

International Parenting and Child Protection Matters Beyond the Specific Issue of Parental Child Abduction: The 1996 Hague Convention on the International Protection of Children¹

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The globalisation of the economy and the increasing ease of travel have led to the internationalisation of families. Bi-national couples and families relocating from one country to another are now commonplace. The international element of family life often leads to complex legal situations – such as international parental abduction – when these families are facing a crisis. However, the scope of legal issues arising from the internationalisation of families and affecting children is wider than the abduction problem and can relate to relocation, access rights, urgent protection measures or transborder placement, to name only a few. This paper aims to present the 1996 Hague Convention on the International Protection of Children which establishes a comprehensive framework ensuring the effectiveness of the rights of children involved in a crossborder situation.

■ **Keywords:** International family law, Hague Convention, children, rights, protection, relocation

Although not as well known as the 1980 Hague Convention on the International Abduction of Children, the 1996 Hague Convention on the International Protection of Children has tremendous potential with respect to a large number of international family law matters.

For years, the 1996 Convention did not have many Contracting States, although Australia was one of them. Now that the 1996 Convention has 39 Contracting States,² its potential is developing at a fast pace. The interest of this Convention lies in the fact that it applies to a wide range of international parenting and child protection matters involving one or several measures (decisions) relating to the following issues:³

- Parental responsibility.
- Rights of custody, access, residence of the child.
- Guardianship, curatorship and analogous institutions.
- The designation and functions of any person or body having charge of the child's person or property, representing or assisting the child.
- The placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution.

- The supervision by a public authority of the care of a child by any person having charge of the child.
- The administration, conservation or disposal of the child's property.

In such matters, the 1996 Convention provides answers to questions of: jurisdiction, applicable law, enforcement, and administrative co-operation.

For the purpose of illustrating the principal provisions of the Convention dealing with jurisdiction and applicable law, this article uses the following factual scenario:

Mr and Mrs Smith live in country A. They had a child together (Smith Junior) who is now 10 years old. Country A is the State of the family's habitual residence. Both Mr and Mrs Smith intend to file an application for divorce in country A. Also, Mr Smith has received an incredible job offer which involves him relocating to country B very shortly. A number of questions regarding Smith Junior consequently arise: in case of disagreement between the parents, what country's judge will decide whether Smith Junior lives in country A with his mother or country B with his father? What country's judge will decide on the visits Smith Junior

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will enjoy with his other parent? What country's judge (or other relevant authorities) have jurisdiction if, one day, whilst visiting his father in Country B, Smith Junior finds himself in a situation which requires urgent protection measures? For the purpose of the exercise both country A and country B are Contracting States to the 1996 Hague Convention.

Background to the convention

1. The institution - The Hague Conference on Private International Law (HCCH)

The HCCH is an intergovernmental organisation which currently has 74 Members (73 States and 1 Regional Economic Integration Organisation [the EU]). The HCCH Permanent Bureau is based in The Hague, in The Netherlands. Its mission is to negotiate and draft international instruments (Conventions) to harmonise the rules of Private International Law in the fields of Family Law and Civil & Commercial Cooperation. In carrying out its mission, the HCCH ensures that the Conventions negotiated will not only be able to be implemented in various legal systems (e.g. in civil/common law systems or unitary/federal States) but will also fit within the socio-cultural background of each potential signatory State.

2. The context - Conventions relevant to Children pre-1996

Pre-1996, the global Children Conventions framework was principally made up of the following instruments:

- The Convention of 24 October 1956 on the law applicable to maintenance obligations towards children.
- The Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.
- The Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants.
- The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
- The 1989 UN Convention on the Rights of the Child.
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

After the 1950s and 1960s series of Children Conventions, the 1996 Conventions is part of a new series that aims to modernise and improve the rules governing children and family matters. The 1996 Convention, which replaced the 1961 Convention on the protection of infants, was drawn up taking into account the UN Convention on the Rights of the Child,⁴ and came in to complement the other Children Conventions, leading to a complete set called the 'Hague Children Conventions'.⁵

3. Contracting States

Australia is one of the very first countries in which the 1996 Hague Convention entered into force.⁶ Australia being a dualist legal system, the provisions of the Convention were enacted into domestic legislation, and are now found in PART XIII A Div 4 of the *Family Law Act 1975* (Cth) and in the Family Law (Child Protection Convention) Reg 2003.

Since January 2010, the Convention has entered into force in 23 Contracting States (out of a total number of 39 Contracting States).⁷ The scope of the Convention, combined with the recent increase in the number of Contracting States, explains why this Convention has been considered by many to be a 'sleeping giant'.

Jurisdiction

'In what country do we start our case with respect to issues relating to Smith Junior?' – or in legal terms, 'what country's authorities⁸ have jurisdiction?' – is the first question that will come to Mr and Mrs Smith's mind now that the family is spread across two countries.

The philosophy underlying the 1996 Hague Convention is to centralise jurisdiction in the authorities of the State of the child's habitual residence⁹ thereby avoiding competition of authorities arising from concurrent jurisdiction. This solution appears natural as in an overwhelming majority of cases, the authorities of the State of the child's habitual residence are the best place to hear the case.

Thus, with respect to measures directed at protection of the child / his or her property,¹⁰ Article 5 of the Convention provides that jurisdiction belongs to the court, or relevant authorities, of the State of the Child's habitual residence.

Illustrations

- *Mr Smith has relocated to country B. Mrs Smith and Smith Junior still live in country A. Mr Smith would like Smith Junior to relocate to country B. Mrs Smith does not agree. Mr Smith knows that, therefore, a judge will have to decide on this issue. In the event the judge decides against Smith Junior's relocation, Mr Smith would like his son to travel to country B as often as possible during long holidays. Also, Mr Smith would like to visit and spend time with his son when he travels to country A. Mr Smith wonders in what country he should file his application for relocation (and, in the alternative, for 'access' and 'contact'). Country A being the State of habitual residence of Smith Junior, the authorities of country A have jurisdiction, under the Convention, to hear the matter. Mr Smith should therefore file his application in Country A.*
- *Smith Junior has inherited some property from his grandmother. His mother, who is the trustee holding the inherited assets on trust for him, is dissipating them in breach of her duties whilst Smith Junior is on a 3-month holiday visiting his father in country B. The judge having jurisdiction to*

hear the matter and take measures directed at the protection of Smith Junior's property is the judge from country A because country A is the habitual residence of Smith Junior.

Unsurprisingly, the 1996 Hague Convention¹¹ follows the central principle of the 1980 Hague Abduction Convention principle. In case of wrongful removal¹² or retention¹³ of the child, the 1996 Convention states that the authorities of the Contracting State in which the child was *habitually resident immediately before* the wrongful removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State.

Illustration

For the Smith family, this principle means that in the event Mr Smith abducted Smith Junior from country A to country B or did not return Smith Junior to country A after Smith Junior spent some holiday in country B, the judge who has jurisdiction to hear about this dispute is the judge from country A – the reason being that Country A was the habitual residence of Smith Junior before his wrongful removal (or wrongful retention).

In matters involving Internationally displaced children (e.g. refugee children/disturbance in country of origin/country of origin cannot be established),¹⁴ Article 6 of the Convention specifies that jurisdiction belongs to the authorities of the Contracting State on the territory of which these children are present as a result of their displacement.

Illustration

Smith Junior is watching the news. He learns that two boats with refugee children on board have been located. One boat has arrived to the shores of country A and one boat has just made it to country B. Protection measures have to be taken with respect to these children. Because these children are internationally displaced (they were not abducted) the relevant authorities having jurisdiction to decide on protection measures will be the authorities of country A for children who arrived into country A, and the authorities of country B for children who arrived into country B.

The authors of the Convention have introduced some flexibility with respect to the principles embodied in Article 5 and 6 by introducing, in specific circumstances, the possibility of a transfer of jurisdiction.¹⁵

Anticipating the unpredictable turns of life, the 1996 Convention Articles also provides for situations of urgency and required protection through concurrent jurisdiction provisions. In case of urgency,¹⁶ the courts – or relevant 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*. Similarly, in circumstances where provisional measures of territorial effects are required¹⁷ ¹⁸ the court, or relevant 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.¹⁹ Urgency measures and provisional measures of territorial effects lapse as soon as the court, or relevant authorities which have jurisdiction under Articles 5 to 10²⁰ of the Convention, have taken the measures required by the situation.

Illustration

Smith Junior is on holiday visiting his father in Country B. His father's new partner turns out to be a drug addict and is abusing Smith Junior. Smith Junior's father becomes aware of the situation and thinks protection measures should be ordered. Mr Smith wonders what court should hear the matter – after all Smith Junior's country of habitual residence is country A. If one of country B's courts assesses the situation as urgent, then country B's courts will have jurisdiction to hear the matter. Protection measures taken by country B's courts (or relevant authorities) will lapse as soon as country A's courts (or relevant authorities) have taken measures of protection with respect to this matter.

Applicable law

Once the issue of jurisdiction is resolved and the applicant knows in what country to start their case, the next stage consists of determining what law is applicable to the matter.

The **general principle** is that in exercising their jurisdiction under the provisions of Chapter II of the Convention (chapter on jurisdiction), the authorities of the Contracting States must apply their own law.²¹

Illustration

In the example of child abuse given above, Country B's court will apply Country B's law when hearing and deciding the case of Smith Junior.

However, this general principle is flexible. Where the protection of the person or the property of the child requires, authorities may *exceptionally* apply or take into consideration the law of another State with which the situation has a substantial connection.

Further, 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.

Illustration

Smith Junior's paternal uncle (Uncle Smith) lives in country A. He is a violent man with a criminal record of aggravated assault, including against children. Two years ago, a country A court ordered supervised contact with Uncle Smith as a protection measure for Smith Junior. In the conditions of

application of this measure, the court specified that supervised contact between Smith Junior and his uncle can only take place at a specific contact centre where the staff are trained to handle situations of serious physical violence. A few months ago, Country A court has allowed Mr Smith to relocate with his son to Country B. Smith Junior relocated to country B two weeks ago. Uncle Smith announces his intention to come and visit both Mr Smith and Smith Junior in Country B. Now that country B is the habitual residence of the child, the condition of application of the protection measure (condition of application of supervised contact) is determined by the law of country B.

The Convention also provides for clear rules concerning the law applicable to parental responsibility.²² The Attribution or extinction of parental responsibility is governed by the law of the State of the habitual residence of the child. The exercise of parental responsibility is governed by 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. Parental responsibility referred to in Article 16 of the Convention may be terminated, or the conditions of its exercise modified, by measures taken under the Convention.

Last, the universal character of the conflict of law rule should be underlined.²³ The provisions of Chapter III of the Convention (Chapter on applicable law) apply even if the law designated by these provisions is the law of a non-Contracting State.

Recognition and enforcement

The finality of international co-operation in legal matters is to ensure that, once the issues of jurisdiction and applicable law are resolved, the orders made by the courts – or relevant authorities – of one country can effectively and swiftly be recognised and, where required, enforced in another country.

1. Recognition

The 1996 Hague Convention provides an unequivocal recognition principle.²⁴ The measures taken by the authorities of a Contracting State must be recognised *by operation of law* in all other Contracting States. Recognition by operation of law means that no proceedings are required for recognition to be obtained in another Contracting State, as long as the party relying on the measure does not take any step to enforce it.²⁵

Exceptionally, recognition may be refused by another contracting State. Grounds for refusal are limited to those set out in Article 23(2) of the Convention:

- 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.

A person may have an interest in knowing whether a measure taken by a Contracting State will be recognised in another Contracting State before this question becomes the object of a dispute.²⁶ Thus, under the Convention, any interested person can request from the relevant authorities of a Contracting State that they decide on the recognition (or non-recognition) of a measure taken in another Contracting State. The Convention specifies that the law of the requested State governs the procedure.

Consistent with the general philosophy of the Convention, the authority of the requested State is bound by the findings of fact on which the authority of the requesting State based its jurisdiction to take the measure at stake.²⁷

2. Enforcement

Where the enforcement of a measure taken in a Contracting State is sought in another Contracting State, the rules set out by the Convention provides an efficient framework designed around three principles:

(1) Where a measure taken in a Contracting State requires enforcement in another Contracting State, the relevant authorities of the requested State *must declare* such measure enforceable *or register it* for the purpose of enforcement according to its rules for registration of foreign measures. The procedure applied to the declaration or the registration *must be simple and rapid*.²⁸

(2) Consistent with the overall philosophy of the Convention, the authorities of the requested State cannot review the merits of the measure taken.²⁹

(3) Where a measure is taken in a Contracting State and declared enforceable (or registered for enforcement) in another Contracting State, the measure must be enforced in the latter State as if it had been taken by the authorities of the latter State.³⁰

Administrative co-operation

Similar to other Hague Conventions, the 1996 Convention establishes a system of Central Authorities whose functions are to ensure effective co-operation between Contracting States.

The Central Authority for the Commonwealth of Australia is the International Family Law Section, Access to Justice Division, of the Commonwealth Attorney-General's Department. Additionally, all Australian States and Territories have their own Central Authorities.³¹

The Central Authorities have general obligations of co-operation. These general obligations include obligations such as the facilitation of agreed solutions (notably through mediation) for the protection of the child (or his/her property) and or providing information as to the whereabouts of a child who may be in need of protection.³²

Further, the Convention imposes specific functions of co-operation on the Central Authorities, notably with regard to transborder placements, access rights, and exchange of information in particular circumstances.³³

Access rights A parent residing in a State where the child does not habitually reside and who is seeking to obtain (or maintain) access to the child, may request the Central Authority of his State to assist him/her with the application by gathering evidence and making a finding on the suitability of that parent to exercise access rights.

Measures of protection: transmission of information and implementation 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 the Convention. Under the Convention, the implementation of such measures includes the effective exercise of rights of contact.

Where a measure of protection is contemplated by a Contracting State, competent authorities in relevant Contracting States must communicate information relevant to the protection of the child where so requested.

Serious danger: Transmission of information Where a protection measure has been taken to protect a child exposed to a serious danger and that child has relocated – or is present – in another Contracting State, the former State must inform the latter State about the danger and the measures taken (or under its Authorities' consideration).

Transborder placements The Central Authority of the Contracting State having taken the placement decision must consult the Central Authority of the other Contracting State where the placement will be effected. The former Central Authority must also transmit a report on the child together with the reasons for the proposed placement to the latter Authority.

Exception to the transmission of information Where the transmission of information is likely to create a risk for a child (or a child's property) an Authority shall not request or transmit such information.

Conclusion

The provisions of the 1996 Hague Convention have succeeded in establishing a protection framework for children

in a broad scope of international situations ranging from relocation to transborder placement. Thus, the Convention ensures the effectiveness of a vast number of the rights of the child, whether the children involved are refugees, in need of a placement or caught in the middle of the breakdown of their parents' relationship.

In light of the large number of international matters which are susceptible to falling within its scope, the 1996 Convention should become, in the future, as well-known as the 1980 Hague Abduction Convention amongst family law practitioners, social workers and the general public. The Permanent Bureau of the Hague Conference has published several documents assisting Contracting States in the practical implementation of the Convention,³⁴ and providing guidance with respect to its practical operation.³⁵

Endnotes

- ¹ The official and full title of the Hague 1996 Convention is: the *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 'The 1996 Hague Convention' or 'the Convention'. The text of the Convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=70.
- ² As at 22 June 2013.
- ³ The scope of the Convention is defined by Article 3. Matters excluded from the scope of the Convention are listed under Article 4.
- ⁴ See Convention Preamble, paragraph 7.
- ⁵ Post-1996, the following Children Hague Conventions were signed: The Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
- ⁶ The 1996 Hague Convention entered into force in Australia on 1 August 2003.
- ⁷ The Status table of the 1996 Hague Convention is available at: http://www.hcch.net/index_en.php?act=conventions.status&cid=70
- ⁸ The term 'authorities' includes judicial authorities.
- ⁹ See Article 5 of the Convention.
- ¹⁰ See Article 5 of the 1996 Convention.
- ¹¹ See Article 7 of the 1996 Convention.
- ¹² The Convention term for what is also known as 'abduction'.
- ¹³ The Convention term for what is also known as 'not returning the child'.
- ¹⁴ See Article 6 of the Convention.
- ¹⁵ These provisions are found under Article 8 (*Transfer of jurisdiction to an appropriate forum*) and 9 (*Jurisdiction requested by an appropriate forum*) of the Convention.
- ¹⁶ See Article 11 of the Convention.
- ¹⁷ See Article 12 of the Convention.
- ¹⁸ Subject to Article 7 of the Convention.
- ¹⁹ In so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.
- ²⁰ See above under the heading 'II – Jurisdiction'.
- ²¹ See Article 15 of the Convention.

²² See Articles 16, 17 and 18 of the Convention.

²³ See Article 20 of the Convention.

²⁴ See Article 23(1) of the Convention.

²⁵ With respect to enforcement, see the heading 'IV - 2. Enforcement' below.

²⁶ See Article 24 of the Convention.

²⁷ See Article 25 of the Convention.

²⁸ The only grounds for a refusal to enforce a measure taken in a Contracting States are similar to the grounds for a refusal of recognition, see Article 26(3) and Article 23(2).

²⁹ Article 27 of the Convention.

³⁰ Article 28 of the Convention.

³¹ The list of Central (and competent) Authorities under the 1996 Hague Convention is available at: http://www.hcch.net/index_en.php?act=conventions.authorities&cid=70

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³² For further details, see Article 31 of the Convention.

³³ See Articles 33 to 37 of the Convention.

³⁴ An Implementation Checklist was published in 2009 by the Permanent Bureau of the Hague Conference and is available at: http://www.hcch.net/index_en.php?act=publications.details&pid=4727&dtid=2

³⁵ A Revised Draft Practical Handbook on the operation of the 1996 Hague Protection of Children Convention – aimed at all users of the 1996 Convention – was published in 2011 by the Permanent Bureau of the Hague Conference And is available at: http://www.hcch.net/index_en.php?act=publications.details&pid=5535&dtid=2

