

INTRODUCING THE HAGUE ABDUCTION CONVENTION

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§ 1.01 INTRODUCTION

The purpose of this book is to provide legal practitioners in the United States and overseas with an introduction to the operation in the United States of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the “Hague Convention” or the “Convention”).

The Convention is an international treaty which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. It has been signed by more than 90 countries, including the United States. It provides that a child who has been taken to or retained in a foreign country without the consent of a person with “rights of custody” over the child under the law of the child’s “habitual residence” must be returned to the habitual residence unless one of six exceptions applies.

This book is primarily concerned with what are sometimes referred to as “incoming” abductions, meaning abductions from other countries into the United States.

U.S. courts have no jurisdiction under the Convention in the case of “outgoing” abductions from the United States to other countries, with limited exceptions, since those cases must be brought in the courts of the foreign country to which the child has been ab-

ducted. The primary exception is that the judicial or administrative authorities of the country to which a child has been taken may, before ordering the child's return, request that the applicant obtain from the State of the habitual residence of the child a decision or other determination that the removal or retention was "wrongful" within the meaning of the Convention (Article 15 of the Convention).

§ 1.02 A REVOLUTIONARY TREATY

The Convention is a revolutionary document. Its drafters determined that it is wrong that a parent should be able to take a child to another country in search of a friendlier forum for a child custody case, and that it would be far better to return an abducted child to his or her habitual residence so that the courts there may determine what is best for the child. It embodies the brave decision, made thus far by more than 90 countries, to defer any decision about what is best for wrongfully removed or retained children until they have been returned to the country from which they have been taken.

The Convention provides an extremely simple and relatively unambiguous remedy that is expressly designed to deter parents from taking their children across international borders without the other parent's consent. That remedy is to send the child "back home" forthwith.

The fundamental idea underlying the Convention is that "we will return children to you so that in the future you will do the same for us." It works only because each country has agreed to trust the other "Hague partner" countries to do the same thing when similar cases come before their courts.

However, when the purported abduction is by a parent who has brought a child "back home" to the primary care provider's country of origin, it may require a judge who is extremely committed to the treaty to follow its precepts, sometimes even in the face of public opinion and a judge's own sense of right and wrong.

The Convention requires judges to be brave enough to implement its terms even in the face of concerns that a return order might not be in the child's best interests. It sometimes compels courts to have kids put on planes, sometimes forcibly, to go back to the place from which they were taken, even in the face of a parent's frantic pleas that she brought the child "home" to avoid injustice overseas.

The treaty embodies the "greater good" theory. The best interests of any particular child might perhaps not be served by returning that child to the country from which he or she was removed, usually by a loving parent. But

the interests of children at large are best served by ensuring that parents who abduct their children are not rewarded for doing so.

While family lawyers and judges are trained to consider nothing but the best interests of the child in any child custody case before them, the Hague Convention requires that “best interests” should not be considered and that the child must instead be sent back to the country from which his or her parent has fled.

On its face, the treaty is purely a jurisdiction-selection document. The Convention does not resolve any of the substantive issues concerning what is best for a child. It simply provides for the prompt return of an abducted child so that the courts in the jurisdiction from which the child was taken may make those decisions.

The Convention resulted from a consensus that international child abduction is a terrible thing. In the *Abbott* case in the U.S. Supreme Court, Justice Anthony Kennedy, writing the majority opinion, said that “[A]n abduction can have devastating consequences for a child.” He quoted with approval language and studies showing that “[S]ome child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse”; that studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to post-traumatic stress disorder and identity-formation issues; and that a child abducted at an early age can experience loss of community and stability, leading to loneliness, anger, and fear of abandonment; and that abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child’s ability to mature.¹

§ 1.03 A FUNDAMENTAL MISCONCEPTION

It must be acknowledged that the Hague Convention was drafted upon the basis of a fundamental misconception. When it was negotiated, it was anticipated that the abductors would mostly be noncustodial fathers. In fact, most parental international child abductors are the custodial parents of their children, most of whom are the children’s mothers, as the U.K. Supreme Court has expressly acknowledged.² One might well ask whether such a clear-cut but sometimes harsh remedy as prompt return would have been adopted had the drafters understood this essential fact.

1. *Abbott v. Abbott*, 560 U.S. 13, 130 S. Ct. 1983, 1996 (U.S., 2010).
2. *Re E* [2011] UKSC 27 [2011] FLR 758.

While some claim that most mothers who wrongfully remove their children across international borders are fleeing domestic violence, that is not consistent with what I see in running a very busy international family law practice. In my experience, most abducting parents are mothers who have been living in another country in relationship with a national of that country or with a person who is located in that country for business, career, or educational reasons. When the relationship breaks down, she simply wants to “go home” with her child to her country of origin.

Such mothers often feel alone—a “fish out of water” in a foreign land without family or friends. They may not know the language or the culture. They may well have enjoyed living overseas while the relationship was strong, but now that the relationship is over they feel isolated and often afraid. They are almost certainly not familiar with the local legal system, and they are probably unfamiliar with local social services programs. They may well have been cut off financially, both from ongoing support and from their access to bank accounts and credit cards. They may not be able to work because they do not have a work visa, or they lack the necessary language skills or know-how. Once the relationship is over, if not before, their in-laws may well have taken “his side” in the disputes that arise and may raise new complaints and demands and assert additional pressures. They very often feel utterly betrayed and completely out of place. They certainly may have been abused, most often psychologically and sometimes physically. They desperately want to go home to their family, their friends, and the environment that they know and in which they feel safe.

The appropriate solution for such expat parents should be to seek a relocation order from the courts in the country in which they and their children are currently located. This is where, in my opinion, the theory falls down. Winning international relocation cases in most jurisdictions is tough and seems to be getting tougher. There is an inverse relationship between how difficult it is to obtain a local court’s permission to relocate with a child and how frequent it is that parents abduct their children. In recent years there seems to be a trend toward making permission for international relocation even harder to obtain. That trend is designed to serve the interests of a child in having both parents in his or her life and the interests of both parents in having their child in their life. Unfortunately, the trend is often counter-productive. It is unfair to the expat parent who is stranded in a foreign country, and it is unfair to the child whose primary care provider is upset,

angry, and beaten down and whose parents are at each other throats. The stranded parent often feels that she has no choice but to run away with her child.

However, all cases are unique, especially in this area of the law—and generalizations are dangerous.

§ 1.04 PARTIES TO THE CONVENTION

The Convention was drafted under the auspices of the Hague Conference on Private International Law (the “Hague Conference”), which is a global inter-governmental organization based in The Hague in the Netherlands. The Convention was approved unanimously by the 23 member states at the Fourteenth Session of the Hague Conference in 1980.

To bring a case under the Hague Convention, the petitioner must be able to establish that, on the date of the wrongful taking or the wrongful retention of the child, the Convention was actually in force between the two countries—that is, between the country of the child’s habitual residence on the relevant date and the country in which the child is currently located.

Currently, more than 90 states are Contracting Parties to the Convention. However, the Convention is not in force between all of these States, because many have not accepted the accessions of all other Contracting States. The Convention provides that it will not enter into force between an existing Contracting State and a newly acceding State unless and until the existing state expressly accepts the accession of the new state.³

Thus, Article 38 of the Convention provides that the accession of a new state will have effect only as regards the relations between the acceding state and those Contracting States that have declared their acceptance of the accession.

When a country accedes to the Convention, the U.S. State Department reviews the new signatory’s domestic legal and administrative systems to determine whether the necessary legal and institutional mechanisms are in place for it to implement the Convention and to provide effective legal relief under it. If it determines that a country has the capability and capacity to be an effective treaty partner, the State Department declares its acceptance of the accession by depositing a written instrument with the Hague Permanent Bureau. Only then does the Convention enter into force between the United States and the acceding country. The State Department posts these details on its website and the Permanent Bureau maintains a current status list on its website.

3. Hague Convention, Articles 38 and 39.

Currently, the United States has a Hague Convention treaty relationship in force with 81 countries.⁴ Thus, although Russia, by way of example, has signed the Convention, the United States has not yet accepted it as a treaty partner. As a result, the Convention cannot be invoked for children abducted between Russia and the United States.

§ 1.05 THE HAGUE CONFERENCE

The Permanent Bureau of the Hague Conference monitors and supports international implementation on a continuing basis. It maintains a website, <http://www.hcch.net>, which is a useful source of information concerning the operation of the Convention. It also maintains the INCADAT database, which contains leading decisions concerning the Convention from courts around the world, searchable summaries of decisions, and compendia of legal analyses.

In addition, official publications of the Hague Conference may be useful sources of information about the operation of the Convention and its interpretation. The Conference publishes *Guides to Good Practice*, which may provide assistance in the interpretation of the provisions of the treaty. Indeed, the concurring judges in the Supreme Court's *Chafin* case found that to be the case.⁵

§ 1.06 THE PÉREZ-VERA REPORT

Professor Elisa Pérez-Vera, the Convention's "Rapporteur," wrote a legislative history of the Convention. It is known as the Pérez-Vera Report and is frequently used to assist in interpreting the key terms and intent of the Convention. The Second Circuit has stated, "We have repeatedly observed that the Pérez-Vera Report is 'an authoritative source for interpreting the Convention's provisions.'"⁶ The report may be accessed at Appendix Two to this treatise.

The U.S. Supreme Court cited the Pérez-Vera Report in both the *Chafin* and the *Abbott* cases.⁷ In *Abbott*, the Court stated: "We need not decide whether this Report should be given greater weight than a scholarly commentary," noting that the Report has been cited as the "official history" of

4. As of May 2016.

5. *Chafin v. Chafin*, 133 S. Ct. 1017, 1030 (concurring opinions) (U.S. 2013).

6. *Guzzo v. Cristofano*, 719 F.3d 100, 106 fn.4 (2d Cir. 2013).

7. *Chafin v. Chafin*, 133 S. Ct. 1017, 1029 (concurring opinions) (U.S. 2013); *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983 (U.S. 2010).

the Convention and “a source of background on the meaning of the provisions of the Convention.” On the other hand, the Court also stated that the Report itself states that it was not approved by the Conference, and that “it is possible that, despite the Reporter’s [*sic*] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.”⁸

The Pérez-Vera Report should always be checked whenever a term in the Convention is in dispute.

§ 1.07 U.S. EXECUTIVE BRANCH INTERPRETATION

Some courts have placed significant weight on the interpretation of the Convention made by or proposed by the executive branch of the U.S. Government.

Thus, the U.S. State Department’s initial legal analysis of the Convention, which is attached as Appendix Four, has been a source of interpretative assistance by many courts.⁹ It was expressly prepared “to facilitate understanding of the Convention by the Senate and the use and interpretation of the Convention by parents, judges, lawyers and public and private agency personnel.”

In some cases, the opinions of the Solicitor-General in amicus briefs or the opinions of the State Department in answers to questionnaires submitted by the Hague Conference have been scrutinized and given significance.¹⁰

In the *Lozano* case, the Supreme Court relied significantly on the fact that the State Department, not only in its original Legal Analysis but also in its amicus brief in the pending case, had taken a certain position on the appropriate interpretation of a key provision in the Convention. The Court stated that “[a]s this Court has previously explained (in the context of the Convention, in fact), the State Department’s interpretation of treaties ‘is entitled to great weight.’”¹¹

§ 1.08 THE PURPOSE OF THE TREATY

It is often of substantial importance in a Hague case for the petitioner to remind the court of the purpose of the Convention. The Hague process is unusual, and it may be surprising to a judge who is not fully familiar with

8. *Abbott*. 560 U.S.at 19.

9. *E.g.*, *Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013); *Krefter v. Wills*, 623 F. Supp. 2d 125 (D.Mass. 2009).

10. *E.g.*, *Yamin, supra*; *Blondin v. Dubois*, 238 F.3d 153, 159 (2d Cir. 2001).

11. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1238 (2014).

such cases—especially if the judge has a background in handling conventional child custody cases, where the emphasis is always on the best interests of the child. Indeed, the decision in many cases reflects a struggle between the instinct of a judge to do what is in the best interests of the child and the philosophy of the Hague Convention that the best interests determination should be left to the courts of the child’s prior habitual residence.

The recital provisions of the Convention state that its purpose is “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”

Article 1 provides that the central purposes of the Convention are to secure the “prompt return” of children who have been wrongfully removed to or retained in any contracting state and to ensure that rights of custody and access under the law of one such state are effectively respected in the other states.

The treaty provides a specific mechanism to handle international child abductions in all cases, which all treaty partners have elected to follow and are required to follow. That method is to return abducted children promptly to their prior habitual residence, unless one of a very limited number of exceptions applies. Articles 11, 12, and 13 impose that duty upon all courts in all Contracting States.

The U.S. brought the Convention into U.S. law by means of the International Child Abduction Remedies Act (ICARA).¹² Congress expressly declared in ICARA its findings that:

- the international abduction or wrongful retention of children is harmful to their well-being;
- people should not be permitted to obtain custody of children by virtue of their wrongful removal or retention;
- international abductions and intentions of children are increasing; and
- only concerted cooperation pursuant to an international agreement can effectively combat this problem.

The U.S. Supreme Court has reviewed the Convention in three cases. In the *Abbott*¹³ case, the Court stated that the purpose of the Convention is “to

12. 22 U.S.C. § 9001 (Appendix 3 to this book).

13. *Abbott v. Abbott*, 130 S.Ct. 1983 (U.S. 2010).

prevent harms resulting from abductions,” which “can have devastating consequences for a child” and may be “one of the worst forms of child abuse.” The Supreme Court also referred with approval to findings that international child abduction “can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity formation issues” and can lead to a child’s experiencing “loss of community and stability, leading to loneliness, anger, and fear of abandonment” and “may prevent the child from forming a relationship with the left behind parent, impairing the child’s ability to mature.”

In *Chafin*, the Supreme Court found that the petitioner was correct to emphasize that both the Hague Convention and ICARA stress the importance of the prompt return of children wrongfully removed or retained, and the Court stated that while it was also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children, the courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—by expediting proceedings and granting stays where appropriate.¹⁴

In *Lozano*, the Court explained that in order to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States, the Convention’s “central operating feature” is the return of the child, which in effect lays venue for the ultimate custody determination in the child’s country of habitual residence rather than the country to which the child is abducted.¹⁵

Other courts have explained, for example, that the Convention procedures are designed “to restore the status quo prior to any wrongful removal or retention and to deter parents from engaging in international forum shopping in custody cases.”¹⁶ It is a simple remedy to a complex problem, but in many ways the simplicity is its strength.

Most critically, the Convention is not intended or designed to settle international custody disputes, but rather to ensure that cases are heard in the proper court.¹⁷ Article 19 of the Convention expressly states that “[A] decision under this Convention concerning the return of the child shall not be

14. *Chafin v. Chafin*, 133 S.Ct. 10171026-27 (U.S. 2013).

15. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228 (2014).

16. *Baxter v. Baxter*, 423 F.3d 363 (3d Cir. 2005) (citation omitted).

17. *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009).

taken to be a determination on the merits of any custody issue.” Indeed, any consideration of the best interests of the child is generally out of bounds in a Hague case, although once an exception has been established, the courts have discretion to return a child—and at that stage courts will consider what is best for the child, as well as the purposes of the Convention, in applying that discretion.

§ 1.09 CUSTODY JURISDICTION AND THE HAGUE CONVENTION

The Hague Convention is to some extent a jurisdiction-selection treaty, but in the United States it does not supersede the Uniform Child Custody Jurisdiction & Enforcement Act. A case brought pursuant to the Convention does not determine the custody of the child but merely where the child should be located while decisions about his or her best interests are being made. A Hague decision does not in and of itself create custody jurisdiction or establish custody jurisdiction and does not trump the jurisdictional provisions of the UCCJEA.

Proceedings under the UCCJEA do not conflict with, and are not preempted by, proceedings under the Hague Convention because the two laws address different objectives. The Convention focuses on returning children who have been wrongfully removed from their place of habitual residence, whereas the UCCJEA sets forth standards to determine which jurisdiction decides custody disputes.¹⁸

Thus, a New York court correctly ruled that because the child’s “home state” was New York at the time a custody case was commenced there, the New York courts had custody jurisdiction, even though a court in the Dominican Republic had refused to return the child to New York under the Hague Convention. The child’s mother had taken the child to the Dominican Republic without the father’s consent. She defended a Hague case in that country on the grounds of domestic violence. The Dominican court upheld her claims and refused to return the child to the United States on the ground of the grave-risk exception to the Convention. The New York court then ruled that it retained home state jurisdiction and that that jurisdiction was not preempted by the Convention.¹⁹

Federal courts, which do not handle child custody cases and only rarely handle child-related issues, have sometimes been confused on this issue. In a

18. *In re T.L.B.*, 272 P.3d 1148 (Colo. App. 2012).

19. *Katz v. Katz*, 117 A.D.3d 1054, 986 N.Y.S.2d 611 (2d Dept. 2014).

Colorado case, the federal district court judge stated that a Hague Convention proceeding determines which country should address custody issues. In a subsequent state court custody proceeding, the Colorado Court of Appeals politely corrected the federal court's misstatement.²⁰ Hague cases do not decide custody jurisdiction. The confusion on this issue is enhanced by virtue of the fact that in many foreign countries, custody jurisdiction is based on the habitual residence of the child—the same standard that must be satisfied in any Hague Convention case. However, the UCCJEA (as currently enacted²¹) does not make any mention of “habitual residence” and is founded instead on the concept of the “home state,” which is a term unique to U.S. jurisprudence.

§ 1.10 BEST INTERESTS AND THE HAGUE CONVENTION

The central tenet of the Hague Convention is that while any custody determination must be based on an analysis of the child's best interests, that issue should be decided by the courts of the country of habitual residence from which the child was taken, and not by the courts of the country to which a child was wrongfully removed or in which he or she was wrongfully retained.

The drafters of the Convention acted on the fundamental premise that the best way to deter international child abduction is to ensure that such actions are not rewarded. In particular, forum shopping in such cases should be discouraged. They determined that the best solution is to return abducted children promptly to their habitual residence, whose courts are the most appropriate to determine the best interests of children.

States adopted the Convention because they agreed with this philosophy, and they expected that their treaty partners would adhere to it. When the United States was considering whether to adopt the Hague Convention, the U.S. State Department explained to Congress that “[t]he Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.” It

20. *In re T.L.B.*, 272 P.3d 1148, 1156 (Colo. App. 2012).

21. The 2013 Amendments to the UCCJEA would modify the UCCJEA and would incorporate the term “habitual residence” to comport with the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, to which the U.S. is not yet a party.

specifically explained that the grave-risk exception “was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child’s best interests.”²²

Undoubtedly, the Hague Convention adopted a “greater good” premise, meaning that it is intended to discourage international child abduction in general, even if in any specific case it might perhaps be best for that particular child not to be returned. However, the drafters of the Convention recognized that a balance must be struck between the interests of children in general in not being wrongfully taken from their habitual residence and the need to protect individual children in specific, extreme, and unusual cases. For this reason, while the Convention contains certain exceptions to the rule requiring a child’s prompt return to the habitual residence, the exceptions are carefully delineated, they are to be narrowly interpreted, and even if they are established, the courts nonetheless retain discretion to order the child’s return.

Courts in the United States have adhered to this philosophy consistently. They have upheld the fundamental principle that the Convention is clear that a court considering a Hague petition should not consider matters relevant to the merits of the underlying custody dispute, such as the best interests of the child, as these considerations are reserved for the courts of the child’s habitual residence.

Indeed, the Ninth Circuit refused to grant comity to a Greek order in a Hague case because it concluded that the Greek court had “strayed from the objective inquiries prescribed by the Convention” and had focused on matters largely irrelevant to its ultimate decision, such as the details of the breakdown of the parties’ relationship, the father’s alleged infidelity, and his failure to be the sole breadwinner for the family.²³

On the other hand, Baroness Hale insisted in a leading English case that “[t]hese children should not be made to suffer for the sake of general deterrence of the evil of child abduction worldwide.”²⁴ Justice Clarence Thomas cited that quotation in the Supreme Court’s opinion in *Lozano v. Montoya Alvarez*, declaring, “We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost. The child’s interest in choosing to remain,

22. Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 19,494 (1984).

23. *Asvesta v. Petroutsas*, 580 F.3d 1000 (9th Cir. 2009).

24. *In re M*, [2008] 1 A.C. 1288, 1310 (Eng. 2007).

Art. 13, or in avoiding physical or psychological harm, Art. 13(b), may overcome the return remedy.”²⁵

§ 1.11 THREATS TO THE CENTRAL TENET

The central idea underlying the Convention has been under threat on two fronts.

First, in Europe, the European Court of Human Rights (ECHR) embarked on an interpretation of the Convention that required European countries to apply a best-interests test in Hague cases. In 2010 the ECHR ruled in *Neulinger & Shuruk v. Switzerland*²⁶ that the European Convention on Human Rights requires that courts in states that are parties to the European Convention may not return an abducted child to its habitual residence, even when the child’s return is mandated by the Hague Convention, unless it is first established that it is in the best interests of both the child and the child’s family to do so. The ECHR decision in *Neulinger* was heavily criticized for having overruled 30 years of international case law, for discounting the fundamental purposes of the Hague Convention of deterring international child abduction, for rewarding international child abduction, and for ensuring that any Hague case that follows its precepts will be lengthy and expensive, as well as often unfair to the left-behind parent, who must now defend what could be almost a custody case on the taking parent’s home turf.²⁷

The ECHR followed the *Neulinger* case in subsequent cases. In *Sneersone and Kampanella v. Italy*,²⁸ the ECHR applied *Neulinger* to override an Italian return order, since the Italian courts had not “conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material, and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.”

But in *X v. Latvia*,²⁹ decided in 2013, the Grand Chamber of the ECHR changed course and ruled that a European court’s obligation to protect a

25. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014).

26. *Neulinger & Shuruk v. Switzerland*, 41615/07 [2010] ECHR 1053.

27. Morley, *The Hague Abduction Convention and Human Rights: A Critique of the Neulinger Case*, Vol. 4, INT’L ACAD. OF MATRIMONIAL LAW. J.

28. *Sneersone and Kampanella v. Italy* (ECHR Application no. 14737/09).

29. *X v. Latvia* (ECHR Application no. 27853/09).

child's "best interests" would be satisfied in a Hague case, as distinct from a custody case, by complying with a twofold procedural obligation: (1) by examining the allegations of a "serious risk" to the child in the event of return, and demonstrating such examination through a reasoned decision on this point; and (2) by satisfying themselves that adequate safeguards were provided in the state of habitual residence (in this case, Australia), particularly through tangible protection measures in the event of a known risk.

The second front of the attack on the central idea of the Hague Convention comes from advocates of domestic violence victims, who contend that the Convention does not provide sufficient protection for women who take their children back to their country of origin when fleeing domestic violence. While this campaign is directed primarily at an effort to expand the grave risk of harm exception to the Convention, it is sometimes expressed in broader terms as seeking to subordinate all Hague cases to a best-interests test. Its influence has been felt in other countries that have enacted legislation that weakens the application of the Convention in their countries by expanding the definition of the grave risk of harm exception (e.g., Switzerland³⁰ and Japan³¹).

Of course, the underlying theory of the Convention—that it should make little difference to the ultimate outcome of a case because the Hague Convention merely determines which country's courts will decide what is in the best interests of the child—is, in reality, pure fiction. Even among the treaty partners to the Convention there is far less uniformity in the way that courts decide custody cases than the theory claims. All treaty partners claim that their laws are based on the fundamental concept that the best interests of a child must prevail. Translating that concept into reality produces wildly divergent results in practice.

Such results are magnified enormously by the fact that there may be lengthy delays before a case can be heard; that there may be considerable logistical difficulties for a parent who accompanies a child who is returned to the habitual residence; that local courts may act parochially in favor of the local left-behind parent; that the returning parent may be branded an "international child abductor"; and that restoring the child to the post-abduction, pre-return status quo will uproot the child yet again. In addition, the returning parent is often in financial ruin, since she will likely be unemployed and

30. See <http://www.international-divorce.com/Swiss-Law-Undermines-the-Hague-Convention>.

31. See http://www.international-divorce.com/japan_hague_convention_practical.

perhaps unemployable in the original habitual residence; she may well have exhausted her financial resources by defending the Hague case in a U.S. court; she will almost certainly be the subject of an enormous award against her of legal fees and expenses, especially if the petitioner was represented by pro bono counsel whose theoretical hourly rates are high and who have thrown many lawyers into the case; she will often face a contested divorce case in the place to which she is being returned; and she must fund and provide the emotional strength to fight what is likely to be a hotly contested custody case in that country.

Notwithstanding these pressures, courts in the United States have remained steadfast that the purpose of the Convention is best fulfilled by interpreting the exceptions narrowly and by avoiding “best interests” analyses in Hague cases except for limited and well-defined circumstances.

§ 1.12 ESSENCE OF THE CONVENTION

Article 12 of the Convention requires judicial authorities in the state in which a child is found to order the return of the child if (1) an application for such relief is made by a person who has a “right of custody” over the child under the laws of the child’s “habitual residence” immediately before the removal or retention, and (2) the judicial authorities in the state in which the child is located determine that the child was “wrongfully” removed or retained within the meaning of Article 3 of the Convention. Article 11 calls for the expeditious conclusion of the proceedings.

The Convention provides for six exceptions to the obligation to return. While the exceptions are often referred to as “defenses” or “affirmative defenses,” they are not complete defenses because the Convention provides that, even if any or several of the exceptions are established, and perhaps all of them, the judicial authorities nonetheless have the authority to order the child’s return if they determine that it is appropriate to do so.

Article 3 provides the key definition of a wrongful removal or retention. It states that a child’s removal to, or retention in, another state is wrongful if:

- a) it is a 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.

A reading of Article 3 shows that its application hinges on three key terms, these being “child,” “rights of custody,” and “habitual residence.”

§ 1.13 THE KEY TERMS IN THE HAGUE CONVENTION

1. “Child”

The Convention applies only in respect to children under the age of 16. Article 4 provides that “[t]he Convention shall cease to apply when the child attains the age of 16 years.” This means that if a case is commenced while a child is under that age, it must terminate upon the child reaching the age of 16.

2. “Rights of Custody”

A petitioner in a Hague case must establish that he or she had a “right of custody” over the child under the law of the child’s habitual residence. This does not require that there must have been a custody order in place before the child was taken. It means that the law in question gave certain rights to the petitioner that are sufficient to constitute a custody right. The U.S. Supreme Court has ruled that a parent’s right to prevent international travel, known as a *ne exeat* right, is a “right of custody” within the meaning of the Convention.

3. “Habitual Residence”

The key term “habitual residence” is not defined in the Convention. In many judicial circuits in the United States, there is a heavy presumption that a child’s habitual residence should be determined by “the last shared intent” of the child’s parents, unless it is clearly shown that the child has become acclimatized to another jurisdiction. The courts in other circuits look primarily at the position of the child objectively without regard to parental intention. Many Hague cases are won or lost based on the application of the competing approaches to the often-complicated facts of particular international situations.

§ 1.14 OVERVIEW OF THE EXCEPTIONS

The Convention provides that there are six exceptions to the requirement that wrongfully removed or retained children must be returned. These exceptions are as follows:

1. The Consent Exception

If the petitioning parent is proved to have consented to the child being taken

to live in the new jurisdiction, this will act as a complete exception in a Hague case.

The key to the consent inquiry is the petitioner's subjective intent. In many cases a parent allows a child to be taken out of the habitual residence, and then there is a dispute as to whether the permission was for a temporary visit or permanently. In such cases it is critical to focus on what the petitioner actually contemplated and agreed to in allowing the child to travel outside its home country. The burden of proof rests with the respondent to establish that the petitioner harbored a subjective intent to permit the respondent "to remove and retain the child for an indefinite or permanent time period."

2. The Acquiescence Exception

Acquiescence by the left-behind parent is also an exception to a Hague petition, but it is far harder to prove than consent. It requires either some kind of formality, such as testimony in a judicial proceeding, or a convincing written renunciation of rights, or a consistent attitude of acquiescence over a significant period of time.

3. The Child's Objections Exception

Another exception is that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. For this exception, there is a twofold test:

1. Does the child object to being returned to its place of habitual residence? and
2. Has the child obtained an age and degree of maturity at which it is appropriate to take account of its view?

In assessing the maturity level of the minor child, the court must consider the extent to which the child's views have been influenced by an abductor, or if the objection is simply that the child wishes to remain with the abductor.

There is no defined age at which the Convention considers children sufficiently mature enough for their views to be taken into account. It depends entirely on the child.

4. The "One Year and Settled" Exception

It is also an exception if both of the following are established: that more than

one year has elapsed from the date of the alleged wrongful removal or retention to the date that a Hague case is commenced, and that the child is now settled in the new environment.

Some courts in the United States, but not in other countries, previously ruled that if a child has been concealed so that the left-behind parent does not know where the child is located, the one-year period does not start to run until the parent learns of the child's location. Such cases have been overruled.³²

5. Human Rights Exception

Another possible exception is that the return of the child “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” This provision was intended to deal with the rare occasion when the return of a child would utterly shock the conscience of the court or offend all notions of due process. However, it is almost never utilized by the courts.

6. The Grave Risk of Harm Exception

Finally, Article 13(b) of the Hague Convention provides that a court is not bound to order the return of the child if the petitioner establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The grave risk of harm “defense” is raised in almost every Hague case, but it is successful in only a handful.

The language of the exception is extremely loose. Since a parent who takes a child away from the other parent invariably has a reason to blame that parent, counsel for a respondent is always required to consider the exception, and often there is enough evidence to at least make out a viable claim. On the other hand, the exception requires proof of “grave risk” by clear and convincing evidence, and the drafting history of the Convention establishes that the drafters intended its terms to be narrowly interpreted.

In recent years, some cases in the United States have allowed the “defense” on a somewhat more liberal basis.

§ 1.15 UNIFORM INTERPRETATION

The Convention anticipates that its terms will be interpreted uniformly by all treaty partners. Courts and commentators often express this by stating

32. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014).

that there should be an “autonomous” definition of Hague Abduction Convention terms. The U.S. Supreme Court has expressly endorsed this approach. See § 4.02.

§ 1.16 UNIFORM TRUST

The Convention rests upon the basic premise that the authorities in one treaty partner will trust the authorities in another treaty partner to handle custody cases appropriately and fairly. The concept is that abducted children should be returned forthwith to the country of the child’s habitual residence so that the courts in that original country can decide what is best for the child.

This is the same approach that is followed in the United States by means of the Uniform Child Custody Jurisdiction & Enforcement Act, which treats foreign countries as if they were sister states unless a party meets a very heavy burden of proving that the child custody laws of the foreign country violate fundamental provisions of human rights.³³

However, as more countries become parties to the Convention, the disparity among the legal systems of treaty partners is growing. Some new treaty countries have substantive family law provisions that differ in substance from the “best interests” approach that is fundamental to U.S. jurisprudence. Others have legal systems that do not provide any effective enforcement of family law orders. Some provide little or no financial support to a custodial mother. Others require a mother with residential custody to keep the child in the location designated by the father.

The tension in this approach is vividly seen in the somewhat typical case of a mother who moved to the father’s country of origin at his request, had her child there (or took her child there), is and has always been the child’s primary care provider, and who then faced loneliness, despair, psychological and perhaps physical abuse, and economic distress when the relationship with the father ended. Such a mother will invariably want to “go home” with her child and, indeed, will believe that she has the perfect right to do so. If she then, without the father’s consent, exercises what might be a moral right to do so, and if the father initiates a Hague case against her, she will normally be forced to return to the habitual residence with the child and will be told that she can request international child relocation from the courts of the habitual residence. To add insult to injury, not only will she normally have hired her own counsel (often spending her last savings), but she will nor-

33. See JEREMY D. MORLEY, *INTERNATIONAL FAMILY LAW PRACTICE*, Chapter 7 (West Publishing 2015).

mally be forced under ICARA to pay the legal expenses and travel and other expenses of the father (who often will have a team of world-class pro bono lawyers, who will demand that she pay their fees at their full hourly rates). The idea that the courts in the habitual residence will then permit her—a proven international child abductor—to take the child back to her country of origin is usually quite fanciful.

Indeed, if the law in the habitual residence does not adequately protect the rights of a child to have both parents in its life, that might be deemed to create a grave risk of harm to the child.

Nonetheless, the purpose of the Convention is deterrence, which is fulfilled by not permitting an exception in the typical scenarios just described.

§ 1.17 STEP-BY-STEP ANALYSIS IN ANY HAGUE CASE

The structure of the Convention requires a court in any Hague case in the United States to follow a step-by-step process in order to apply the Convention logically and correctly.³⁴ Those steps are as follows:

1. First, the court must determine when the removal or retention took place. It cannot determine the habitual residence of the child without first deciding the relevant date as of which the habitual residence must be determined.
2. The court must then determine the child's habitual residence immediately prior to that date.
3. It must then ascertain whether the Convention was in force, as of the date of the wrongful removal or retention, between the country of habitual residence and the United States.
4. Next, it must determine what rights the petitioner had at that time under the law of the child's habitual residence and whether or not those rights constitute "rights of custody" within the meaning of the Convention.
5. The court must then determine whether the petitioner was exercising those custody rights at the time of removal or retention.
6. It must determine whether the removal or retention breached those custody rights.
7. It must determine whether any exceptions to the Conventions have been established.

34. Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259 (3d Cir. 2007).

8. If an exception is established, the court must determine whether to exercise its discretion to nonetheless return the child.
9. Next, if the child is to be returned to its country of habitual residence, it must determine the conditions under which the return shall be made.
10. Finally, if a petition is granted, it must determine the legal fees and expenses, if any, to be paid by the respondent.

§ 1.18 ACCESS CLAIMS

The Convention contains certain provisions concerning the protection of a left-behind parent's rights of access to a child. In particular, Article 21 of the Convention provides that an application "to make arrangements for organizing or securing the effective exercise of rights of access" may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authority in the United States is the Department of State.

However, the Convention contains no provision for the judicial enforcement of access rights. That is in sharp contrast to Article 12 of the Convention, which addresses wrongful removal and return claims, specifically refers to the initiation of judicial proceedings, and grants judicial authority to provide expedited relief in the case of the wrongful removal or retention of children.

Accordingly, the Fourth Circuit ruled that neither the Convention nor ICARA provides any authority for federal courts to exercise jurisdiction over access claims, as opposed to claims for the return of children.³⁵ Other federal courts have stated that access claims are far better left to the state courts.³⁶

However, the Second Circuit ruled in *Ozaltin*³⁷ that it did have jurisdiction over a petitioner's access claims.

Thus, the strange result is that although the Convention was expressly intended to assist noncustodial parents to enforce their rights of visitation, it does not in fact do so. The issue is not particularly significant in practice in the United States if the left-behind parent has a court order from his home country, because the UCCJEA provides an excellent and effective remedy

35. Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006).

36. Janzik v. Schand, No. 99-C-6515, 2000 WL 1745203 (N.D. Ill. 2000); Fernandez v. Yeager, 121 F. Supp. 2d 1118, 1126 (W.D. Mich. 2000); Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998).

37. Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013).

for the enforcement of all of the terms of any such order if the foreign jurisdiction was the child's "home state" within the meaning of the UCCJEA.

It should be noted that some countries, such as Australia and New Zealand, have made specific statutory provisions for the enforcement in their domestic courts of Hague access claims.³⁸

§ 1.19 RELATIONSHIP OF THE CONVENTION TO THE UCCJEA

The Hague Convention operates independently of the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA). The UCCJEA (or its predecessor, the Uniform Child Custody Jurisdiction Act) has been incorporated into the law of all U.S. states.

A left-behind parent often has the choice of proceeding under the UCCJEA instead of under the Hague Convention. If a child's "home state" (as that term is defined in UCCJEA Sec. 102(7)) is a foreign country, then, as far as U.S. courts are concerned, courts of that country have primary jurisdiction to make a custody order (Sec. 201), and they have "continuing exclusive jurisdiction" concerning custody of the child as long as the "substantial connection" provisions of section 201 are met.³⁹

Section 105 of the UCCJEA requires courts in the United States to enforce custody determinations of other countries if jurisdiction was in substantial compliance with the requirements of the Act, provided only that the foreign custody law does not violate human rights.

It may be preferable for a left-behind parent to bring suit under the UCCJEA instead of under the Hague Convention. There are several reasons for this:

- The UCCJEA requires a court in the U.S. state in which a child is located to register and enforce a custody order issued by the child's home state, even if the home state is a foreign country. This means that the primary venue for the litigation is the jurisdiction from which the child was taken. It allows the left-behind parent to bring suit on his or her home turf, which is likely to be far more convenient and comfortable than a distant and unfamiliar American court. The left-behind parent can use a local lawyer in the home state to

38. *State Central Authority & Quang* [2009] FamCA 1038; *Gumbrell v. Jones* [2001] NZFLR 593.

39. UCCJEA, § 202.

handle the bulk of the work, and the local court will most likely be more sympathetic.

- The foreign country will normally be the child's home state for UCCJEA purposes once the child has lived there for six months. However, that may or may not be sufficient to constitute habitual residence. In any event, if habitual residence is to be an issue in a Hague case, it is an expensive issue to prove, since it is extremely fact-based and often requires lawyers to collect, evaluate, and present extensive evidence and extensive testimony.
- The UCCJEA does not permit the alleged abductor to assert in the U.S. court the exceptions that can be asserted in a Hague case. Registration of a foreign custody order can be contested only on the following grounds: that (1) the issuing court had no jurisdiction to enter the child custody determination, or (2) the foreign child custody determination has been vacated, stayed, or modified by a court having proper jurisdiction to modify same, or (3) notice or an opportunity to be heard was not given to the person contesting jurisdiction (provided he or she was entitled to receive notice).⁴⁰ There are no defenses. By contrast, exceptions are invariably claimed in Hague Convention cases. If one exception is upheld, return may be denied.
- Many countries are not parties to the Hague Convention. A case can be brought under the UCCJEA to register and enforce a foreign custody order issued by any country in the world provided only that the country was the child's "home state," that the action was initiated in compliance with U.S. concepts of due process, and that the foreign custody law does not violate human rights.
- The Hague Convention does not effectively provide for the enforcement of access rights. The UCCJEA has no such restriction.
- The Hague Convention applies only in respect to children under the age of 16.
- Hague cases generally raise "interesting" (i.e., expensive) issues. UCCJEA enforcement cases generally (but not always) do not. Therefore UCCJEA cases are generally substantially cheaper.

On the other hand, it might be better in many cases to bring suit under the Hague Convention, instead of under the UCCJEA, for a variety of reasons:

40. UCCJEA, § 305.

- The courts in the child’s habitual residence might not exercise custody jurisdiction if the child is no longer located there. From a U.S. perspective the courts of that country might have jurisdiction, but if those courts do not have jurisdiction under their own jurisdictional rules, and if there was no custody order in place prior to the child’s removal, there will be no foreign custody order to register and enforce in the United States.
- If the foreign country was not the home state for purposes of the UCCJEA because the child lived there for less than six months (unless he or she was less than six months old), a custody order issued by a court in that country will generally not be enforceable under the UCCJEA, since it will not have been “a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act]” (UCCJEA Sec. 105(b)).
- If proper notice or a proper opportunity to be heard was not provided by the foreign court, this should be fatal to an effort to register and enforce the order in the United States. UCCJEA Section 305(d)(3) requires that a registered order be vacated if the person contesting registration was entitled to receive proper notice (as required by the UCCJEA) but such notice was not received.
- If the courts in the child’s habitual residence act slowly, it may be better to bring a Hague case forthwith in the place where the child is currently located.
- If the courts of the habitual residence will not handle the custody case unless and until the child is returned there, it would be possible for the left-behind parent to wait until the U.S. court has custody jurisdiction, usually after six months, and then to sue for custody in the U.S. state where the child is located. In such a situation, however, a Hague case would invariably be a far wiser course, since it would be much quicker and would not open the door to a full-blown best-interests analysis.
- Financial considerations might favor a Hague case, especially if the foreign country provides legal aid to its nationals for Hague cases but not for UCCJEA cases.

41. *In re T.L.B.*, 272 P.3d 1148 (Colo. App. 2012).

The fact that the UCCJEA and the Hague Convention are entirely separate creatures was well illustrated in a 2012 Colorado decision.⁴¹ There, a respondent mother won the battle but lost the war, because although she successfully defended the father's petition under the Hague Convention, the father was able to enforce a custody order under the UCCJEA that required the children's return to Canada. The left-behind father filed a Hague petition in a Colorado state court seeking the return to Canada of children born out of wedlock. The mother filed in another Colorado state court under the UCCJEA for an allocation of parental responsibilities. The petition in the Hague case was dismissed because the mother established the exception of grave risk of harm in that returning the children would risk subjecting them to sexual abuse. The proceedings were then consolidated in one proceeding, and that court ruled that Canada had jurisdiction under the UCCJEA because it was the "home state." However, the court ordered that the children would remain in Colorado under temporary emergency jurisdiction until a Canadian court took action.

The mother appealed. During the pendency of her appeal, the Canadian court entered an order awarding sole custody and guardianship to the father. The Canadian court rejected the allegations of the father's abuse and ordered a brief period of reintegration therapy before the children would be reunited with him.

The mother argued, to no avail, that her victory in the Hague case should act as a bar against contradictory results in a UCCJEA case, under concepts of issue and claim preclusion (or *res judicata*). But the court held that the issues in a Hague case are entirely different from those in a UCCJEA case. Subject matter jurisdiction to determine parental responsibilities or custody is not decided in a Hague Convention action. Rather, the Hague action concerned only the return of the children, and there was no identity of claims or issues.

Similarly, it is firmly established that a left-behind parent may participate in a custody case in the state court in the place where the child is now located and, if dissatisfied by the result, may thereafter initiate a Hague case in the federal court. The Ninth Circuit has held that it would undermine the very scheme created by the Hague Convention and ICARA to hold that a Hague Convention claim is barred by a state court custody determination simply because a petitioner did not raise his Hague Convention claim in the initial custody proceeding.⁴²

42. *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002).

Indeed, it is also well established that federal courts have the power to vacate state custody determinations and other state court orders that contravene the treaty. The *Rooker–Feldman* doctrine prohibiting federal court review of state court actions does not bar a federal district court adjudicating a Hague Convention proceeding from vacating a state court’s custody order or its order enjoining removal of the child from its jurisdiction.⁴³

§ 1.20 HAGUE CONVENTION AND CRIMINAL LAW

The Hague Convention is a purely civil law remedy, even though it uses the criminal terminology of “abduction” and “wrongful” removal or retention.

The United States has enacted federal legislation to prevent children from being removed from or retained out of the United States by one parent without the consent of the other parent or a court order,⁴⁴ but such legislation, as well as criminal provisions in state statutes concerning custodial interference, does not normally have any significant bearing on the Hague Convention process.

However, the issue of criminality may arise in connection with a claim that returning the child to the habitual residence will endanger the child, since the parent who took the child may face arrest in that country. Child abduction is a criminal offense in many countries, including Argentina, Belgium, Canada, China (Hong Kong SAR), Croatia, Denmark, Finland, France, Germany, Iceland, Israel, Italy, Malta, New Zealand, Panama, Sweden, Switzerland, and the United Kingdom. However, definitions as to what precisely constitutes the offense vary from one country to another. In some jurisdictions (e.g., the U.K.) only wrongful *removal* of a child constitutes a criminal offense, while in other jurisdictions wrongful *retention* can also be a criminal offense. In some countries (e.g., Austria, Poland, and Slovakia) parental child abduction is an offense only if the abducting parent has no parental responsibility or custody rights. Legislation in certain countries creates an offense specifically relating to abduction by parents (e.g., Canada and Finland), whereas in other countries only a more general offense of

43. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001); *Holder v. Holder*, *thid.*

44. The International Parental Kidnapping Crime Act 1993, 18 U.S.C. § 1204.

45. This paragraph is based on the *Hague Conference Guide to Good Practice*, Part III, ¶ 1.3, available at www.hcch.net.

abduction exists, which in most instances can be applied to parents and third parties alike (e.g., New Zealand, Slovakia, and Switzerland).⁴⁵

§ 1.21 WHAT THE HAGUE CONVENTION IS NOT

It is important to note what the Hague Convention is not, and what it does not handle, since there is often a false perception among family lawyers who do not handle many international cases, and also judges, that it is far broader than it really is.

1. The Convention does not provide for the international registration of custody orders. Indeed, other countries, with very few exceptions, do not have any such registration procedures, unlike the UCCJEA.
2. The Convention does not deal with the international service of process. That is the province of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
3. The Convention does not deal with international child support.
4. The Convention does not deal with international divorce jurisdiction, although in practice it may have a momentous impact on the jurisdictional issues.
5. The Convention does not deal with international travel of children, except to the extent that courts may be more inclined to allow a child to travel to a country that is a compliant Convention partner, since if a child is retained in a foreign Hague country, the left-behind parent will normally have the right to initiate proceedings in the foreign country to seek the child's return.
6. The Convention does not deal with international relocation of children, except to the very limited extent that it contains (relatively toothless) provisions about rights of access. Some courts place inappropriate reliance on the Hague Convention as a reliable device that will ensure that the terms of a U.S. court order setting forth the rights of a non-relocating parent will be enforced in the foreign country pursuant to the Convention.
7. The Convention does not provide any substantive rights.
8. The Convention does not allow the court in which a Hague Convention action is filed to consider the merits of any underlying child

custody claims. However, in the exercise of its discretion, once a Hague exception has been established, the court may consider such factors as it deems appropriate.

9. Neither the Convention nor ICARA nor any other treaty or legislation authorizes the U.S. Secretary of State to re-abduct an abducted child or to take any other direct action to take back an abducted child.
10. The State Department does not initiate Hague court cases. This is in sharp contrast to the procedures in several other countries, whose Central Authorities are the initiating agency.
11. There is no international court for Hague cases.
12. Submitting an application to the State Department does not constitute the commencement of a judicial proceeding, and it does not stop the clock on the running of the one-year period in Article 12.

Instead, the Hague Convention establishes only a procedure to be used between countries who are treaty partners under the Convention by which the return of children under the age of 16 years may be accomplished if their removal or retention is determined to be “wrongful” under the Convention.