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**LATIN AMERICAN MEETING ON THE INTERNATIONAL PROTECTION OF CHILDREN
AND THE RECOVERY OF MAINTENANCE ABROAD**

Santiago, Chile, 4-6 December 2013

EXPLANATORY NOTE ON SPECIFIC MATTERS CONCERNING THE 1996 CONVENTION

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Latin American Meeting on the International Protection of Children and the Recovery of Maintenance Abroad (Santiago, Chile, 4-6 December 2013)

Explanatory Note on Specific Matters Concerning the 1996 Convention

A. Background

In September 2013, the Permanent Bureau of the Hague Conference on Private International Law ("Hague Conference") called upon experienced officials from National Organs, Ministries of Foreign Affairs, Ministries of Justice, State Attorneys, representatives of the judiciary, Members of the International Hague Network of Judges, Central Authorities, Children's Authorities and renowned academics of the region to contribute to the preparatory work for the Latin American meeting on the International Protection of Children and the Recovery of Maintenance Abroad (the "Santiago Meeting").

The Santiago Meeting, co-organised by the Hague Conference and the Heidelberg Center for Latin America, was held in Santiago de Chile from 4 until 6 December 2013. Its focus was on the analysis and discussion of the 1996 Hague Convention on International Protection of Children¹ ("1996 Convention") and the 2007 Hague Convention on Recovery of Maintenance Abroad ("2007 Convention").

The main objectives of the Santiago Meeting were to:

- consider the benefits resulting from the implementation of the 1996 and 2007 Conventions and to facilitate their study by relevant national authorities and other actors in the region
- discuss with relevant national authorities and other actors the potential impact of the coming into force of the 1996 and 2007 Conventions and to respond to questions on the implementation and operation of the two Conventions, in light of their respective Explanatory Reports, Practical Handbooks, Implementation Checklists and the preliminary study of the 1996 Convention (all available on the Hague Conference website at < www.hcch.net >)
- disseminate the results of the work carried out and the products developed in the context of this initiative and to make them available to the relevant actors in the region

Work in preparation of the meeting entailed sending questionnaires on the theoretical and practical aspects relating to the 1996 and 2007 Conventions to national authorities and academics of the region and sharing of experiences and opinions on the operation of the 1996 Convention among Central Authorities and Members of the International Hague Network of Judges.

¹ 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*. All references to the "1996 Hague Convention on Protection of Children", the "1996 Hague Convention" or to the "Convention" found hereinafter in this document shall refer to this Convention. The text of the Convention can be found on the Hague Conference website at < www.hcch.net >, then "Conventions".

In light of the responses received, two working documents were prepared for discussion during the meeting. Adjustments and amendments were made and finally the documents were approved for publication by the participating experts. The two resulting documents were:

- 1) the “Explanatory Note on specific matters concerning the 1996 Convention” (below); and
- 2) the “Study of legal and practical impact of the 2007 Convention in Latin American States”.

This document containing the changes proposed to the Explanatory Note on specific matters concerning the 1996 Convention should be read in conjunction with the Explanatory Report on the 1996 Convention² and the Practical Handbook on the operation of the Convention.³ Several paragraphs from the latter document were included in this Note since its objective is not to provide a thorough or detailed analysis of the Convention, but to shed some light on certain legal aspects which raise or have raised concerns in Latin American States at the time of analysing the Convention.

B. Explanatory Note on Specific Matters Concerning the 1996 Convention

1. Jurisdiction of the authorities of the child’s habitual residence

a. Habitual residence of the child

“Habitual residence is the main connecting factor and basis for jurisdiction used in the 1996 Convention. The use of habitual residence is a factor common to all the modern Hague Children’s Conventions. 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.”⁴

As can be inferred from the paragraph above, the term habitual residence was not defined so that users of the Convention could define it in each case, taking into account all the relevant specific circumstances.⁵

² 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. All references to the “Explanatory Report on the Convention”, or to the “Explanatory Report” shall refer to this document, which is available at < www.hcch.net > under “Publications” then “Explanatory Reports”. Hereinafter, it is referred to simply as the “Explanatory Report”.

³ 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*. This document is available on the Hague Conference website at < www.hcch.net > under “International Protection of Children, Family and Property Relations” then “Protection of Children (1996) – [34]” then “HCCH Publications”. All references to the “Practical Handbook on the operation of the Convention”, the “Practical Handbook” or the “Handbook” shall hereinafter refer to this document.

⁴ Para. 13.83, Practical Handbook.

⁵ In this regard, the example provided in paragraph 13.87 of the Practical Handbook on the operation of the Convention may be of use: “The concept of habitual residence has been discussed by the Court of Justice of the European Union (hereafter, the “CJEU”) in the context of the Brussels II a Regulation. 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’.”

There are several grounds for the choice of habitual residence as the primary connecting factor in the Convention. At the Hague Conference, as well as at other legislative organisations such as the OAS or the European Union, other jurisdictional connecting factors such as nationality and domicile are no longer used, in an understanding that the closest connection between the authorities and the case facilitates the parties' access to justice, due process and ultimately effective protection of the interests at stake. In other words, habitual residence has emerged as the most effective and appropriate connecting factor to protect the interests of the child in most cases.

One of the practical reasons underpinning this choice is the close connection between the forum and the child and its environment. Amongst other things, it allows the judge and court officers appropriate access to the parties and the evidence. It should be remembered that in family and childhood issues, different agents might be involved in dealing with the case (lawyers, defenders, prosecutors, psychologists, social workers, doctors, etc.).

In summary, the Convention considers the court located where the child is habitually resident to be the best placed to assess the best interests of the child in cases falling within the ambit of the Convention. It ascribes such importance to the best interests of the child being assessed by the court that, by way of exception, if the court located where the child is habitually resident were not the best placed to conduct an appropriate assessment, jurisdiction could be transferred to a court better placed for that purpose (*e.g.*, transfer of jurisdiction as provided for in Arts 8 and 9 is dealt with later in this paper).

b. Positive and negative conflicts of jurisdiction

"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."⁶

"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."⁷

"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. For example, if one Contracting State is seised 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."⁸

Specifically in international child abduction cases, the possible positive conflict of jurisdiction – between the authorities of the country where the child was habitually resident prior to removal and the authorities of the country to where the child has been removed – is solved by Article 7. This Article determines that the authorities of the place where the child was habitually resident immediately before removal keep their jurisdiction until, under certain circumstances, the child acquires habitual residence in another State.

⁶ Para. 4.29, Practical Handbook.

⁷ Para. 4.30, Practical Handbook.

⁸ Para. 4.31, Practical Handbook.

Article 6 also provides a solution for certain negative conflicts of jurisdiction in order to avoid the denial of justice. In cases concerning refugee or displaced children, or children whose habitual residence cannot be established, the authorities of the place in which these children are present shall have jurisdiction.

Finally, it might be useful to bear in mind that where the authority allegedly “second seised” is uncertain as to whether conditions to assume jurisdiction are satisfied in a particular case (*e.g.*, the question may arise as to how to determine whether “corresponding measures” have been requested from the authorities of another State), it may consider it appropriate to make inquiries of the relevant authorities in the other State regarding these matters. Such inquiries could be made through direct judicial communications, or with the assistance of the Central Authorities in both States.⁹

2. Transfer of jurisdiction (Arts 8 and 9)

“By way of exception to the general rules of jurisdiction, 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, to authorities of Contracting States which do not. Jurisdiction will only be transferred where certain conditions are satisfied and only to authorities in another Contracting State with which the child has a particular connection.”¹⁰

“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”.”¹¹

In summary, jurisdiction can only be transferred by way of exception as a response to the need to ensure that the best interests of the child are assessed by the authority best placed to do so. Jurisdiction can only be assumed by one of the authorities expressly provided in the Convention (Art. 8.2), so long as the interested authorities (the authority first seised and the requested authority) agree that transfer of jurisdiction is the most effective way to proceed to best protect the child.

“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.”¹²

Jurisdictions whose legal systems do not provide for the transfer of jurisdiction

As can be seen from the proceedings of the negotiating sessions of the Convention, transfer of jurisdiction was much debated. Experts from common law backgrounds introduced the issue and intended to include the *forum non conveniens* doctrine in the Convention. However, this initiative was rejected by some civil law experts on the grounds that this doctrine is not provided for in their systems. The debate was resolved by a compromise between the two approaches, reflected in Articles 8 and 9 of the Convention. The mechanism finally adopted draws inspiration from the *forum non conveniens* doctrine, but builds upon a child-centred approach where the assessment

⁹ Cf. para. 4.35, Practical Handbook.

¹⁰ Para. 5.1, Practical Handbook.

¹¹ Para. 5.4, Practical Handbook.

¹² Para. 5.17, Practical Handbook.

of the best interests of the child is the primary consideration and the only ground for the authorities of both countries involved to consider, by way of exception, the transfer of jurisdiction.

In addition, even though it is provided for by way of exception under the Convention, background information indicates that the intention of the delegates was to allow the authority having jurisdiction to avail itself of this mechanism and implement it where the best interests of the child so require.¹³ In other words, it could be concluded that States which join the Convention assume the responsibility of making all mechanisms available for the users of the Convention. For this reason, and in particular cases, transferring jurisdiction should be possible if all the conditions provided for in the Convention were fulfilled.

Experience would indicate that the solution provided for in the Convention has been effective, given that both common law as well as civil law countries are Parties to the Convention.¹⁴

For the purposes of implementation of the Convention and, in particular, transfer of jurisdiction provisions, it should be remembered that, in accordance with the operation of international treaties as regards the hierarchy of laws in the corresponding country, a modification in domestic law might be required. International treaties prevail over domestic law in several legal systems, while they have the same status as domestic law in others. Joining the Convention could therefore indirectly modify domestic law to the extent contrary to the Convention.

Moreover, it must be recalled that in those countries where procedural rules are considered public policy, the scope of domestic public policy and international public policy differs, the latter being much more restrictive (*i.e.*, the fundamental principles which define the legal essence and particularities of a State). For this reason, the notion of international public policy does not include procedural rules regarding jurisdiction in various cases. This distinction is important when analysing the compatibility of the Convention with the domestic law of a given State. The fact that a provision of the Convention is not provided for in domestic law, or even if it is contrary to a “domestic public policy” rule, does not necessarily mean that such a provision would be incompatible with the law of that State.¹⁵

3. Measures of protection of the child’s property (particularly Arts 1, 3 and 55)¹⁶

Article 1 establishes measures for the protection of the property of the child as falling within the scope of the Convention. In turn, Article 3 *g)* includes “the administration, conservation or disposal of the child’s property” within the scope of the Convention. This phrase has been used and explained in several Hague Conference documents,¹⁷ where it was indicated that protection of the property of the child was included as one of the objectives of the Convention with the aim of governing issues relating to the administration of the property the child might have abroad and the scope of the administrators’ powers. In contrast, it does not refer to the quality of the property, the rights of the parties, the capacity to acquire property, methods of transfer of property, or the formalities that should be observed. It therefore does not interfere with property law systems nor

¹³ The antepenultimate phrase of para. 54 of the Explanatory Report reflects the view that States have to make the necessary adjustments in their respective legal systems so that the mechanisms provided for in the Convention are available to its users.

¹⁴ In the region, the cases of Ecuador, Dominican Republic and Uruguay should be noted.

¹⁵ This seems to be the case of Uruguay. Art. 6 *in fine* of Law No 15.750 (*Ley Orgánica de la Judicatura y de Organización de los Tribunales* [Law on the Judiciary and organisation of the courts]) establishes that “transfer of jurisdiction is forbidden”. However, Uruguayan experts who were consulted affirmed this provision is not part of the “international public policy” of the country. For this reason, Uruguay has ratified international Conventions – such as the 1996 Hague Convention – which provide for the transfer of jurisdiction.

¹⁶ For further reference, see Chapter 13.G of the Practical Handbook on the Operation of the Convention.

¹⁷ Explanatory Report and Practical Handbook.

with substantive law issues relating to property interests, for example, disputes as to ownership or title.¹⁸

Because the scope is limited to certain aspects of the measures directed to the protection of the property of the child, the Convention's provisions would not conflict with domestic rules in States whose legal systems contemplate the principle of *lex rei sitae* as applying to the essential aspects of property located in those States.

Nonetheless, if a State Party to the Convention wanted to ensure the application of *lex rei sitae* to the aspects mentioned in the Convention relating to the property located within its territory (administration, conservation or disposal of the child's property), it could resort to the reservations provided for in Article 55.¹⁹

Article 55 of the Convention provides the possibility of making a reservation to the general rules of jurisdiction which establish principal jurisdiction of the authorities of the State of habitual residence of the child to take measures directed to the protection of the person or the property of the child. To this effect, it allows a State Party to reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory (Art. 55(1) a) and to 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 (Art. 55(1) b).

Even though the Convention only enables States to reserve jurisdiction, with no mention made of applicable law, in reality a reservation of jurisdiction of its authorities to take measures to protect the child's property situated on its territory automatically ensures the application of the principle of *lex rei sitae* since it coincides with the principle of *lex fori*, applicable under Article 15(1) of the Convention. In fact, the Convention sets forth the application of the *lex fori* as a general rule. This option to enable each court to apply its own law is aimed at facilitating the work of the authority hearing the case, as it can apply the law with which it is most familiar.

4. Measures of protection in cases of urgency²⁰ (Art. 11)

"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."²¹

The Convention does not provide a definition as to what constitute "cases of urgency". 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". However, experts consider that as it is the situation of "urgency" which justifies the derogation from the general rules of jurisdiction under the Convention, this concept ought to be interpreted rather strictly.

The measures of protection which can be taken in cases of urgency have the same material scope as the ones which can be taken under Articles 5 to 10 of the Convention (Art. 3 provides a non-exhaustive list of the possible measures and Art. 4 an exhaustive list of excluded questions). They can be extremely useful in various situations, for example: i) cases of unaccompanied children,

¹⁸ "[...] 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." Para. 13.72, Practical Handbook.

¹⁹ Almost half of the States have made a reservation by adopting one or both paragraphs of Art. 55: Albania, Armenia, Bulgaria, Croatia, Cyprus, Hungary, Latvia, Lithuania, Malta, Montenegro, Poland, Romania, Russian Federation, Slovakia, Spain, Switzerland, Ukraine. Information collected in May 2014.

²⁰ For further reference, see Chapter 6 of the Practical Handbook.

²¹ Para. 6.1, Practical Handbook.

victims of human trafficking or irregular immigrants, where immediate protection is required in the place they are found, as well as coordination with the authorities of their habitual residence in order to facilitate secure reinsertion into their respective communities; or ii) in cases of international child abduction, to facilitate a safe return through the necessary measures of protection (*e.g.*, provisional custody or restriction to contact, etc.). This provision would generally apply instead of mirror orders, which are used quite frequently, especially in common law countries. Some experts even consider that these measures could provide protection for the caretaking parent, in so far as this protection was necessary for the effective protection of the child.

Urgent measures under Article 11 differ from those under Article 12 because the former are granted in situations of urgency and can therefore modify the measures taken by the authorities having jurisdiction under Articles 5 to 10 (this is not possible through a provisional measure). Furthermore, urgent measures taken in child abduction cases can be ordered by the authorities of the country to which the child has been removed or in which he or she has been retained. In principle, such authorities cannot take provisional measures (Art. 7.3).

5. Provisional measures of protection (Art. 12)

Regardless of cases of urgency, Article 12 provides a specific criterion for the attribution of jurisdiction which allows the authorities of a Contracting State in whose territory the child or property belonging to the child is present to have jurisdiction to take any necessary measures directed to the protection of the person or the property of the child.

These provisional measures have three features:

- i) they are restricted to the territory of the Contracting State whose authorities take such measures;
- ii) they should not be incompatible with the measures already taken by the authorities having jurisdiction under Articles 5 to 10; and
- iii) in cases of international child abduction, they cannot be taken by the authorities of the State of refuge, if the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention maintains jurisdiction.

"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.). 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."²²

6. Recognition and enforcement of a foreign measure of protection (Arts 23 to 28, 43 and 54)²³

As highlighted in the Explanatory Report and the Practical Handbook, the Convention distinguishes recognition (Arts 23 to 25), the declaration of enforceability, or registration for purposes of enforcement (Arts 26 and 27), and finally enforcement (Art. 28).

²² Para. 7.2, Practical Handbook.

²³ For further reference, see Chapter 10.A and 10.B of the Practical Handbook.

The Convention provides that measures of protection taken in one Contracting State will be recognised by operation of law in all other Contracting States. This means a measure will be recognised automatically, that is, without the need to take proceedings in the requested Contracting State, in so far as this does not entail enforcement.

Where enforcement of a measure is sought in a different legal system to the one where it was ordered, a declaration of enforceability or the registration of the measure for the purposes of enforcement in another State shall be requested.

The Convention does not set down the procedure that must be followed for a declaration of enforceability. It merely indicates that it must be simple and rapid. It is then for each State to decide which procedure to implement (*e.g.*, type of procedure, time limits, instances for appeal, etc.) and which authority is to deal with such requests (*e.g.*, court of origin, Supreme Court, etc.), in so far as the Convention requirements for a rapid and simple procedure are observed.

The 1996 Convention, like other Hague Conventions, renders formal requirements related to submitting applications and documents more flexible, with a view to facilitating access to justice and the effective protection of the persons it seeks to benefit. For this reason, the person who applies for the declaration of enforceability or registration of the measure of protection will only need to submit the document granting the measure. It is not necessary for this document to follow any formality whatsoever, as it is exempt from legalisation or any analogous formality (Art. 43). The Convention also provides that documents shall be sent in the original language, accompanied with a translation into the official language of the requested State or where that is not feasible, a translation into English or French (Art. 54).

Once a document comes to the relevant authority, its enforceability or registration shall be declared. To this end, there is to be no review of the merits of the measure taken (Art. 27), but only an assessment of whether the procedural and material requirements established in the exhaustive list in Article 23(2) have been observed.

Once declared enforceable or registered, measures are to be enforced in the requested State as if they had been taken by the authorities of that State, and to the extent provided by the law of such State (Art. 28).

a. Advance recognition of measures of protection (Art. 24)²⁴

Since recognition is produced by operation of law, it is only at the time when the measure is invoked in a State that a possible dispute over the existence of a ground for non-recognition will be the subject of a ruling. This date may be too late, and any interested person may have a legitimate interest in dispelling, without waiting, any doubt which may exist about the existence of such a ground for non-recognition.²⁵

Advance recognition of measures of protection can thus be used to dispel any doubts as to the existence of a ground for non-recognition of a decision. The need for advance recognition arises especially in cases where the child has not yet entered the requested State but will do so in the near future.

²⁴ For further reference, see Chapter 10 of the Practical Handbook.

²⁵ *Cf.* para. 129, Explanatory Report.

The possibility for “advance recognition” is a particularly useful tool because it may allay parental concerns that contact orders will not be respected by parties in other Contracting States. For example where a child is to travel to another State for a period of contact, or where a parent wishes to relocate internationally with a child. In both cases, the parent who is to authorise the visit abroad for a period of contact or the relocation may be concerned that the child may not be returned to their care at the conclusion of contact, or that the right of access granted in the State where the child is habitually resident may not be effective in the other State. Advance recognition of both the custody and contact orders by the authorities of the Contracting State where contact is exercised ensures that those rights will be respected, or it will be a warning sign about the need to take measures which ensure the rights of the authorising parent.²⁶

The procedure for obtaining a decision on the recognition or non-recognition will be determined by the law of the requested State.

This tool requires legal users, especially judges, to have appropriate knowledge of the Convention. For this reason, at the time of implementing the Convention, States might find it useful to hold training seminars to maximise the possibilities afforded to users involved in international child protection.

b. Special cases of recognition

- *Recognition of a measure of protection taken in another State which does not provide for these measures*²⁷

Measures for the protection of children taken in a Contracting State shall be recognised by operation of law in other Contracting States. Once recognised, they shall be applied as if they had been taken in that State.

This general principle also applies, with some nuances, where the measure of protection is provided for or contemplated in the State where it is to be enforced.

Indeed, when faced with a request for enforcement of a measure of protection alien to its legal system, the requested authority shall assess whether its recognition is manifestly contrary to the public policy of the requested Contracting State, taking into account the best interests of the child.²⁸ If that were not to be the case, it shall declare the measure enforceable.

Enforcement of that measure shall be in accordance with the law of the requested State and to the extent provided by its law, taking into account the best interests of the child.

This could be the case of a request for a measure of protection in respect of a child by *kafala*²⁹ which has to be carried out in a Latin American country. Even though this institution has not been adopted in Latin American legal systems, it shares some features with the placement of the child in a foster family, so its scope is not unfamiliar to Latin American States. The Convention also accommodates both institutions and institutes a procedure for obligatory consultation where the authority of the State in which the measure is to become effective should consent to the placement. This requirement is necessary for the taking of the measure (Art. 33).

²⁶ Cf. para. 13.20 of the Practical Handbook.

²⁷ For further reference, see Chapter 10.D, para. 10.10, 10.13 and Chapter 11.D, para. 11.16 of the Practical Handbook.

²⁸ See Art. 23(2) d) of the Convention.

²⁹ *Kafala* is an Islamic law institution through which the child in need of protection may be entrusted either by a decision of the guardianship judge or by an administrative commission to a public or social institution or to a Muslim family which will care for the child's person (shelter, maintenance, education) and, if needed, for the property of the child and who, if necessary, would receive delegation of guardianship over the child.

- Simple and uniform recognition and enforcement of measures of protection taken in neighbouring countries or countries which are part of an economic integration zone³⁰

Recognition and enforcement of measures of protection taken in neighbouring countries, or countries which are part of an economic integration zone, shall be governed by the general rules of recognition and enforcement established in the Convention.

However, 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 the States bound by such instruments.

Moreover, this Convention does not affect the possibility for States to conclude (bilateral, regional or global) agreements which contain provisions on matters governed by this Convention, for example provisions towards developing mechanisms to define or to render the procedure for recognition or enforcement of measures of protection more effective.³¹

This can be of particular interest to those States which, as part of an economic integration zone, might envisage the development of new mechanisms to facilitate the enforcement of foreign judgments in the appropriate geographical areas.

7. The role of Central Authorities

“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.”³²

Article 29 provides for the appointment of one or more Central Authorities (for Federal States) to discharge the different kinds of duties imposed by the Convention:

a. Direct obligations of Central Authorities (which cannot be delegated to other bodies) (Arts 30 and 31)

- Central Authorities shall co-operate with each other and promote co-operation amongst competent authorities in their States; and
- in applying the Convention, 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.

b. Obligations which can be delegated or performed through public authorities or other bodies (Art. 31)

- Facilitate communications and offer assistance in the cases provided for in Articles 8 and 9 of the Convention (transfer of jurisdiction provisions) and in Chapter V (co-operation provisions);
- Facilitate, by way of 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;

³⁰ For further reference, see Chapter 10.D, para. 10.24, 10.25, 10.26 and Chapter 12.D of the Practical Handbook.

³¹ See Art. 52 of the Convention.

³² Para. 11.1, Practical Handbook.

- Provide assistance, at 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.

c. Situations where it is obligatory for authorities of States which have taken or wish to take a measure of protection to co-operate / communicate (through, or with the assistance of, the Central Authority) (Arts 33 and 36)

- The Convention institutes a procedure for consultation and co-operation amongst authorities when an authority 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.
- Where the child is exposed to a serious danger, the authorities of the 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 (Party or non-Party to the Convention), shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.

d. Specific instances of co-operation provided for in the Convention which are not mandatory to Central Authorities but may be thought of as good practice (Arts 32, 34, 35, 40)

- The Convention provides for co-operation between authorities in specific instances, namely, requesting a report on the situation of a child, considering the need to take measures for the protection of the person or the property of the child, requesting information relevant to the protection of a child when contemplating taking a measure of protection, requesting assistance to implement measures of protection abroad, seeking / providing assistance in international access / contact cases, determining the powers of a person having parental responsibility or responsible for the protection of the child's person or property. This list is by no means exhaustive, so Central Authorities may provide the co-operation that is requested of them in other circumstances.

One of the aspects to be considered when appointing a Central Authority under the 1996 Convention is whether the authority should be the same as the one already designated under the 1980 Hague Convention on Child Abduction. The following statements may facilitate this choice:³³

- Central Authorities under both Conventions are the key points to achieve co-operation with a view to protecting certain categories of children at risk in cross-border situations, and to exchange information between States regarding laws and services available for the protection of the child.
- Certain forms of assistance are common to both Conventions (*e.g.*, among other things, discovering the whereabouts of the child, facilitating common solutions, securing the effective exercise of rights of access).
- The categories of protected children differ in each Convention. The 1980 Convention applies to children until they reach the age of 16 years, while the 1996 Convention applies to children until they reach the age of 18 years.
- Central Authorities under the 1996 Convention have less responsibilities to facilitate or process applications, and more possibilities of delegating functions to other bodies.

³³ See also para. 11.2 of the Practical Handbook.

- States which participated in Parts I and II of the Sixth Meeting of the Special Commission on the operation of the Conventions on the return and protection of children, held in 2011 and 2012, respectively, provided solid grounds for the designation of the same Central Authority for both Conventions: overlapping competencies, similar functions, similar required abilities and the complementary nature of the two Conventions. They also stated that if there are different Central Authorities for each Convention, it is necessary that they work in a co-ordinated way.³⁴

8. Direct judicial communications

a. General aspects

Direct judicial communications (“DJC”) refer to communications that take place between judges of different jurisdictions concerning disputes with an international angle. Through these communications, judges can exchange information and learn how to implement procedures regarding the application of an international convention, as well as procedures in force in different States to deal with the issues they must address. DJC will also contribute to promoting a consistent interpretation of the Conventions. Judges will thus better understand how their colleagues in other jurisdictions work, and will have a better and broader understanding of different “jurisdictional cultures”.

DJC can be carried out in writing, via e-mail or fax, as well as orally, by telephone, video conference or any other video conference facilities.

The aim of DJC may be a request for information on the rules or other aspects of the legal system of the requested judge, or an exchange of information about a specific case involving the two judges.

DJC, which have been developing steadily over the past 15 years, hand in hand with the International Hague Network of Judges, can be useful in any matter requiring judicial co-operation, but especially in child abduction cases. These practices and the discussions within the Network gave rise to the “Emerging Guidance and General Principles for Direct Judicial Communications in specific cases, in the context of the International Hague Network of Judges”, endorsed by Part I of the Special Commission in 2011.³⁵ This document, apart from setting guidelines for the development of the Network of Judges, establishes principles, safeguards and mechanisms which are to be taken into account when using DJC.

b. Application of DJC in the context of the Convention

The Convention is based on co-operation amongst competent authorities, both administrative as well as judicial, in order to achieve its objectives – basically, the best protection of the child. There is express reference to these communications in Arts 8, 9, 31 a), 32, 34(1), 35(1), as well as in the Practical Handbook, the latter relating to international child abduction (para. 4.25; 13.12), *lis pendens* situations (para. 4.33; 4.35), and measures of protection in cases of urgency (para. 6.9).

³⁴ Conclusions Nos 67 to 71 of the Sixth Meeting of the Special Commission on the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and 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*. 1-10 June 2011. Available on the Hague Conference website at < www.hcch.net > under “Child Abduction Section” then “Special Commissions on the practical operation of the Convention”.

³⁵ *Ibid.* Note 34, Conclusion No 68.

As indicated above, even though current practice shows that DJC are frequently used in international child abduction cases, it is recognised that they can be used where necessary in any situation within the scope of the Convention.³⁶

Matters that may be the subject of DJC include, for example:

- a) scheduling the case in the foreign jurisdiction:
 - i) to make interim orders, *e.g.*, support, measures of protection;
 - ii) to ensure the availability of expedited hearings;
- b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
- c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- d) ascertaining whether the foreign court can issue a mirror order (*i.e.*, same order in both jurisdictions);
- e) confirming whether orders were made by the foreign court;
- f) verifying whether findings about domestic violence were made by the foreign court;
- g) verifying whether a transfer of jurisdiction is appropriate;
- h) ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful;
- i) ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (*e.g.*, where necessary, access to free legal representation, etc.);
- j) ascertaining whether a parent will be subject to civil / criminal sanctions when returning with a child to the State of habitual residence;
- k) resolving issues of parallel proceedings and the taking of jurisdiction.³⁷

c. Legal basis for DJC

In the context of the preparatory work for the Meeting of the International Hague Network of Judges (United Kingdom, 17-19 July 2013), the Permanent Bureau drew up the *Briefing Note: Legal Basis for Direct Judicial Communications within the Context of the International Hague Network of Judges*, where the existence of a large number of non-legislative bases for DJC is noted, one of them being the 1996 Hague Convention. In turn, the Members of the International Hague Network of Judges invited States to consider these practices with a view to utilising them in their own jurisdiction as possible legal bases for DJC.³⁸

³⁶ See Conclusions Nos 2 and 3 of the Conference celebrating the 15th anniversary of the International Hague Network of Judges (United Kingdom, 17-19 July 2013). Available on the Hague Conference website at: < http://www.hcch.net/upload/concl_cumberland_en.pdf >.

³⁷ Extract from the Information Document on direct judicial communications in specific cases within the context of the International Hague Network of Judges, prepared by the Permanent Bureau for the Conference celebrating the 15th anniversary of the Network.

³⁸ *Ibid.* Conclusions Nos 17 to 19.

In light of the foregoing, it can be stated that the 1996 Hague Convention provides a legal basis that will favour the promotion and use of DJC.

9. Relationship between the 1996 and 1980 Hague Conventions

“The 1996 Convention does not amend or substitute the mechanism established by the 1980 Convention for dealing with situations of international child abduction. 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 [...].”³⁹

a. Jurisdiction

“[...] 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.”⁴⁰

In addition, this rule also constitutes a tool to help avoid any confusion judges may encounter as regards jurisdiction in custody and return issues, which is one of the greatest obstacles to the proper application of the 1980 Hague Convention.

b. Safe return of the child

“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. 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).”⁴¹

c. Access / contact

“The 1996 Convention may also assist with questions of interim access / contact in abduction cases where return proceedings under the 1980 Convention are pending. Where the Contracting State of the child’s habitual residence is not in a position to deal

³⁹ Para. 13.1, Practical Handbook.

⁴⁰ Para. 13.2, Practical Handbook.

⁴¹ Para. 13.7, Practical Handbook.

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. 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.⁴²

In addition, apart from child abduction situations, the 1980 Convention has shown some limitations when an application under Article 21 is made, to make arrangements for organising or securing the effective exercise of rights of access abroad. In this sense, the 1996 Convention can be very useful because Article 35 specifically addresses co-operation in international cases of rights of access / contact, as it provides a co-operation system for the implementation of measures of protection to ensure the effective exercise of a right of access granted under the Convention. It also provides an innovative mechanism for the taking of evidence abroad, which will certainly facilitate access to justice for persons residing in a country other than where the court is located.⁴³

⁴² Para. 13.8, Practical Handbook.

⁴³ Art. 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. 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. Para. 13.18, Practical Handbook.