- (1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.
- (2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

CHAPTER VI – GENERAL PROVISIONS*Article 40*

- (1) The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.
- (2) The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.
- (3) Each Contracting State shall designate the authorities competent to draw up the certificate.

Article 41

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 42

The authorities to whom information is transmitted shall ensure its confidentiality, in accordance with the law of their State.

Article 43

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 44

Each Contracting State may designate the authorities to which requests under Articles 8, 9 and 33 are to be addressed.

Article 45

- (1) The designations referred to in Articles 29 and 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law.
- (2) The declaration referred to in Article 34, paragraph 2, shall be made to the depositary of the Convention.

Article 46

A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law.

Article 47

In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

- (1) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;
- (2) any reference to the presence of the child in that State shall be construed as referring to presence in a territorial unit;
- (3) any reference to the location of property of the child in that State shall be construed as referring to location of property of the child in a territorial unit;
- (4) any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection;
- (5) any reference to the State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, shall be construed as referring to the territorial unit whose authorities are seised of such application;
- (6) any reference to the State with which the child has a substantial connection shall be construed as referring to the territorial unit with which the child has such connection;
- (7) any reference to the State to which the child has been removed or in which he or she has been retained shall be construed as referring to the relevant territorial unit to which the child has been removed or in which he or she has been retained;
- (8) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit;
- (9) any reference to the law or procedure or authority of the State in which a measure has been taken shall be construed as referring to the law or procedure or authority of the territorial unit in which such measure was taken;
- (10) any reference to the law or procedure or authority of the requested State shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought.

Article 48

For the purpose of identifying the applicable law under Chapter III, in relation to a State which comprises two or more territorial units each of which has its own system of law or set of rules of law in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which territorial unit's law is applicable, the law of that unit applies;
- b) in the absence of such rules, the law of the relevant territorial unit as defined in Article 47 applies.

Article 49

For the purpose of identifying the applicable law under Chapter III, in relation to a State which has two or more systems of law or sets of rules of law applicable to different categories of persons in respect of matters covered by this Convention, the following rules apply –

- a) if there are rules in force in such a State identifying which among such laws applies, that law applies;
- b) in the absence of such rules, the law of the system or the set of rules of law with which the child has the closest connection applies.

Article 50

This Convention shall not affect the application of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 51

In relations between the Contracting States this Convention replaces the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, and the *Convention governing the guardianship of minors*, signed at The Hague 12 June 1902, without prejudice to the recognition of measures taken under the Convention of 5 October 1961 mentioned above.

Article 52

- (1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
- (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.
- (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.
- (4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.

Article 53

- (1) The Convention shall apply to measures only if they are taken in a State after the Convention has entered into force for that State.
- (2) The Convention shall apply to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.

Article 54

- (1) Any communication sent to the Central Authority or to another authority of a Contracting 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 other State or, where that is not feasible, a translation into French or English.
- (2) However, a Contracting State may, by making a reservation in accordance with Article 60, object to the use of either French or English, but not both.

Article 55

- (1) A Contracting State may, in accordance with Article 60,
 - a) reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory;
 - b) reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
- (2) The reservation may be restricted to certain categories of property.

Article 56

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convoke a Special Commission in order to review the practical operation of the Convention.

CHAPTER VII – FINAL CLAUSES*Article 57*

- (1) The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session.
- (2) It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 58

- (1) Any other State may accede to the Convention after it has entered into force in accordance with Article 61, paragraph 1.
- (2) The instrument of accession shall be deposited with the depositary.
- (3) Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in sub-paragraph *b* of Article 63. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the 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.
- (2) Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
- (3) If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 60

- (1) 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 59, make one or both of the reservations provided for in Articles 54, paragraph 2, and 55. No other reservation shall be permitted.
- (2) Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.
- (3) 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 61

- (1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.
- (2) Thereafter the Convention shall enter into force –
 - a)* for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

- b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;
- c) for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 62

- (1) A State Party to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units to which the Convention applies.
- (2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period.

Article 63

The depositary shall notify the States Members of the Hague Conference on Private International Law and the States which have acceded in accordance with Article 58 of the following –

- a) the signatures, ratifications, acceptances and approvals referred to in Article 57;
- b) the accessions and objections raised to accessions referred to in Article 58;
- c) the date on which the Convention enters into force in accordance with Article 61;
- d) the declarations referred to in Articles 34, paragraph 2, and 59;
- e) the agreements referred to in Article 39;
- f) the reservations referred to in Articles 54, paragraph 2, and 55 and the withdrawals referred to in Article 60, paragraph 2;
- g) the denunciations referred to in Article 62.

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

Done at The Hague, on the 19th day of October 1996, 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 Eighteenth Session.



Annex II

Implementation Checklist

**HAGUE CONVENTION OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW,
RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF
PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN**

IMPLEMENTATION CHECKLIST

Introduction

A “CHECKLIST” OF MATTERS THAT MAY NEED TO BE EXAMINED IN IMPLEMENTING THE CONVENTION

The purpose of this Checklist is to highlight issues which may need to be considered by States when implementing the Convention.

The Checklist does not seek to prescribe the method by which the Convention is implemented in Contracting States. Rather, it indicates some questions that may arise prior to, or upon implementation of the Convention. The list is not exhaustive and there undoubtedly will be other issues specific to States that will require consideration.

The Checklist includes “Preliminary matters” for consideration that relate to the Convention generally, while “Specific Measures of Implementation” and the annexes to the Checklist may also assist a State when considering particular aspects of the Convention. The annexes cover the following matters:

Annex I

A summary of provisions in the Convention that may require implementing measures, *e.g.*, changes to legislation, prior to the Convention entering into force.

Annex II

A summary of information to be communicated to the depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands), and the Permanent Bureau of the Hague Conference on Private International Law.

Annex III

A summary of the functions performed by Central Authorities, competent authorities and other authorities under the Convention.

Annex IV

List of available resources from States that may be of assistance to other States.

Preliminary matters

I Contemplating becoming a State Party

- Consult with the Permanent Bureau of the Hague Conference on Private International Law and other Contracting States on the benefits of the Convention.
- Identify and consult with different stakeholders and experts in your State, for example, government and non-government agencies, judiciary, child protection services and the legal profession to:
 - determine the implications of becoming a State Party;
 - decide whether to become a State Party;
 - identify the best methods to implement the Convention; and,
 - develop a plan for the implementation and operation of the Convention.

2 Methods of implementation

- Consider the method by which the Convention will be implemented in your State:
 - In your legal system, is the Convention automatically incorporated into domestic law once the Convention enters into force?
 - or
 - In your legal system, is incorporation or transformation of the Convention into domestic law necessary? If so, by what means will this be achieved?

Regardless of whether incorporation or transformation is required in your legal system, some implementing measures will be needed to assist the effective implementation and operation of the Convention within the context of your own legal and administrative systems.
- Conduct a comprehensive review of domestic laws, rules, regulations, orders, policies and practices to ensure that existing provisions are not contrary to the Convention.
- If there are any existing provisions that create obstacles or impediments to the effective implementation and operation of the Convention, what amendments are needed? (See below under “Specific Measures of Implementation” and Annex I.)
- Consider which matters will need, in your legal system, to be dealt with:
 - by administrative acts (*e.g.*, appointment of a Central Authority¹);
 - in legislation (*e.g.*, rules of jurisdiction to take measures of protection, including provisions to transfer or assume jurisdiction²);
 - in rules, regulations or orders (*e.g.*, rules of Court to admit and consider evidence from another Contracting State in proceedings related to access³).

¹ Art. 29.

² Arts 8 and 9.

³ Art. 35.

3 Becoming a State Party – signature and ratification or accession

Any State may become a State Party to the Convention. However, there are different ways in which a State may become a Party to the Convention. Consider which of the following is applicable:

- **Signature followed by ratification:** A State which was a Member of the Hague Conference on 19 October 1996 may **sign and ratify** the Convention.⁴ By **signing** the Convention, a State expresses, in principle, its intention to become a Party to the Convention. However, signature does not oblige a State to ratify the Convention.⁵ The State will then need to **ratify** the Convention for it to enter into force. The Convention enters into force three months after ratification.⁶
- **Accession:** Other States wishing to become a Party to the Convention may **accede**.⁷ For an acceding State the Convention will enter into force nine months after the date of accession.⁸ Within the first six months of that nine-month period, any other Contracting State may raise an objection to the accession. The Convention will not enter into force between the acceding State and the State which has raised the objection, until such time as the objection is withdrawn. Nevertheless, the Convention will enter into force between the acceding State and all other Contracting States which have not raised an objection.⁹

Ratification or accession to the Convention requires the deposit by a State of the appropriate instruments with the depositary.¹⁰ Annex II summarises other information that should be communicated to the depositary and / or the Permanent Bureau of the Hague Conference on Private International Law prior to, or on, ratification / accession.

4 Developing a timetable

Determine the date on which the Convention should come into force for your State. In developing a timetable for implementation, keep this date in mind and take steps to:

- Ensure that the necessary instruments and information are deposited with the depositary and communicated to the Permanent Bureau (see Annex II).
- Ensure that the appropriate implementing measures are put in place, or enacted and in force, by the time the Convention enters into force in your State.
- Make certain that all key stakeholders (*e.g.*, government departments, child welfare agencies, courts, police, legal profession) are informed of when the Convention will come into force, any changes to law and procedures and, where applicable, their respective roles under the Convention.
- Ensure that adequate training is provided to individuals involved in the application of the Convention (*e.g.*, government departments, child welfare agencies, courts, police).
- Disseminate information on the Convention to the public.

4 Art. 57(1): The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session (19 October 1996).

5 Art. 18 of the *Vienna Convention on the Law of Treaties* obliges States, once an expression of consent to be bound by the treaty has been made, not to defeat the object and purpose of the treaty prior to its entry into force.

6 Art. 61(2) *a*): The Convention shall enter into force for each State **ratifying, accepting or approving** it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession.

7 Art. 58(1): Any other State may accede to the Convention after it has entered into force.

8 Art. 61(2) *b*): The Convention shall enter into force for each State **acceding**, on the first day of the month following the expiration of three months after the expiration of the period of six months.

9 Art. 58(3). Note that an objection in respect of an earlier accession may be raised by States at the time they **ratify, accept or approve** the Convention.

10 Art. 57(2); Art. 58(2).

5 Designations, declarations and reservations

There are some obligatory designations to be made under the Convention as well as optional declarations and reservations that States may consider necessary.

A summary of the information to be communicated to the depositary and / or the Permanent Bureau of the Hague Conference is provided at Annex II, but in particular:

- Ensure that the designation of a Central Authority or Central Authorities is made at the time of ratification / accession (or at least before the Convention enters into force).¹¹
- Ensure that, as a matter of priority, the contact details of each Central Authority and the language(s) of communication are communicated to the Permanent Bureau and are kept updated.
- Contracting States may designate the authorities to which requests under Articles 8 and 9 (transfer of jurisdiction) and Article 33 (requests for placement of child in care) are to be addressed.¹² Ensure that, as a matter of priority, the designation and contact details of the authorities are promptly communicated to the Permanent Bureau (as well as language(s) of communication of the authorities).
- Consider whether a declaration is needed under Article 34, paragraph 2 (where a measure of protection is contemplated information relevant to the protection of a child is to be communicated to its authorities only through the Central Authority).¹³
- Consider whether reservations are necessary under Article 54 (language of communication) and Article 55 (property).¹⁴
- Consider whether a declaration under Article 59 is necessary (application of the Convention to territories).¹⁵

6 Ongoing processes of implementation

- Develop and implement mechanisms to monitor and evaluate the application and functioning of the Convention, for example, consultation with courts and other authorities responsible under the Convention. Regular evaluation will assist in identifying and responding to any implementation difficulties that may arise.
- Ensure that any future changes to contact details of Central Authorities and designated authorities are provided to the Permanent Bureau.
- Access the following resources for assistance:
 - Website of the Hague Conference on Private International Law < www.hcch.net >.
 - P. Lagarde, “Explanatory Report on the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children”, *Proceedings of the Eighteenth Session, Tome II, Protection of children*, The Hague, SDU, 1998, available at < www.hcch.net > then “Publications” then “Explanatory Reports.”
 - *The Judges’ Newsletter on International Child Protection* – available on the website of the Hague Conference under “Publications” then “Judges’ Newsletter”.
 - List of available resources from States that may be of assistance to other States (see Annex IV).

¹¹ Art. 29; Art. 45. There is a risk that, if a Central Authority is not designated at the time of ratification / accession, this may lead other Contracting States to consider whether an objection to the accession should be raised.

¹² Art. 44; Art. 45.

¹³ Art. 45; Art. 60. See also Explanatory Report, para. 144.

¹⁴ Art. 60. See also Explanatory Report, para. 181.

¹⁵ Art. 60.

Specific measures of implementation

Chapter I – Scope

- ❑ Identify what measures of protection are already available in domestic law and how they relate to the Convention. The measures listed in Article 3 are not exhaustive and there may be other measures of protection available in your State.¹⁶
- ❑ Consider what rights and responsibilities under domestic law reflect the concept of “parental responsibility” (see Art. 1(2)).

Chapter II – Jurisdiction

- ❑ Consider whether changes to legislation are necessary for judicial or administrative authorities to have jurisdiction to take measures of protection based on a child’s “habitual residence” (Art. 5).
- ❑ Authorities must also be able to take certain measures of protection in respect of a child that is **present** in the State but not **habitually resident** (Arts 6, 11 and 12).
- ❑ Note that the Convention permits the authorities of a State to take measures of protection for a child habitually resident in another Contracting State in the context of an application for divorce, legal separation or annulment in respect of the parents’ marriage. However, this is in very limited circumstances, and only if permitted by the law of the State (Art. 10).
- ❑ Identify which judicial or administrative authorities will be competent to exercise jurisdiction under the Convention and ensure they are informed of any changes to legislation, policy or practice.
- ❑ Consider what implementing measures may be necessary to facilitate the transfer of jurisdiction under Articles 8 and 9, for example:
 - changes to legislation or rules to enable competent authorities to transfer or assume jurisdiction (authorities should be aware of the conditions under which the transfer may occur, in particular, that it must be in the best interests of the child and agreed to by both competent authorities (see Arts 8 and 9));
 - implementation of internal procedures, such as:
 - mechanisms for transferring or assuming jurisdiction (authorities should have the ability to agree to requests to transfer or assume jurisdiction in appropriate cases). Consider:
 - how the application for measures of protection will come before an authority where jurisdiction has been assumed; and,
 - how to ensure that where jurisdiction has been transferred the case is no longer dealt with by the authorities of your State.
 - procedures for the transmittal and receipt of requests for the transfer of jurisdiction and the role, if any, of the Central Authority (States should consider how their authorities will communicate with authorities in other Contracting States, for example, by a direct exchange between the competent authorities concerned with the proceedings or communication through the Central Authority; they should also consider whether a declaration under Article 44 is necessary (*i.e.*, designation of the authorities to which requests under Arts 8 and 9 are to be addressed));
 - procedures for parties to a matter (other than Central Authorities or competent authorities) that are invited to request the transfer of jurisdiction; it should be borne in mind that one of the parties may be located in another Contracting State.

¹⁶ By contrast, the list in Art. 4 of matters for which the Convention does not apply *is* exhaustive. See Explanatory Report, paras 26 to 36.

Chapter III – Applicable law

- Consider whether any changes to existing legislation are needed to enable:
 - the recognition of parental responsibility that has been attributed or extinguished under the laws of the child’s habitual residence, *i.e.*, the laws of another State (Art. 16);
 - authorities to **exceptionally** apply or take into account the law of another State where the child has a “substantial connection” (Art. 15(2)).

Chapter IV – Recognition and enforcement

- Consider whether any implementing measures are needed to amend existing legislation or procedures that are contrary to the following provisions:
 - measures of protection taken by the authorities of a Contracting State must be recognised “**by operation of law**” (Art. 23(1));
 - recognition of measures of protection taken in another Contracting State may only be refused on the grounds provided in Article 23, paragraph 2;
 - any “**interested person**” may request a decision on the recognition or non-recognition of a measure taken in another Contracting State (Art. 24). It may be that the interested person is located outside the requested State;
 - the procedure for the declaration of enforceability or registration of measures of protection must be “**simple and rapid**” (Art. 26);
 - enforcement of measures of protection takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child (Art. 28).
- Examine any existing domestic laws outside the Convention that apply to the recognition, declaration of enforceability or registration for enforcement of foreign measures of protection taken by another State and consider how these laws relate to the Convention.

Chapter V – Co-operation

a) Central Authorities

Central Authorities will play an important role in the effective operation of the Convention. Ideally, Central Authorities will be established and managed to provide a point of contact as well as complementing any existing domestic and cross-border arrangements.

- When planning to establish a Central Authority, consider:
 - which authority is best placed to perform the functions of a Central Authority; (This is most likely to be an authority with responsibilities that are closely related to the subject matter of the Convention. The Central Authority should also be in a position to promote co-operation amongst the national authorities responsible for the different aspects of child protection, as well as to co-operate with other Central Authorities in Contracting States. The Central Authority might, for example, be a government authority such as a ministry of justice or a ministry of child and family issues. Alternatively, a non-governmental organisation with similar responsibilities for children could be appointed.)
 - the functions that Central Authorities will perform and the functions that other authorities will perform (see Annex III);
 - the measures needed to ensure that each authority has the necessary powers and resources to effectively perform their functions under the Convention;
 - whether internal procedures are needed to ensure that requests are transmitted and processed quickly. For example:
 - communication between Central Authorities, competent authorities and other authorities **within** your State;
 - communication with authorities in other States.
 - how mediation, conciliation or similar means can be used to reach agreed solutions for measures of protection (Art. 31 *b*) (identify what services are available to enable and support parties to engage in making consensual solutions);
 - while Central Authorities and other public authorities of Contracting States are required to bear their own costs in carrying out their obligations under the Convention, consider whether “reasonable charges” might be imposed for the provision of certain services (Art. 38).¹⁷
- If your State is a Party to the 1980 Child Abduction Convention, consider whether the designated Central Authorities will be the same for both Conventions.
 - If the Central Authorities to be designated are not the same, ensure that the Central Authorities are able to consult in cases involving wrongful removal or retention of a child,¹⁸ or contact / access cases.

¹⁷ See Explanatory Report, para. 152.

¹⁸ See Art. 7.

b) Access – Article 35

- Consider whether any implementing measures or amendments to existing legislation are needed to:
 - assist in “securing the effective exercise of rights of access” for a parent residing in another Contracting State (identify which authorities will transmit and receive requests for assistance);
 - enable authorities that are seized of proceedings relating to access to consider information from another Contracting State as to the suitability of a parent residing in another State.
- Identify what legal assistance or other advice may be available to foreign parents seeking measures of protection relating to access in respect of a child that is habitually resident in your State.

For further advice on this aspect of the Convention, see *Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice (2008)* available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

c) Cross-border placement of children – Article 33

- Consider whether implementing measures or amendments to existing legislation are necessary in respect of the cross-border placement of a child in a foster family or institutional care or the provision of care by *kafala* or an analogous institution.
- Consider which authorities are best placed to:
 - consult on proposed placements;
 - prepare reports on the child;
 - receive and transmit requests from another Contracting State.
- Consider what safeguards and standards should apply before the Central Authority or other competent authority gives consent to a cross-border placement or provision of care.
- A designation under Article 44 may be necessary (Contracting States may designate the authorities to which requests under Art. 33 are directed).
- Ensure that communication procedures are implemented within the State and with other Contracting States, to avoid placements being made without the consent of the receiving State.

d) Judicial communication

The International Hague Network of Judges facilitates direct judicial communication between, and information sharing among, judges in different countries.

- If your State is represented in the Network consider whether the designated judge should also be available to communicate information relating to the Convention. Consider whether it may be useful to designate an additional judge with an interest or expertise in the Convention.
- If your State is not represented in the Network, consider whether a member of the judiciary in your State has a specialist interest in the operation of the Convention and would be willing to participate. Further information on the Network is available from the Permanent Bureau of the Hague Conference.
- Consider the possible role of direct judicial communication in the operation of Articles 8 and 9 in your State.
- Consider whether any implementing measures are necessary to provide the legal basis for direct judicial communications.

Confidentiality (Arts 41-42)

- Consider whether existing domestic laws are sufficient to protect the confidentiality of information that is gathered or transmitted under the Convention.
- If there are existing limitations in your State on the type of information that can be released to third parties, consider whether exceptions could be made for an exchange of information where it would be consistent with the objects of the Convention, for example, where a child is in need of urgent protection.

Relationship between the Convention and other instruments

- Identify any other international instruments to which your State is a Party which deal with the protection of children and consider how they will relate to the Convention. If appropriate, consider, together with other Parties to the instruments, whether any declaration is needed to ensure compatibility with the Convention (Art. 52).

March 2009

ANNEX I

Checklist of provisions in the 1996 Convention that may require changes in domestic laws or procedures

The following table provides a summary of provisions where it may be necessary to consider legislative or procedural changes for the effective implementation and operation of the Convention. The need of such changes will obviously be less for those countries in which the provisions of the Convention are automatically incorporated into the legal system.

ARTICLE	PROVISION	ISSUE
Article 5	The State of the child's "habitual residence" has jurisdiction to take measures of protection.	Do authorities have jurisdiction to take measures based on a child's "habitual residence"?
Articles 6, 11, 12	Contracting States may take certain measures of protection in respect of a child that is not habitually resident but is present in the State.	Do authorities have jurisdiction to take measures of protection when a child is present in the State but not habitually resident? Can authorities take measures of protection under Article 12 that are provisional and limited in territorial effect?
Article 7	In cases of child abduction, the authorities of the State of the habitual residence of the child immediately before the wrongful removal or retention retains jurisdiction for measures of protection until a number of conditions have been met.	Are there mechanisms in place to ensure that the authorities with jurisdiction are aware that the case is an international child abduction matter? Is the jurisdiction of authorities where the child is located limited so as to take only urgent measures?
Articles 8, 9	Jurisdiction may be transferred between authorities of Contracting States once certain conditions are fulfilled.	Can authorities assume or transfer jurisdiction in accordance with the Convention? Are procedures in place to facilitate the transfer of jurisdiction?
Article 10	Where certain conditions are fulfilled, authorities may be able to take measures of protection for a child habitually resident in another Contracting State where the measures are taken as part of an application for divorce or legal separation or annulment in respect of the parents' marriage.	Ensure that, if authorities in your State can take measures of protection as a part of an application for divorce or legal separation of parents, they do so only where the conditions in Article 10(1) a) and b) are fulfilled.

<p>Articles 1, 3, 16-18</p>	<p>The Convention defines parental responsibility in Article 1(2).</p> <p>Measures of protection include the attribution, exercise, delegation and termination or restriction of parental responsibility.</p>	<p>Is the concept of “parental responsibility” familiar to your system of law?</p> <p>What are the rights and responsibilities in your State that reflect the concept of parental responsibility?</p> <p>Will parental responsibility attributed or extinguished under the laws of the child’s habitual residence, <i>i.e.</i>, laws of another State, be recognised?</p>
<p>Article 23</p>	<p>Measures of protection shall be recognised in all Contracting States “by operation of law”.</p>	<p>Are measures of protection taken in another Contracting State recognised in your State by operation of law, <i>i.e.</i>, a measure will be recognised without the need to take proceedings?</p>
<p>Article 24</p>	<p>Any “interested person” may request a decision on the recognition or non-recognition of a measure taken in another Contracting State.</p>	<p>Can an interested person seek the recognition or non-recognition of a measure of protection? It may be that the interested person is located in another Contracting State.</p>
<p>Article 26</p>	<p>The declaration of enforceability or registration of measures of protection shall be “a simple and rapid procedure”.</p>	<p>Are procedures for registration of measures of protection “simple and rapid”?</p>
<p>Articles 30–39</p>	<p>Co-operation under the Convention.</p>	<p>Does each authority have the necessary powers and resources to effectively perform their functions under the Convention?</p>

ANNEX II

Information to be communicated to the depositary or the Permanent Bureau by States Parties to the 1996 Convention

DESIGNATIONS WHICH CONTRACTING STATES MUST PROVIDE DIRECTLY TO THE PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (ART. 45(1))

Article 29	<p>Contracting States shall designate a Central Authority to discharge duties which are imposed by the Convention on such authorities. As a matter of priority, contact details of Central Authorities and the language(s) of communication should be communicated to the Permanent Bureau.</p> <p>Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority.</p> <p>Where more than one Central Authority is designated, the State shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.</p>
Article 44	<p>Contracting States may designate authorities where requests under Articles 8, 9 and 33 are to be addressed.</p>

IT IS RECOMMENDED THAT THE FOLLOWING INFORMATION BE COMMUNICATED TO THE PERMANENT BUREAU:

Article 40	<p>Each Contracting State shall designate authorities competent to issue certificates under Article 40. The contact details and language(s) of communication of the designated authorities should be communicated to the Permanent Bureau.</p>
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NOTIFICATIONS TO BE COMMUNICATED TO THE DEPOSITARY¹⁹

Article 57	<p>Instruments of ratification, acceptance and approval.</p>
Article 58	<p>Instruments of accession.</p> <p>Objections to accession. Contracting States may object to the accession of an acceding State within six months after the receipt of a notification of accession.²⁰</p>
Article 62	<p>A State Party to the Convention may denounce the Convention by notification to the depositary.</p>

¹⁹ Ministry of Foreign Affairs of the Kingdom of the Netherlands.

²⁰ Note that an objection in respect of an earlier accession may be raised by States at the time they ratify, accept or approve the Convention.

DECLARATIONS WHICH MAY BE MADE AND MUST BE COMMUNICATED TO THE DEPOSITARY

Article 45	A State may declare that requests for information under Article 34(2) shall only be communicated through its Central Authority.
Article 52	The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by States Parties to such instrument.
Article 59	Where a State has two or more territorial units in which different systems of law are applicable, it may declare that the Convention shall extend to all or to one or more of the territorial units of the Contracting State (which must be identified). The declaration may be modified.

INFORMATION TO BE PROVIDED TO THE DEPOSITARY REGARDING AGREEMENTS BETWEEN CONTRACTING STATES:

Article 39	Contracting States may enter into agreements with other Contracting States with a view to improving the operation of the Convention. A copy of any such agreements shall be transmitted to the depositary.
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RESERVATIONS WHICH MAY BE MADE AND MUST BE COMMUNICATED TO THE DEPOSITARY

Article 54(2)	States may make a reservation objecting to the use of either French or English, but not both.
Article 55	A Contracting State may reserve the jurisdiction of its authorities to take measures of protection directed to the property of a child situated on its territory, and reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
Article 60(2)	The withdrawal of any reservations.

ANNEX III

Functions of Central Authorities and other authorities under the 1996 Convention

DIRECT OBLIGATIONS OF CENTRAL AUTHORITIES	
Article 30(1)	Central Authorities shall co-operate with each other and promote co-operation amongst competent authorities in their States.
Article 30(2)	Central Authorities shall take appropriate steps to provide information as to the laws of, and services available, in their State relating to the protection of children.
FUNCTIONS WHERE CONTRACTING STATES MAY DESIGNATE SPECIFIC AUTHORITIES TO WHOM REQUESTS BE DIRECTED (ART. 44)	
Article 8(1)	Requests to transfer jurisdiction: the authority of a Contracting State which has jurisdiction can request or ask the parties to request an authority in another Contracting State to assume jurisdiction in a particular case.
Article 9(1)	Requests to assume jurisdiction: the authority of a Contracting State which does not have jurisdiction can request or ask the parties to request an authority in the Contracting State of the habitual residence to transfer jurisdiction in a particular case.
Article 33	Requests regarding cross-border placement: the Central Authority or competent authority of Contracting States must consult the Central Authority or competent authority in another Contracting State regarding placement in that other State of a child in a foster family or institutional care, or the provision of care by <i>kafala</i> or other analogous institution. The requesting State must provide a report with reasons for placement. The requested State shall communicate its decision regarding the proposed placement.
OTHER FUNCTIONS WHICH MAY BE PERFORMED BY CENTRAL AUTHORITIES, COMPETENT AUTHORITIES OR OTHER PUBLIC AUTHORITIES AS DETERMINED BY THE CONTRACTING STATE ²¹	
Article 23, 24	Receipt and transmittal of requests related to the recognition or non-recognition of measures.
Article 26	Declaration of enforceability or registration for enforcement of measures of protection taken in another Contracting State.
Article 28	Enforcement of measures of protection.
Article 31 a)	Authorities to facilitate communication and offer assistance under Articles 8 and 9 and Chapter V.

²¹ For example: government agencies, courts, administrative authorities / tribunals, child welfare services, health professionals, social welfare services, counselling services, court services, police services, mediation professionals. States should ensure that each authority has the necessary powers and resources to perform effectively their functions under the Convention. Procedures may also be necessary to ensure that authorities are aware of the responsibilities and functions performed by different authorities in the State.

Article 31 b)	Facilitate consensual solutions for protection measures to which the Convention applies.
Article 31 c)	Provide assistance, on request from competent authorities, in locating missing children in need of protection.
Article 32 a)	Provide a report on the situation of the child in the State of habitual residence.
Article 32 b)	Request a competent authority to consider taking measures of protection for a child.
Article 34(1)	Receive or transmit requests for information relevant to the protection of a child. States may declare that requests under Article 34(1) be communicated only through its Central Authority.
Article 35(1)	Assist in securing the effective exercise of rights of access.
Article 35(2)	Authorities of the Contracting State where a non-custodial parent resides may, on request, gather information and make a finding on suitability of the parent to exercise access. Authorities of a Contracting State considering a request from a foreign parent for access to a child shall admit and consider information gathered, or findings made, by authorities of the Contracting State where the foreign parent resides.
Article 36	Where a child has been moved and is exposed to serious danger, competent authorities seized of the proceedings shall inform the State where the child is located about the danger (notwithstanding Art. 37).
Article 40	A certificate may be issued under Article 40 to a person having parental responsibility or is entrusted with the protection of the child's person or property. The certificate should indicate the capacity in which the bearer is entitled to act.

ANNEX IV

Available resources from States that may be of assistance to other States

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

< www.hcch.net >

AUSTRALIA (English)

Family Law (Child Protection) Regulations 2003 (Cth)

<http://www.comlaw.gov.au/comlaw/legislation/LegislativeInstrument1.nsf/0/71EB7B19DB0B4659CA256F700080E993?OpenDocument>

Family Law Act 1975 (Cth) – Division 4

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/59D7F763D13627B5CA2573B5001A451B?OpenDocument&mostrecent=1>

Child Protection (International Measures) Act 2003 (Qld)

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ChildProtInMA03.pdf>

Child Protection (International Measures) Act 2006 (NSW)

[http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22Child%20Protection%20\(International%20Measures\)%20Act%202006%20No%2012%22&nohits=y](http://www.legislation.nsw.gov.au/scanview/inforce/s/1/?TITLE=%22Child%20Protection%20(International%20Measures)%20Act%202006%20No%2012%22&nohits=y)

Child Protection (International Measures) Act 2003 (Tas)

http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=23%2B%2B2003%2BAT%40EN%2B20080731230000;hison=;prompt=;rec=;term

EUROPEAN UNION (English, French, Spanish)

Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Convention

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:151:0036:0038:EN:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:151:0036:0038:FR:PDF>

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:151:0036:0038:ES:PDF>

DENMARK (Danish)

Lov om Haagerbørnebeskyttelseskonventionen

Act on the 1996 Convention

<https://www.retsinformation.dk/Forms/R0710.aspx?id=31721>

FRANCE (French)

Enfance : responsabilité parentale et protection des enfants (Convention de La Haye)

http://www.assemblee-nationale.fr/13/dossiers/lahaye_responsabilite_parentale.asp

IRELAND (English)

Protection of Children (Hague Convention) Act, 2000

<http://www.irishstatutebook.ie/2000/en/act/pub/0037/index.html>

NETHERLANDS (Dutch)

Uitvoeringswet internationale kinderbescherming

International Child Protection Act, 16 February 2006

<http://wetten.overheid.nl/BWBR0019574/>

SWITZERLAND (French, German, Italian)

Announcement and documents - Towards more effective protection of the children in cases of international abduction, 28 February 2007

Vers une protection plus efficace des enfants en cas d'enlèvement international

Entführte Kinder werden besser geschützt

Migliore protezione dei minori rapiti

http://www.bj.admin.ch/bj/fr/home/dokumentation/medieninformationen/2007/ref_2007-02-281.html



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