ENLÈVEMENT INTERNATIONAL D'ENFANTS
INTERNATIONAL CHILD ABDUCTION

Doc. prél. No 4
Prel. Doc. No 4

octobre / October 2006

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

DROIT DE VISITE / DROIT D'ENTRETENIR UN CONTACT TRANSFRONTIÈRE
PRINCIPES GÉNÉRAUX ET BONNES PRATIQUES

élaborés par William Duncan, Secrétaire général adjoint

* * *

TRANSFRONTIER ACCESS / CONTACT
GENERAL PRINCIPLES AND GOOD PRACTICE

drawn up by William Duncan, Deputy Secretary General

Document préliminaire No 4 d'octobre 2006
à l'intention de la Cinquième réunion de la Commission spéciale
sur le fonctionnement de la Convention de La Haye du 25 octobre 1980
sur les aspects civils de l'enlèvement international d'enfants
(La Haye, 30 octobre – 9 novembre 2006)

Preliminary Document No 4 of October 2006
for the attention of the Fifth meeting of the Special Commission
to review the operation of the Hague Convention of 25 October 1980
on the Civil Aspects of International Child Abduction
(The Hague, 30 October – 9 November 2006)

Permanent Bureau | Bureau Permanent
6, Scheveningseweg 2517 KT The Hague | La Haye The Netherlands | Pays-Bas
telephone | téléphone +31 (70) 363 3303 fax | télécopieur +31 (70) 360 4867
e-mail | courriel secretariat@hcch.net website | site internet http://www.hcch.net

DROIT DE VISITE / DROIT D'ENTRETENIR UN CONTACT TRANSFRONTIÈRE
PRINCIPES GÉNÉRAUX ET BONNES PRATIQUES

elaborés par William Duncan, Secrétaire général adjoint

* * *

TRANSFRONTIER ACCESS / CONTACT
GENERAL PRINCIPLES AND GOOD PRACTICE

drawn up by William Duncan, Deputy Secretary General

TABLE OF CONTENTS

Page

INTRODUCTION

Background

The matter of transfrontier access / contact, and in particular the adequacy of Article 21 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, has been a concern of the Hague Conference for many years. Indeed the drafters of the 1980 Convention recognised that, despite the fact that an objective of the Convention was to "secure protection for rights of access",[1] the Convention provisions on this subject were limited.[2]

The framers 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* were also well aware of these limitations and took the opportunity to fill in some of the gaps left by the 1980 Convention. The measures of protection in respect of children, which are a primary focus of that Convention, include those which deal with rights of access.[3] Thus the uniform rules defining jurisdiction to take child protection measures, as well as the related provision for the recognition and enforcement of such measures in other Convention countries, apply to decisions relating to access / contact. In addition Article 35, within the chapter on co-operation, makes specific provision for inter-State request for assistance especially in securing "the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis".

More recent concern began with a decision of the Special Commission on General Affairs and Policy in May 2000 (8-12 May) to request the Permanent Bureau to prepare a report on the desirability and potential usefulness of a protocol to the 1980 Convention which would "provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests". This led first to the drawing up of a preliminary report on transfrontier access / contact[4] which was discussed during the Fourth meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001). This Report drew in part on responses to a questionnaire circulated among States Parties to the 1980 Convention, Member States of the Hague Conference and certain international organisations prior to the Special Commission of March 2001.[5]

Discussions at the March 2001 Special Commission led to a conclusion that the deficiencies in the 1980 Convention in securing protection for rights of access in transfrontier situations were "a serious problem requiring urgent attention in the interests of the children and parents concerned".[6]

---

[1] Preamble to the 1980 Convention, para. 3. See also Article 1 *b)*.

[2] See E. Pérez-Vera, "Explanatory Report on the Convention on the Civil Aspects of International Child Abduction", *Actes et documents de la Quatorzième session* (1980), tome III, *Child abduction,* at p. 426.

[3] Article 1, 1996 Convention.

[4] "Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. A Preliminary Report", Prel. Doc. No 4 of February 2001 for the attention of the Special Commission of March 2001 prepared by William Duncan.

[5] See the Hague Conference website at < www.hcch.net > => Child Abduction Section => Special Commission related documents.

[6] Conclusion 6.1, "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)" drawn up by the Permanent Bureau, April 2001 (available at < www.hcch.net > => Child Abduction Section => Special Commission related documents).

Following the Special Commission meeting of March 2001 the Permanent Bureau continued the process of consultation and, in January 2002, circulated a Consultation Paper on Transfrontier Access / Contact to Member States, States Parties to the 1980 Convention and relevant governmental and non-governmental organisations.[7] Part of the purpose of this Consultation Paper was to obtain preliminary views on the approaches or techniques, which were thought by respondents most likely to offer effective solutions to those aspects of transfrontier access / contact which are causing concern. The Consultation Paper listed several possible approaches or techniques (a protocol, recommendations, a Guide to Good Practice, model agreements), and it discussed some of their implications.

The Final Report[8] on transfrontier access / contact was then prepared and circulated in July 2002 for the attention of a Special Commission meeting in October 2002, convened to follow up on matters arising from the March 2001 meeting.

The Final Report drew attention to the diversity of legal elements that make up the framework for resolving international access / contact disputes. These included matters of jurisdiction, the recognition and enforcement of decisions relating to contact, assistance to foreign applicants, remedies for wrongful retentions, co-operation between authorities, promoting agreement and mediation, national laws and procedures, prior guarantees and safeguards and enforcement under national law.[9] The interrelationships between the different elements were pointed out and it was suggested that reform of isolated elements without regard to context carries a risk of failure.[10]

The Final Report considered the laws and practices, which had developed under the 1980 Convention in a number of Contracting States and drew the following general conclusions:

> "*119 The principal shortcomings, which have all been mentioned in responses to the Questionnaire and the Consultation Paper, may be summarised as falling within the following broad areas:*
>
> *(1) The failure to have in place uniform rules determining the jurisdiction in international cases of authorities to make or modify contact orders and adequate provisions for the recognition and enforcement of foreign access / contact orders.*
>
> *(2) The absence of agreement among States on the nature and level of the supports, which should be made available to persons seeking to establish or secure access / contact rights in a foreign country. This refers inter alia to information and advice, including legal advice, assistance in gaining access to the legal system, facilities to promote agreed outcomes, and the physical or financial supports, which are sometimes necessary to enable access / contact which has been agreed or ordered to take place.*
>
> *(3) The operation in some countries of procedures, both at the pre-trial and enforcement stages, which are not sufficiently sensitive to the special features*

[7] "Consultation Paper on Transfrontier Access / Contact", Prel. Doc. No 1 of January 2002 for the attention of the Special Commission of September / October 2002, prepared by William Duncan.
[8] "Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report", Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002, prepared by William Duncan. This document will be referred to as the "Final Report".
[9] Chapter III.
[10] At para. 48.

and needs of international cases, and which are the cause of unnecessary delays and expense.

(4) An inadequate level of international co-operation at both the administrative and judicial levels."

The 2002 Conclusions

The following were the conclusions on transfrontier access / contact reached by the Special Commission concerning the 1980 Hague Convention at its meeting in The Hague of 27 September–1 October 2002:

"*(a) It is premature to begin work on a Protocol to the 1980 Convention. If the alternative steps outlined below do not lead to significant improvements in practice, the issue of a Protocol should be revisited in the future.*

(b) Chapter 5 of Preliminary Document No 3 should be retained subject to agreed modifications. [The document referred to was the draft Guide to Good Practice on Central Authority Practice.]

(c) Work should continue on a separate chapter of the Guide to Good Practice relating to transfrontier access/contact in the context of the 1980 Convention with the following objectives:

a. to promote consistent and best practices in relation to those matters which it is agreed fall within the competence and obligations of States Parties under the Convention,

b. to provide examples of practice even in relation to matters which fall within the disputed areas of interpretation.

(d) Work should begin on the formulation of general principles and considerations. The idea is not to create a set of principles applying to access cases generally, but rather to draw attention to certain general considerations and special features, which need to be borne in mind by Contracting States and their authorities when formulating policies in respect of international access / contact cases. These general principles would not be binding; they would be advisory in nature. As well as offering general advice to States in formulating policy in this area, the general principles could be helpful to Central Authorities in informing their practice, they could possibly be helpful to the courts and other authorities, as well as to applicants as they present their cases.

(e) It is recognised that the provisions 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 has the potential to make a substantial contribution to the solution of certain problems surrounding cross-frontier access / contact. Those States which have already agreed in principle to ratify or accede to the 1996 Convention are urged to proceed to ratification or accession with all due speed. Other States are strongly encouraged to consider the advantages of ratification or accession and implementation.

(f) The Meeting notes and welcomes the readiness of some judges from common law jurisdictions to tackle problems posed by conflicting interpretations of Article 21 in their jurisprudence by proposing a common law judicial congress."

Developments in which the Permanent Bureau has been involved since 2002

1. The work on Central Authority practice relating to access applications was completed and forms Chapter 5 (Access applications: role of requesting and requested Central Authorities) of Part I of the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*", *Central Authority Practice*, which was published in 2003.[11]

2. A number of international judicial conferences / seminars have been organised by the Permanent Bureau which have included discussions of access / contact issues, in particular the Noordwijk Seminar,[12] the two Latin American Judges' Seminars held in Monterrey, Mexico, 1-4 December 2004[13] and in The Hague from 27 November-3 December 2005.[14]

3. The "Malta Process" has been established by the Permanent Bureau for the purpose of discussing among other things how to secure better protection for cross-frontier rights of contact of parents and their children as between a number of States Parties to the 1980 Convention and a number of non-Party States whose laws are based on or influenced by Shariah law. Two judicial conferences have been held, both in St Julian's Malta, the first from 14-17 March 2004[15] and the second from 19-22 March 2006.[16] The Malta Process has provided the opportunity to consider in a rather fresh and radical way what are the essential building blocks for an effective system of international co-operation in matters of access / contact. These are reflected in the Declarations, which emerged from each of the conferences.[17]

4. An informal meeting of experts on transfrontier access / contact was held at the Permanent Bureau in The Hague from 23-24 October 2005. The meeting of experts, who

---

[11] Published by Family Law for the Hague Conference on Private International Law. Also available at < www.hcch.net > => Child Abduction Section => Guide to Good Practice. See Appendix 1.

[12] Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Noordwijk, 19-22 October 2003, involving judges and Central Authority personnel from Germany, the United States of America, Austria, France, Israel, the Netherlands, Sweden, Switzerland, Turkey and the United Kingdom (England and Wales, Northern Ireland, Scotland).

[13] Participating in the Seminar were ninety Judges, Central Authority officials and other experts from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, United States of America, Uruguay, and Venezuela and the following Organisations: Organization of American States - Inter-American Children's Institute, International Centre for Missing and Exploited Children, American Bar Association - Latin American Law Initiative Council, Texas-Mexico Bar Association and the Law School of Instituto Technologico y de Estudios Superiores de Monterrey (see *The Judges' Newsletter*, Vol. IX, Spring 2005).

[14] See *The Judges' Newsletter*, Vol. X, Autumn 2005.

[15] Participating in the Seminar were Judges and Experts from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, the European Commission, the Council of the European Union, the International Social Service and Reunite (see *The Judges' Newsletter*, Vol. VIII, Autumn 2004).

[16] Participating in the Seminar were Judges and Experts from Algeria, Australia, Belgium, Canada, Egypt, France, Germany, Indonesia, Lebanon, Libya, Malaysia, Malta, Morocco, the Netherlands, Sweden, Tunisia, Turkey, the United Kingdom, the United States of America, the European Commission, the European Parliament, the Council of the European Union, the International Social Service, the International Center for Missing and Exploited Children and Reunite (see *The Judges' Newsletter*, Vol. XI, Spring 2006).

[17] See < www.hcch.net > => Child Abduction Section => Judicial Seminars on the International Protection of Children.

attended in their personal capacities,[18] was convened to provide the Permanent Bureau with further advice and assistance in completing this Report.

5. The Permanent Bureau has assisted at a number of other international meetings at which issues of transfrontier access / contact have been discussed, including an Informal Ministerial Meeting, convened in Sweden by the Minister of Foreign Affairs of Sweden on 4 November 2005, involving Ministers and other experts from Algeria, Ireland, Latvia, Malta, Morocco, Sweden, Tunisia and Turkey as well as the European Commission.[19]

The structure of this Report

This Report responds to the mandate given by the Special Commission of September / October 2002 to work on a Guide to Good Practice relating to transfrontier access / contact in the context of the 1980 Convention and to formulate certain general principles and considerations which need to be borne in mind by Contracting States and their authorities when formulating policies in respect of international access / contact cases. The approach adopted is a comprehensive one embracing most of the important elements (structural, substantive and procedural) necessary for effective inter-State co-operation in this area. One consequence of this is that some of the matters addressed fall, or may fall, within the scope of the 1980 Convention; others are more general. The reason for this approach is that it avoids the disadvantages of a piece-meal treatment, it presents an integrated picture of what is needed, it helps to identify the matters of importance which are not covered by the 1980 Convention, and which therefore may call for supplementary provisions, and it provides States which are not Parties to the relevant international instruments with broad guidance on what may be required to become an effective international partner in securing cross-frontier rights of access / contact for parents and children.

The Report is not at this stage comprehensive. The treatment or full treatment of matters such as mediation and enforcement has been set to one side pending further discussion of these matters under separate Agenda items within the Special Commission. If it is agreed by the Special Commission that work should continue on the Report these gaps will need to be filled in. There are also a number of other miscellaneous matters that may need to be added relating, for example, to the development of contact centres and facilities for supervised contact, visa and immigration issues and special schemes that have been devised to enable groups of parents to exercise rights of access in a safe environment in particular countries.

Finally in a Postscript some consideration is given to the question of whether the 1980 Convention should be amended by a Protocol in order to make its provisions concerning transfrontier contact more effective. Without prejudice to any conclusions that may be reached by the Special Commission on this question, the Postscript also suggests a programme for future action including a procedure for preparing Chapters 1 to 7 of this Report for publication.

[18] See *The Judges' Newsletter*, Vol. X, Autumn 2005, article entitled "Informal meeting of experts on transfrontier contact / access", pp. 96-97. Participating in the meeting were Sarah Armstrong, Eberhard Carl, Denise Carter, Mary Sue Conaway, Denise Gervais, Peter McEleavy, Joan MacPhail, Michael Nicholls, Kathy Ruckman, Adel Omar Sherif, Linda Silberman, Jennifer Degeling, Caroline Harnois, Philippe Lortie, Andrea Schulz and William Duncan.

[19] See *The Judges' Newsletter*, Vol. X, Autumn 2005, article entitled "Informal Ministerial Meeting on incompatibility of norms as a source of conflicts – child abductions and related issues", pp. 98-99.

Sources

Much of the material which has gone to make up this Report derives, in addition to legislative and judicial sources, from the various questionnaires, Special Commission meetings, judicial and other seminars and conferences, mentioned above in the section entitled "background". *The Final Report* is a principal source. In addition, the following have also been of particular assistance:

– Part I (Central Authority Practice) and Part II (Implementing Measures) of the Guides to Good Practice under the 1980 Hague Convention;[20]

– Part III of the Guide (Preventive Measures)[21] already contains many recommendations and examples of good practice relevant to the subject matter of this Report;

– The Judges' Newsletter on International Child Protection;[22]

– The two statistical surveys of applications made in 1999 and 2003 under the 1980 Hague Convention;[23]

– Good Practice Report on Access.[24]

Acknowledgement

The Permanent Bureau would like to extend its thanks to the many authorities and persons who have provided help and information in relation to its work on transfrontier contact. Particular thanks are due to the members of the group of experts mentioned in footnote 17 as well as to Kerstin Gollwitzer and Eimar Long, former interns with the Permanent Bureau.

[20] See *Guide to Good Practice under the* Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I – Central Authority Practice*, drawn up by the Permanent Bureau, January 2003 and *Guide to Good Practice under the* Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part II – Implementing measures*, drawn up by the Permanent Bureau, January 2003.

[21] See *Guide to Good Practice under the Hague* Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part III – Preventive Measures*, drawn up by the Permanent Bureau, 2005.

[22] Volumes I-XI available at on the Hague Conference website at < www.hcch.net > => Child Abduction Section.

[23] Prepared by the Centre for International Law Family Studies, Cardiff Law School, with the co-operation of the Permanent Bureau: "A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Prel. Doc. No 3 of March 2001 drawn up for the attention of the Special Commission of March 2001 and "Questionnaire on the enforcement of return orders under the 1980 Hague Convention and of access / contact orders".

[24] By Professor Nigel Lowe and Katarina Horosova, Centre for International Law Family Studies, Cardiff Law School, 2006, sponsored by the National Center for Missing and Exploited Children.

PRELIMINARY MATTERS

The objectives and scope of the general principles and good practice

The principles and good practices set out in the Report serve the following purposes:

(a) they provide guidance as to general principles and practices which may lead to the more effective implementation and application of those provisions of the 1980 Hague Convention which concern transfrontier contact;

(b) they draw attention to provisions of the 1996 Hague Convention which supplement the 1980 Convention, and provide guidance concerning their application;

(c) they provide an overall model or template for constructing an international system of co-operation designed to secure effective respect for rights of contact. As such, the Principles and Guide are intended to be helpful also to those States, which are not Parties to the Hague Conventions.

Matters of terminology

"Contact" and "Access"

The term "contact" is used in a broad sense to include the various ways in which a non-custodial parent (and sometimes a person other than a parent) maintains personal relations with a child and vice versa. As such, "contact" includes access and visitation as well as distance communications. "Contact rights", when used in the context of the 1980 and 1996 Hague Conventions, are taken to be the same as "rights of access". However, in Chapter 7, where matters of definition are addressed, the term "access" is retained.

"Custodial parent" and "contact parent"

Except where the context otherwise indicates, the term "custodial parent" should be read in a non-technical sense as referring to the parent with whom the child has his or her usual or habitual residence, and the term "contact parent" should be read as referring to the parent holding or claiming rights of contact in respect of a child.

Chapter 1 – The importance of contact and of promoting parental agreement

1.1 The importance of contact

It is generally recognised that children should for their well-being maintain personal relationships and have regular contact with both of their parents unless it is unsafe or otherwise contrary to their interests to do so. This remains the case even when the parents are living apart and in different countries, and even though the primary care of the child is vested in one of the parents.

While different legal systems adopt varying approaches to the substantive issues surrounding contact,[25] certain fundamentals are subscribed to by almost all States. Under Article 9, paragraph 3 of the *United Nations Convention on the Rights of the Child*:[26]

> *"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."*

In addition, under CRC Article 10, paragraph 2:

> *"A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents …"*

This is not the place to develop a uniform law on the substantive issues.[27] Nevertheless, experience has shown that international structures designed to secure contact may be set at nought if, when a case comes to court, a parochial approach is adopted by the deciding judge. Hence the importance of stressing fundamental principles.

The general precept applies whether expressed in terms of the rights of the child or of the parents, or of both the child and the parents.[28] The importance for the child of maintaining personal relationships with other persons with whom the child has close family ties is also widely recognised.[29]

---

[25] See Final Report para. 99, which points out that "these differences become more apparent and pronounced when issues of child abuse or domestic violence are involved."

[26] *United Nations Convention on the Rights of the Child* (adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990, in accordance with Article 49) [hereinafter the "CRC"]. The CRC has 192 States Parties. See also the *International Covenant on Civil and Political Rights* of 1966 which, in Articles 23 and 24, gives protection to family and children's rights.

[27] One of the objects of the *Council of Europe Convention on Contact Concerning Children* (Strasbourg, 15 May 2003) [hereafter referred to as the Convention of 2003 on Contact Concerning Children] is to establish a common approach to the principles to be applied to contact orders. Article 1(a). The intention is that the adoption of common standards should enhance international co-operation. See the Preamble of the Convention.

[28] For example, Article 8 of the European Convention on Human Rights which recognises that "everyone has the right to respect for his private and family life" has been interpreted by the European Court of Human Rights as guaranteeing the right of a parent and his or her child to maintain regular contact with each other. The European Court of Human Rights has asserted on several occasions that the right of contact belongs to the parent as well as the child, and that it is a fundamental right, shared mutually between parent and child, and protected under Article 8 of the European Convention on Human Rights. In its decision in the case of *Elsholz* v. *Germany* (Judgment of 13 July 2000, citing *inter alia Johansen* v. *Norway*, Judgment of 7 August 1996 and *Bronda* v. *Italy*, Judgment of 19 June 1998) the Court stated as follows: "*The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.*"

[29] See *e.g.* the decision of the European Court of Human Rights in *Scozzari and Giunta* v. *Italy* (13 July 2000), in which it is recognised that ties between more relatives, such as grandparents and grandchildren, may also be protected under Article 8 of the ECHR. See also Article 5 of the Convention of 2003 on Contact Concerning Children, which gives some protection to contact rights between "the child and persons other than his or her parents having family ties with the child." Rights of access are not confined to those existing between parents and children either under the 1980 Hague Convention or the 1996 Hague Convention. An application under Article 21 of the 1980 Convention is not confined to a parent. Under Article 21 of the *Inter-American Convention of 15 July 1989 on the International Return of Children*, "any person with visitation rights" may

1.2 Restrictions on contact should be proportionate

Legal restrictions on contact between parents and children should be no more than are necessary to protect the interests of the child.

Limits on contact may include for example a requirement that the contact be supervised or that it take place only at certain times and in certain places. The principle expressed here it one of proportionality, reminding authorities that limits on parental contact should be justifiable in terms of the child's interests.[30] The concept of "necessity" when applied to restrictions on contact involves also the idea that there should be no other less restrictive methods available to protect the interests of the child. The European Court of Human Rights has recognised that unreasonable restrictions on visiting rights may lead to the increased alienation of a child from his or her parent.[31]

1.3 Promoting parental agreement

The primary responsibility for ensuring that regular contact takes place, and for arranging such contact, rests with both parents.[32] The legal and administrative arrangements, whether adopted under the 1980 Convention or otherwise, should support the exercise by parents of this responsibility by promoting and facilitating agreement between them.

These arrangements should in particular:

a) facilitate and encourage the use of mediation, conciliation, negotiation and similar means for achieving agreed solutions;

b) provide a legal framework which ensures fairness in negotiations between the parents, and which respects the rights of the child, including the right of the child to express his / her views and to have those views taken into account in accordance with the child's age and maturity;

c) provide a legal framework which gives effect, in both the countries in which the parents live, to agreements on contact reached between the parents.

The advantages of parental agreement concerning contact arrangements are that "[t]hey are more likely to be adhered to by the parties; they establish a less conflictual framework for the exercise of contact and are therefore strongly in the interests of the child; and once a certain level of co-operation between the parents is established, the painful and expensive pattern of re-applications to the court for orders for modification or enforcement is less likely to become established". [33]

The 1980 Convention recognises the need to promote agreed solutions in Article 7, paragraph 2 *c)*, which requires Central Authorities to secure the voluntary return of the child or bring about an amicable resolution of the issues. The efforts made to secure an amicable solution in contact applications under the 1980 Convention differ widely. Typically, a requested Central Authority will as a minimum communicate with the respondent parent to determine whether agreement may be forthcoming and to point out any facilities, including mediation services, available. However, the patchwork nature of

---

address for their enforcement the competent authorities of any State Party.

[30] See also Convention of 2003 on Contact Concerning Children, Article 4, para. 2.

[31] See for example, *Kutzner* v. *Germany*, Judgment of 26 February 2002.

[32] See UNCRC Article 5 and Article 5 *b)* of the *Convention on the Elimination of all Forms of Discrimination against Women*, adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981.

[33] Final Report, para. 5.

supports available to promote agreement is reflected in the findings of the Statistical Analysis of Applications made in 2003 which reports:

> *"The number of cases in which access was ultimately agreed has decreased from 35 applications (18%) in 1999 to 29 applications (13%) in 2003. This figure is also below the voluntary return rates [*i.e. *in respect of applications for the return of a child under the Convention] of 19% and 18% recorded in 2003 and 1999 respectively."*[34]

The Report also indicates that "consent orders" were made in 4% of the cases in 2003. The Report does not indicate the number of international cases dealt with under domestic procedures (*i.e.* not under Article 21 of the 1980 Convention) in which consent orders or voluntary agreements were the outcome.

The Hague Convention of 1996 contains a provision, which is more specific than that of the 1980 Convention. Article 31 *b)* requires Central Authorities, directly or through public authorities or other bodies, to take all appropriate steps to "facilitate, by mediation, conciliation and similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies."

A separate study has been carried out by the Permanent Bureau of various mediation schemes operating, or being considered, in the context of the 1980 and 1996 Conventions.[35] Among the current schemes covered by this study are those operating between Germany and France[36] and between the United States of America and Germany[37] which have focussed on some particularly intractable international contact disputes. The scheme initiated by Reunite[38] in the United Kingdom operates within the context of the 1980 Convention. One of its objectives is to promote agreement in those cases where there has been an application for the return of the child but where the underlying motive of the applicant is to secure contact rights. Programmes being developed by MAMIF,[39] International Social Service[40] and others[41] are included in the study. This study should lead to the identification of useful models and good practices for international mediation in contact cases. What is stated here is therefore preliminary in nature.

The role of the State in promoting and supporting parental agreement on access is not confined to the provision of mediation or similar facilities. The law has a wider role to play in establishing the conditions, which guarantee fairness in the negotiating process, and in supporting agreements once made.

---

[34] Overall Report, Section II, D.1.

[35] See "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children, especially in the context of the Hague Convention of 1980", Prel. Doc. No 5 for the attention of the Special Commission of October / November 2006, drawn up by Sarah Vigers.

[36] Franco-German Parliamentary Mediation Commission, established in 1999, and the Franco-German Project of Bi-national Professional Mediation, established in 2003.

[37] The US-German Bilateral International Parental Abduction Working Group is currently establishing a pilot project of bilateral mediation.

[38] The Reunite-International Child Abduction Centre, UK, Pilot Project, which commenced in 2003.

[39] *Mission d'aide à la médiation internationale pour les familles*, established within the Ministry of Justice of France in 2001.

[40] This project, which is linked with the Hague Convention of 1996, seeks to establish an international network of mediators.

[41] *E.g.* the Argentine Central Authority, the England and Wales Court of Appeal Alternative Dispute Resolution Scheme, the German Federal Ministry of Justice programme, and bi-national mediation schemes involving States that are not Parties to the Hague Convention of 1980.

Discussion or negotiations between parents over contact take place against the background of the legal rules and procedures which define the limits of party autonomy (for example to protect the interests of a weaker party or of the child) and which also indicate the possible consequences if agreement is not forthcoming. If there are serious gaps in this protective legal framework, the parents will not have a level field on which to negotiate, and there is a real danger of imbalance and unfairness to one of the parties.

In the international sphere this problem is illustrated when negotiations take place between parents who live in different countries which do not have full structures for legal co-operation, but which rely rather on mediating structures to try to achieve parental agreement. This is the case in particular in those countries, which have entered into bilateral agreements which are consular in nature and are based on a model of mediation.[42] The absence of a legal framework defining the circumstances in which each country's authorities have jurisdiction to make contact orders usually means that, if agreement between the parents is not forthcoming, little can be done. The effect of this on the negotiating process is to favour strongly the parent whose interest is in maintaining the status quo.[43] More will be said about the importance of effective structures for legal co-operation in the next Chapter.

---

[42] See generally on the subject of promoting agreement between parents the Malta Declarations of 17 March 2004 (First Malta Declaration) and 22 March 2006 (The Second Malta Declaration). The First Malta Declaration, at para. 3 stated:

> "*Steps should be taken to facilitate, by means of mediation, conciliation, by the establishment of a commission of good offices, or by similar means, solutions for the protection of the child which are agreed between the parents*."

The Second Malta Declaration, at para. 3 stated:

> "*Intensified activity in the field of international family mediation and conciliation, including the development of new services, is welcomed.*
>
> *The importance is recognised of having in place procedures enabling parental agreements to be judicially approved and made enforceable in the countries concerned.*
>
> *Legal processes concerning parental disputes over children should be structured so as to encourage parental agreement and to facilitate access to mediation and other means of promoting such agreement. However, this should not delay the legal process and, where efforts to achieve agreement fail, effective access to a court should be available.*
>
> *International family mediation should be carried out in a manner which is sensitive to cultural differences.*"

[43] See generally *The Judges' Newsletter*, Vol. VIII, Autumn 2004 which features the Malta Judicial Conference on Cross-Frontier Family Law Issues involving certain Hague and non-Hague States and the explanation of the Malta Process given by William Duncan at pp. 4-8 of that issue.

Chapter 2 – Inter-State administrative co-operation

2.1 The need for permanent structures for international co-operation

Securing the protection of contact rights across borders requires the establishment of permanent structures for inter-State co-operation at administrative and judicial levels. The Hague Conventions of 1980 and 1996 offer such structures.

States cannot by unilateral action effectively protect contact rights internationally. Co-operative structures are needed and, if these are to form the basis of a rule of law between the countries concerned, providing predictability and stability for families and children, they need to be established on a permanent basis, and within an agreed international framework.

2.2 The Central Authority model

The administrative authorities (which under the Hague Conventions of 1980 and 1996 are called "Central Authorities") which act as a focal point for cross-border co-operation need to be clearly established by law and given a mandate, powers and resources which enable them to carry out their functions effectively. They should be clearly identifiable and easily accessible. They need to be adequately and professionally staffed and there needs to be continuity in their operations.

Experience with the Hague Conventions over many years has proved the value of the "Central Authority" system. For foreign applicants the Central Authority should act as a window and a door to the legal system of which it is part, providing information about it and access to it. When working successfully, the Central Authority system offers an alternative to *ad hoc* diplomatic activity and should reduce some of the international tensions which sometimes accompany cross-frontier family disputes.

By contrast, the absence of a coherent system of administrative co-operation has been identified as a serious deficiency in States which are not Parties to the Hague Conventions or to other instruments which provide similar structures.[44]

---

[44] Both of the Malta Declarations draw attention to this. The First Declaration (17 March 2004), in para. 2, states as follows:

> "*2. Efficient and properly resourced authorities (Central Authorities) should be established in each State to co-operate amongst one another in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. Such cooperation should include at least:*
> - *assistance in locating a child;*
> - *exchange of information relevant to the protection of the child;*
> - *assistance to foreign applicants in obtaining access to local services (including legal services) concerned with child protection.*"

The Second Declaration, in para. 2, continues in similar vein:

> "*The centralised administrative authorities (sometimes called Central Authorities) which act as a focal point for cross-border co-operation in securing cross-frontier contact rights and in combating the illicit transfer and non return of children should be professionally staffed and adequately resourced. There should be continuity in their operation. They should have links internally with child protection, law enforcement and other related services, and externally they should have the capacity to co-operate effectively with their counterparts in other countries. Their role in promoting the amicable resolution of cross-frontier disputes concerning children is emphasized*."

The Informal Ministerial Meeting which took place in the Haga Palace Sweden on 4 November 2005 agreed first of all upon:

> "– *the importance of establishing Central Authorities for international co-operation in protecting children across frontiers, i.a. through the exchange of information, through the promotion of agreement, and by the provision of assistance to overseas applicants in accessing the legal system. Such Central Authorities should be clearly defined, properly resourced and adequately staffed.*
> – *the relevance of improving specialisation of judges, prosecutors, advocates, enforcement officers and Central Authority personnel, involved in dealing with international abductions and disputes concerning cross-frontier access.*
> – *considering the value, where possible, of concentrating jurisdiction to decide upon child abduction cases among a limited number of courts or judges in order to ensure the necessary level of expertise and experience.*

No more needs to be said here about the establishment of a Central Authority because this matter is fully covered in Part I of the Guide to Good Practice under the 1980 Convention, Part I - Central Authority Practice.[45] However, it is important to restate here some of the specific functions which Central Authorities perform in the context of transfrontier contact disputes.

2.3 Specific functions of Central Authorities:

In the context of transfrontier contact the Central Authority should act as a focal point –

(a) for the exchange of information between States about the laws and procedures applicable and the services available in the context of specific cases;[46]

(b) for channelling information about the progress of specific cases;[47]

(c) for the provision of certain services to help give effect to contact rights by taking appropriate measures –

(i) to assist in locating a child;[48]
(ii) to prevent further harm to a child through provisional measures;[49]
(iii) to bring about an amicable resolution of issues;[50]
(iv) to exchange information about the background of the child;[51]
(v) to eliminate obstacles to the functioning of the Convention;[52]

(d) for responding to requests from other Central Authorities or competent authorities for assistance in implementing access rights or decisions in respect of access rights;[53]

(e) for providing a report in respect of a child who is the subject of a contact dispute;[54]

– *giving priority to reaching rapid solutions to abduction cases, and*
– *paying attention to the importance of facilitating the implementation of the right of access, i.a. pertaining to the issuing of visas*."

See also the Conclusions and Recommendations of the Judicial Seminar on the role of the Hague Child Protection Conventions in the practical implementation of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which took place in The Hague from 3-6 September 2006

[45] *The Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I – Central Authority Practice*; Family Law, 2003, p. 154.
[46] See 1980 Convention, Article 7 *e)* and 1996 Convention, Article 30(2).
[47] See 1980 Convention, Article 7 *i)*.
[48] See 1980 Convention, Article 7 *a)* and 1996 Convention, Article 31 *e)*.
[49] See 1980 Convention, Article 7 *b)*.
[50] See 1980 Convention, Article 7 *c)* and 1996 Convention, Article 31 *b)*.
[51] See 1980 Convention, Article 7 *d)* and 1996 Convention, Article 34(1).
[52] See 1980 Convention, Article 7 *i)*.
[53] See 1996 Convention, Article 35(1). See also Article 32.
[54] Under the 1996 Convention, the Central Authority of a State in which the child has his / her habitual residence may, on a request with supporting reasons, provide a report on the situation of the child.

(f) for removing obstacles to the exercise of contact rights;[55]

(g) for assisting in the implementation of decisions concerning contact rights.[56]

This long list of functions that a Central Authority may perform in supporting contact rights is drawn from the 1980 and the 1996 Conventions which overlap in some respects and supplement each other in other respects. It might appear from the broad scope of services set out here that foreign applicants are well served particularly under the 1980 Convention. However, the reality is different and the situation as described in *the Final Report* remains broadly accurate:

> "*20. As the Pérez-Vera Report points out, the precise ways in which the Central Authorities are required to co-operate under Article 21 (with the exception of removing obstacles as far as possible), in securing the exercise of access rights is "left up to the co-operation among the Central Authorities", and the specific measures which Central Authorities are able to take "will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority".*[57] *The requirements of co-operation are thus very broadly defined leaving much to the discretion of Central Authorities, whose powers are often limited under their national laws. The responses to the Questionnaire confirm that this is an area in which practices vary widely. The issue of resources also arises for many Central Authorities. Although access / contact cases may be smaller in number than abduction cases the Central Authority resources required to deal with them can be much greater, bearing in mind also that in the absence of agreement between parents the dispute may be long running.*
>
> *21. With respect to the provision of other supports, the picture again is a varied one. Most Central Authorities will provide general information to the applicant, though this clearly varies in the amount of detail provided. For example, Manitoba, Canada, offers a free public information booklet describing all aspects of family law services available.*[58] *Many Central Authorities use websites to provide relevant information.*[59] *With regard to practical facilities to assist in organising access, some countries offer support from social or youth / child welfare services, e.g. where supervision of access is required or measures are needed to accustom a child to contact after a long period of separation. Some Central Authorities will contact the International Social Services for assistance. In the United States, in some states, there exist supervised visitation centres for cases involving domestic violence. The extent to which Central Authorities will themselves become involved in arranging or funding supporting services, is limited. An exceptional example is Australia*[60] *where the Central Authority has in certain difficult cases arranged and funded supervised access, arranged and funded telephone access and acted as a post box for letters where the child's address cannot be disclosed.*

---

[55] See 1980 Convention, Article 21.
[56] See 1996 Convention, Article 35(1).
[57] See the Pérez-Vera Report, *supra* note 2, at para. 127.
[58] "Family Law in Manitoba 2002".
[59] The website of the Hague Conference provides links to the websites of the majority of Central Authorities designated under the 1980 Convention. See < www.hcch.net > => Child Abduction Section => Links to related websites.
[60] The sources consulted on the Australian approach to Article 21 include Jennifer Degeling, "Access Provisions and the Hague Convention. An Australian Viewpoint," a paper presented at a Conference on International Child Abduction in Edinburgh (Scotland), 18 June 2002, organised by the Law Society of Scotland and the Scottish Executive; Murray Green, "Hague Convention Access Applications Regarding Children Resident in Australia," a paper prepared for the 1999 Biennial Conference for State and Commonwealth Central Authorities, 27-28 October 1999; and by the same author, "The Role of Australian Central Authorities in Hague Access Applications. An Update", 2001 Biennial Conference for State and Commonwealth Central Authorities, 6-7 December 2001.

This is by no means a comprehensive picture, but it does illustrate the patchwork nature of the information and services made available to foreign applicants."

Given the flexibility in the 1980 Convention, the varying interpretations particularly of Article 21, and the varied range of services actually provided by different Central Authorities in contact cases, it is not easy to prescribe good practice other than by drawing attention to the more generous services provided by certain Central Authorities. The following general principle suggests a proactive role on the part of Central Authorities.

2.4 Proactive approach towards the provision of Central Authority services

Applicants seeking to uphold contact rights abroad without active assistance from a Central Authority face formidable barriers arising from their unfamiliarity with the legal system and culture concerned as well as from language differences. It is the role of the Central Authority to assist in removing the barriers through the provision of information and advice, by helping to promote effective access to local procedures, as well as by providing specific services. All Central Authorities should, as far as possible, adopt a progressive approach to their responsibilities in this area and Contracting States should consider, in the allocation of resources to Central Authorities to carry out their responsibilities in the area, the positive obligation which they have to provide a framework which supports contact between the child and both parents.

2.5 Scope of contact cases in which Central Authorities should offer services

(a) The Central Authority should make its services available in all circumstances where cross-frontier contact rights of parents and their children are in issue. This includes cases where a foreign parent seeks to establish a contact order, as well as cases in which the application is to give effect to an existing contact order made abroad.

(b) In the context of abduction or alleged abduction, this includes cases where an interim order for contact is sought by an applicant pending a decision on the return of the child, as well as cases in which contact arrangements are sought (for example, by the abducting parent) in the country to which the child has been returned or, where return is refused, in the country to which the child has been taken.

Some courts have taken the view that Article 21 of the Hague Convention of 1980 applies only to established contact rights and that it does not apply where a court is asked for the first time to determine contact rights. This limited view of the scope of Article 21 is not acceptable in the light of the overriding objective of giving effect to the child's right to maintain contact with both parents. The duty to respect the right of the child arises whether or not a court has already made a contact order. In a similar vein, in some countries the view has been taken that Article 21 does not cover interim contact applications made pending a decision on return. Again this is in conflict with the underlying principle that contact should be maintained in all circumstances where the child is not at risk. Moreover, a failure to restore contact to a left-behind parent during the course of what may sometimes be protracted return proceedings carries the risk of further harm to the child and alienation from the left-behind parent.

Contact orders are quite often made in the context of a decision not to return a child. However, particular problems and difficulties can be found by an "abducting" parent when he or she tries to establish a contact regime following the return of the child. In these circumstances, the applicant for contact may sometimes be the child's primary carer and the loss of contact can be particularly harmful for the child. It is important that Central Authorities in the country to which the child has been returned do not offer a lower level of commitment or service on the basis that the parent seeking contact is an "abducting" parent.

It has been suggested that certain provisions of the 1980 Convention make it impossible for this broad view to be taken of the scope of the contact cases in respect of which the Central Authority should make available its services. In particular the reference in Article 4 to a "breach" of access rights and the references in Article 1 *b)* to rights of access "under the law of one Contracting State" have been used to suggest that services under the Convention (as well as other procedures under the Convention) should only be made available where there has been a breach of an existing contact order made in another State. This involves a reading of Article 4 which goes well beyond its principal purpose which is to define the scope *ratione personae* of the Convention. As for Article 1 *a)*, once it is recognised that to a very great extent rights of access arise by operation of law, and indeed that in many countries they have a constitutional basis, the narrow interpretation seems inappropriate. It should be remembered that a first application to a court to "establish" a contact order will normally be based on the argument that an existing right of contact (vested in the parent and the child) should receive protection.

2.6 Appropriate measures to initiate or facilitate initiation of proceedings

Under Article 7 *f)* of the 1980 Convention the Central Authority is required, either directly or through any intermediary, to take all appropriate measures "to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access."

The obligation is repeated, but with more discretionary language, in Article 21 which uses the words "… may initiate …". In practice, this is another area in which Central Authorities differ widely in the actions that they are prepared to take. More will be said in Chapter 4 about the general principle of effective access to a judicial or administrative body for a determination concerning access rights. At this point, it is only the role of the Central Authority in instituting or facilitating the institution of proceedings which is in issue.

Some Contracting States to the 1980 Convention have vested their Central Authorities with the power to institute contact proceedings on behalf of a foreign applicant (*e.g.* Australia, the Netherlands and New Zealand). Some Central Authorities are authorised to initiate proceedings, but not necessarily to continue to act on behalf of the applicant (*e.g.* Germany). Others only help to make arrangements for the provision of legal representation (*e.g.* England and Wales,[61] the United States of America, most Canadian Provinces and Israel).

[61] See in particular *Re T and others (Minors)* (Hague Convention: Access) [1993] 2 FLR 617 [INCADAT: HC/E/UKe 111].

It has been suggested that it would be good practice for all Central Authorities, where appropriate, either themselves or through an authorised intermediary to be responsible for instituting proceedings.[62] However, while this would undoubtedly be of great assistance to foreign applicants, it may be unwise to insist that all States should adopt the same model for ensuring effective access to justice. The same may be said of procedures for securing the return of a child following abduction or unlawful retention, where some States have given Central Authorities the responsibility to act on behalf of applicants and others have preferred other methods, including in some cases the provision of free legal assistance,[63] to provide the assistance that foreign applicants need.

2.7 Central Authorities should publish detailed information of the services which they provide or can make available in the context of transfrontier contact cases. This information should be made available on websites or by other readily accessible means and so far as is possible in languages that are likely to be readable by a wide audience.

Given the great disparity in the services offered by Central Authorities, it is very important that parents should be given accurate information about the assistance that they may expect to receive from a Central Authority in a given country.

2.8 The procedures adopted by Central Authorities in relation to applications under Article 21 of the 1980 Convention should be expeditious, responsive and transparent, and should follow those set out in the Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I – Central Authority Practice, Chapter 5.

The Guide to Good Practice, Part I – Central Authority Practice, describes in some detail the procedures to be followed in relation to applications under Article 21. For convenience this is set out in Appendix I.

[62] See N. Lowe and K. Horosova, *Good Practice Report on Access*, p. 11 (1996).
[63] For example the United Kingdom and Ireland.

Chapter 3 – The framework for international legal co-operation

3.1 The basic framework

Two basic elements for successful inter-State legal co-operation to support contact rights across frontiers are:

(a) common rules which define the circumstances in which the courts (or their equivalents) in each legal system may exercise jurisdiction to make or modify binding decisions relating to custody and contact;

(b) mutual respect for, including the recognition and enforcement of, decisions concerning contact which are made on the common jurisdictional bases.

The need for a basic framework of agreed jurisdictional rules accompanied by rules for the recognition and enforcement of decisions concerning custody and contact has been widely recognised at the international and regional levels.[64] The Hague Convention of 1980 does not provide such a framework although it is implicit in the Convention that the authorities of the State of the child's habitual residence should exercise general jurisdiction with respect to matters of custody and contact. However, it is the Hague Convention of 1996 which sets out in detail common jurisdictional rules and provisions for recognition and enforcement which are complimentary to the provisions of the 1980 Convention. The 1996 framework, which is designed to replace the framework contained in the earlier *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, has also provided the inspiration for a European Regulation on Parental Responsibility.[65]

3.2 The Hague Convention of 1996

(a) States Parties to the Hague Convention of 1980 which have not yet signed, ratified or acceded to the Hague Convention of 1996 are encouraged to consider its advantages in providing a framework for jurisdiction and for the recognition and enforcement of contact decisions, and thus as a complement to the 1980 Convention.

(b) In any case, it is incumbent on States Parties to the 1980 Convention, and necessary for the practical operation of Article 21, to make known the circumstances in which their authorities will exercise jurisdiction to make or modify contact decisions and will recognise and enforce the contact decisions made by the other States Parties.

---

[64] See, for example, the First Malta Declaration, paras 5 and 6, and the Second Malta Declaration which, in para. 5, states:

> "*It is in the interests of children that courts in different States should apply common rules of jurisdiction and that custody and contact orders made on the basis of those rules should as a general principle be recognised in other States. Competing jurisdictions add to family conflict, discourage parental agreement, and can encourage the unlawful removal or retention of children.*"

Numerous international judicial conferences have confirmed the importance of an agreed approach to jurisdiction and recognition and have called attention to the advantages of the 1996 Convention.

[65] The European rules are now embodied in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

(c) States which are not Parties to the Hague Convention of 1980 are also encouraged to consider the advantages offered by the Hague Convention of 1996 in providing the basic framework for inter-State legal co-operation.

3.3 A common approach to jurisdiction

Common jurisdictional standards:

– help to avoid litigation and further conflict between the persons involved in a contact dispute;

– ensure that appropriate courts / authorities have the right to make decisions concerning contact when needed in the interests of the child;

– set limits to the circumstances in which an existing contact order may be modified.

It is important that rules relating to jurisdiction are structured in a way which avoids competing jurisdictions or a race by parents to the courts of different countries. These are principal objectives of the Hague Convention of 1996, which gives primary jurisdiction to the courts of the country of the child's habitual residence.[66] Competing litigation concerning contact in two countries results in extra costs, conflicting decisions and a disincentive to agreement.

At the same time it is important to ensure that courts have jurisdiction to take emergency, provisional or interim measures concerning contact where necessary.[67] While the courts of the country where the child habitually resides may have the principal right to make decisions concerning contact,[68] the courts of the country where the child is merely present sometimes need to intervene temporarily. This may be the case for example where the child is temporarily present in a country for the purpose of visiting the non-custodial parent and where emergency measures are found to be needed to protect the child or, by contrast, where the effective exercise of contact in the country where visitation is occurring requires some minor adaptation in the conditions for contact.[69] Another example is where, following an alleged abduction, the courts in the country to which the child has been taken, or in which the child has been retained, are asked to make an interim contact order in favour of the left-behind parent. Again, where a child has been unlawfully retained following a period of visitation abroad, it is obvious that the courts / authorities of the country where retention has occurred should have jurisdiction to order the return of the child to the country of habitual residence. Lastly, it may sometimes be necessary for the courts / authorities of a country to which the child is about to travel for the purpose of visiting the contact parent, to have jurisdiction to make a contact order which "mirrors" that made by the authorities / courts of the country where the chid habitually resides.[70] On the other hand, a contact order should not be too easily modified by the authorities of the country in which the child is temporarily resident, as when the residence occurs for the purpose of visiting the non-custodial parent. Moreover, a judge in the country where the child normally lives with the custodial parent is less likely to allow visitation abroad if he / she knows that any conditions of contact that are laid down may easily be set aside in the country where visitation is to occur.

---

[66] The provisions of the Hague Convention of 1996 relating to jurisdiction and their application to contact cases are explained in greater detail in the Final Report, paras 56-63.
[67] See 1996 Convention, Articles 11 and 12.
[68] See 1996 Convention, Article 5.
[69] See, for example, the *Council of Europe Convention on Contact Concerning Children*, Article 15.
[70] See *e.g.* Re P (a child) (minor order) 2000 1 *FLR* 435 (England and Wales). This should not be necessary if a system of recognition and enforcement is in place.

Another situation where caution is needed before exercising jurisdiction to set aside established conditions of contact is where relocation occurs. Take a case in which a judge in State A allows the custodial parent to relocate with a child to State B, but on condition that the contact rights of the non-custodial parent will be respected and subject to more detailed provisions concerning periods of time to be spent with the non-custodial parent in State A. In such a case there are several reasons why the contact conditions set by the judge in State A should be respected in State B. The conditions were set by a judge having proper jurisdiction and being in a good position to assess the capacity and fitness of the non-custodial parent to care for the child during visiting periods. Moreover, the judge in State A may be less inclined to allow relocation if he / she knows that the contact arrangements stipulated will not be respected in State B.

Such is the concern to ensure respect for contact conditions which have been established by a judge in these circumstances that certain jurisdictional regimes require that the judge who has made the original order should retain jurisdiction either for a set period of time[71] or until both parents and child cease to have a connection with the originating jurisdiction.[72]

The Hague Convention of 1996 does not contain such a rule. Thus, in the relocation context, jurisdiction moves from the originating court to the court of the country to which the custodial parent has relocated as soon as the child establishes a habitual residence in that country. The fact that habitual residence, and hence jurisdiction, may change quickly where relocation occurs certainly does not entail that a judge in the new jurisdiction should or would quickly change the conditions of contact set by the judge who authorised relocation. This matter is further addressed in Chapter 6 which deals with relocation and contact.

3.4 The recognition and enforcement of decisions concerning contact

(a) An essential element of international co-operation is a system which provides for the recognition and enforcement between States of decisions concerning contact, as well as custody decisions, which are made on the agreed or approved jurisdictional grounds.[73]

(b) Provisions should be made for obtaining advance recognition of a contact or custody decision in any country to which the child will travel, whether in the context of relocation, or for the purpose of visiting the non-custodial parent or for other purposes. Advance recognition should be possible irrespective of whether the order is interim or temporary or whether the child is yet present in the State addressed.

(c) The procedures for recognition and enforcement should be simple, inexpensive and swift.

While the Hague Convention of 1980 does not, in Article 21, provide a basis for the recognition and enforcement of foreign decisions concerning contact (or custody), this gap may be filled by the detailed provisions contained in Chapter V of the 1996 Convention.

---

[71] See Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which, in Article 9, preserves the jurisdiction of the child's former habitual residence for a period of 3 months for the purposes of modifying any decision on access made in that country prior to the move.

[72] In the United States of America, exclusive jurisdiction remains with the child's "home state", even though the child and custodial parent may have moved permanently to another jurisdiction, so long as one of the parties (*e.g.* the parent exercising contact) remains living there. See the *Uniform Child Custody Jurisdiction and Enforcement Act*, UCCJEA § 201, 9 ULA.

[73] This essential building block is recognised in the First Malta Declaration, para. 6 "The development in a number of countries of specialised family courts is welcomed. The movement in some countries towards a concentration within the jurisdiction of courts dealing with international disputes concerning children is noted, recognising that in some legal systems such concentration is impracticable." It is referred to again in the Second Malta Declaration, at para. 5. See also Article 14(1) of the Council of Europe Convention on Contact.

Orders relating to contact made by an authority exercising jurisdiction under the Convention are entitled to be recognised by operation of law in all other Contracting States.[74] The grounds for refusing recognition are narrowly drawn,[75] and the recognising State is bound by the findings of fact on which jurisdiction was based in the State of origin.[76] Provision is made for advance determination of whether contact orders made in one State may or may not be recognised in another.[77] Enforcement of contact orders in the State addressed takes place, in accordance with the procedure provided for in the law of that State,[78] as if those measures had been taken by the authorities of that State and to the extent provided by its law.[79] The procedure by which the order is declared enforceable or registered for enforcement must be simple and rapid.[80]

The importance of this matter is further underlined by the existence of many other instruments providing for recognition and enforcement of contact decisions regionally, bilaterally or even unilaterally. The Nordic Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden was one of the first. There is also the Council of Europe *Convention of 20 May 1980 on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (the Luxembourg Convention).[81] In the United States the UCCJEA provides for inter-state (*i.e.* within the United States) recognition of custody and contact orders, as well as for the recognition and enforcement of foreign orders where made in factual circumstances which are in substantial conformity with the jurisdictional standards set out in Article 2 of UCCJEA.[82] The European Union Council Regulation of 27 November 2003[83] gives a privileged position to decisions concerning contact by providing for their recognition among Member States without any special procedure being required,[84] without the need for a declaration of enforceability and without any possibility of opposing recognition provided there has been appropriate certification by the judge of origin.[85]

The absence of any provision on the recognition of decisions concerning contact has obvious disadvantages for parents and children. It may lead to re-litigation of contact issues with consequent delays and costs. It operates as a disincentive to a judge who is considering whether to allow the relocation of a child together with the primary carer,[86] or indeed to allow visitation abroad with a non-custodial parent.

The need for the possibility of obtaining advance recognition arises especially in those cases (relocation or visitation abroad) where the child has not yet entered the State addressed but will do so in the near future. A system of advance recognition can provide the guarantee that contact conditions which are set by the court exercising primary jurisdiction will be enforceable from the moment the child arrives in another country for the purposes of visitation or relocation. Another possible way of achieving the same result is through a “mirror” order made in the country to which the child is to travel.[87]

---

[74] Article 23(1).
[75] Article 23(2).
[76] Article 25.
[77] Article 24.
[78] Article 26(1).
[79] Article 28.
[80] Article 26(2).
[81] Luxembourg, 20.5.1980.
[82] UCCJEA, above note 72, at §105(b), 9 U.L.A. at 662.
[83] See above, note 71.
[84] Article 21, para. 1.
[85] Article 41.
[86] See below, Chapter 6.
[87] See below, Chapter 6.

Chapter 4 – The processing of applications concerning contact

There have been widely differing interpretations of the obligations which arise from Article 21 of the 1980 Convention in respect of the processing of applications concerning the exercise of transfrontier contact rights. These differences have been described in *the Final Report*.[88] At one end of the spectrum are Contracting States which regard Article 21 as laying down nothing more than an obligation on Central Authorities to provide some minimal assistance in accessing the legal system by for example helping the applicant to find a lawyer.[89] Typically in such systems Article 21 is not viewed as establishing a distinct form of proceeding or as giving rise to any special procedural requirements or to any special privileges with regard to legal aid. Instead the applicant has available the normal procedures which are available in purely domestic cases[90] and may or may not be entitled to some form of legal aid. At the other end of the spectrum are States which regard Article 21 as creating a much stronger obligation to provide the applicant in a transfrontier case with assistance in accessing the legal system. In some of those States the Central Authority may be responsible for initiating proceedings on behalf of the applicant,[91] the procedure may also in some respects differ from that applying to domestic cases, and sometimes special provision is made with regard to legal aid. In the middle of the spectrum are jurisdictions such as Scotland where Article 21 is regarded as providing an expedited procedure but only in cases of urgency.[92]

It may be helpful to suggest certain general principles which should be borne in mind when processing transfrontier contact applications, whether under the Article 21 procedure or under domestic procedures.

4.1 Effective access to procedures

Persons seeking to establish or to exercise transfrontier contact rights should have effective access to the procedures, which exist for that purpose. In the case of an applicant from abroad, effective access to procedures implies:

(a) the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;

(b) the provision of appropriate assistance in instituting proceedings;

(c) lack of adequate means should not be a barrier.

The role that should be played by Central Authorities – in the provision of information and advice, the processing of applications and in facilitating the institution of proceedings – has been discussed above in Chapter 2 and in Appendix 1.

In those States which make provision for free legal aid and advice in domestic contact cases,[93] discrimination against foreign applicants should be avoided. Indeed, the special difficulties confronted by overseas applicants should be taken into account in the

---

[88] See especially paras 22 to 31.

[89] *E.g.* England and Wales, *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam. 216 [INCADAT: HC/E/UKe 110]. However, this narrow approach may be revisited in a future case, per Thorpe L.J. in *Hunter* v. *Morrow* [2005] 2 FLR 1119 [INCADAT: HC/E/UKe 809].

[90] *E.g.* the United States of America, where the approach has led Federal Courts to disclaim jurisdiction. See *Bromley* v. *Bromley* 30 F.Supp. 2d 857 (E.D. Pa. 1998) [INCADAT: HC/E/USf 223]. *Teijeiro Fernandez* v. *Yeager* 121 F.Supp. 2d 1118 (W.D. Mich. 2000)

[91] *E.g.* Australia, New Zealand.

[92] See *Donofrio* v. *Burrell* 2000 SLT 1051. 2000 SCLR 465, 1999 Fam. LR. 141 [INCADAT: HC/E/UKs 349]. See also Final Report, para. 27.

[93] See Final Report, para. 35, where it is also pointed out that, unlike the situation with applicants for the return of a child, countries providing free legal aid generally apply a means test to applicants in contact cases.

administration of such schemes and Central Authorities should assist applicants in accessing such schemes. For States which do not provide free legal aid and advice, other mechanisms for making procedures accessible should be made available, *e.g.* through the adoption of schemes of *pro bono* representation,[94] through the active involvement of the Central Authority in the proceedings,[95] or by providing simplified procedures.

4.2 Speed

(a) Authorities should act with due speed in processing applications to establish, enforce or modify decisions concerning contact. Speed is particularly important in cases where contact with a parent is currently disrupted. Delay in restoring a disrupted parent / child relationship may have serious consequences for the child. Moreover, the longer the period of disruption, the more difficult it becomes to re-establish contact without special measures to assist re-integration.

(b) The need to act with due speed applies to all stages of administrative and judicial procedures including, in particular, the location of the child where necessary, the processing of applications via the Central Authority, efforts to achieve an amicable or agreed outcome, the processing of applications for legal aid or assistance, the setting of dates for hearings including on appeal as well as proceedings for enforcement.

(c) Expedited procedures should be available where, having regard to the international character of a particular case, any delay is likely seriously to prejudice the possibility of contact taking place.

The adverse consequence for a child of undue delay by State authorities in processing contact applications are potentially so serious that in some systems they may constitute a violation of the fundamental rights of the individuals concerned and of the family. *The Final Report*[96] referred to the developing jurisprudence of the European Court of Human Rights:

> "*It is relevant to note that the European Court of Human Rights has taken the view that custody cases generally should be dealt with speedily.*[97] *Some delays can be tolerated provided that the overall duration of proceedings cannot be deemed excessive.*[98] *Article 6, paragraph 1 of the European Convention on Human Rights, which entitles everyone "in the determination of his civil rights", to a hearing "within a reasonable time" by a tribunal established by law, has been used as a basis for condemning delays in national access procedures. Whether the length of the procedures is reasonable is considered in the light of a number of criteria, in particular, the complexity of the case, the conduct of the applicant and that of the relevant authorities. Interestingly, the court has expressed the view that the requirements of Article 6, paragraph 1 of the European Convention apply to the totality of the proceedings including the enforcement stage, and that the responsibility for ensuring compliance with the requirements of Article 6, paragraph 1, rest ultimately with the courts."*[99]

---

[94] See *e.g.* USA practices. However, identifying private attorneys willing to assist can be difficult and time consuming, especially in cases which involve modification of contact conditions. See Final Report, at para. 36.
[95] See above, para. 2.6.
[96] At para 106.
[97] *See Hokkanen* v. *Finland*, Judgment of 23 September 1994, Series A No 299-A.
[98] *See Pretto and Others* v. *Italy*, Judgment of 8 December 1983, Series A No 71.
[99] *See Nuutinen* v. *Finland*, Judgment of 27 June 2000.

Further decisions have reinforced this jurisprudence by making it clear that certain stereotypical delaying tactics on the part of the authorities, including for example successive demands for information, are not acceptable, and that even lack of co-operation by the custodial parent does not dispense with the responsibility on the authorities to take all measures capable of restoring family ties.[100]

Although the requirement of Article 11 of the 1980 Convention that authorities shall act "expeditiously" only applies to proceedings for the return of a child, the Article 6 requirement of the 1980 Convention to "use the most expeditious procedures available" also applies to ensuring that rights of access under the law of one Contracting State are effectively respected in other Contracting States. There remains, however, some doubt as to the effects of this provision, particularly in those States which do not regard Article 21 as establishing a separate procedure and in which applications concerning transfrontier contact are processed through the normal domestic procedures.

There are important differences in substance between a "return" application and an application to establish or modify contact. A return hearing is not a hearing on the merits of custody and should not entail a detailed investigation of the child's best interests. On the other hand, when a court deals with a contact application, even in an international context, it is the "best interests" principle which generally will be applied. This has been suggested as a further justification for channelling cross-frontier contact applications through domestic procedures and applying to them all the same procedural requirements, including those which control the speed with which applications are processed.

Nevertheless, as a matter of principle, there may be good reasons for treating an international case even more expeditiously in particular circumstances. Because of the additional distances and costs that may be involved in exercising contact across frontiers, the absence of speedy recourse to a tribunal may sometimes result in serious injustice and cost to the contact parent. An example is a case where a parent, on the basis of an existing contact arrangement or decision, travels a considerable distance from one country to another to visit his young child and, on arrival, is told by the custodial parent that the child for some reason is not available. It may be some months or even a year before another visit can take place so that the situation is one of considerable urgency. Hence, the general requirement of speed, which applies in all cases (domestic and international) where a parent-child relationship is disrupted, needs to be augmented by the special principle set out above in paragraph 4.2(c).

4.3 Concentration of jurisdiction

Consideration should be given to the advantages of concentrating jurisdiction in cross-frontier contact cases, or certain categories of such cases, among a limited number of courts or judges. In countries where jurisdiction has already been concentrated in this way for return proceedings under the 1980 Convention, consideration should be given to using the same system in transfrontier contact cases.

The advantages of concentrating jurisdiction in abduction cases have been well canvassed,[101] and in several jurisdictions such concentration has occurred. The result is that judicial expertise and experience develops and sometimes also a parallel concentration of expertise develops among legal practitioners. However, it is recognised that contact cases are not unique in the same way as "return" cases. The general principles applied are not, as in return cases, *sui generis* but are the general principles which will be familiar to

[100] *Reigado Ramos* v. *Portugal*, 22 November 2005, Applic. No 73229/01.
[101] See para. 3.1 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001).

judges dealing with domestic custody and contact issues. Contact issues are more likely to be linked to other family law issues such as custody or maintenance which it may be necessary to determine together. Also where ongoing co-operation between the court and child welfare or child protection authorities is needed, concentration of jurisdiction in the courts may require parallel adjustments in the organisation of such court-related services.

The arguments for concentration of jurisdiction are therefore less compelling but nevertheless deserve consideration. International cases do involve some special features. They often involve intercultural families, which can affect the application of the "best interests" principle. They also require the judge to be aware of the appropriate guarantees and safeguards that may need to be put in place where contact is to take place abroad.

The argument for concentrating jurisdiction is strongest in cases where contact is the only issue and needs to be dealt with as a matter of urgency. In any event, whichever courts have jurisdiction, it is important that the judges be aware of the special features attaching to cross-frontier cases.

4.4 Case management

It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of cross-frontier contact cases. Trial and appellate courts should set and adhere to timetables that ensure that cases are processed with due speed.

The above general principle is one first endorsed at the Common Law Judicial Conference on International Parental Child Abduction held in Washington, DC[102] in respect of "return" cases. The need for firm case management of international family cases generally has been re-iterated at several international judicial conferences.

[102] Washington, DC, 17-21 September 2000.

Chapter 5 – Orders relating to contact

5.1 Safeguards and guarantees

Courts should have at their disposal a broad range of measures which help to safeguard and guarantee stipulated contact arrangements.[103]

Parental fear can be the enemy of successful contact arrangements. The custodial parent may fear that the parent exercising contact will not respect the specific terms and conditions of contact and, in an extreme case, that the child will not be returned following a period of visitation abroad. On the other hand, the contact parent may be concerned that the custodial parent will not be prepared to facilitate contact at the arranged times by refusing access to the child at the agreed time or by not permitting the child to travel abroad for a period of visitation. It is important for courts to have at their disposal a flexible range of measures which create a legal environment in which both parents feel a sense of security that contact arrangements will not be abused.

5.2 Unlawful retention

The primary guarantee against unlawful retention following a period of visitation abroad is the return order which is available under the 1980 Convention in cases where a child is retained abroad by a contact parent in breach of rights of custody of the left-behind parent.

Good practices surrounding applications for return orders under the 1980 Convention are set out in earlier parts of the Guide to Good Practice.[104]

5.3 Examples of guarantees and safeguards

Examples of other guarantees and safeguards to ensure respect for the terms and conditions of contact are:

(1) the surrender of passport or travel documents,

(2) requiring that the requesting parent report regularly to the police or some other authority during a period of contact,(3) the deposit of a monetary bond or surety,

(4) supervision of contact by a professional or a family member,

(5) various other restrictions attached to contact; *e.g.* forbidding overnight visits or extended visits, restricting the locations where visitation may occur, etc.,

(6) requiring that the requesting parent provide the custodial parent with a detailed itinerary and contact details, etc.,

(7) requesting that foreign consulates / embassies should not issue new passports / travel documents for the child,

[103] See First Malta Declaration, at para. 4.
[104] See Part I – Central Authority Practice, and Part II – Implementing Measures.

(8) requiring that a mirror order should be made in the country where contact is to be exercised.

One of the objectives of the Council of Europe Convention on contact concerning children is to establish appropriate safeguards and guarantees for both national and international cases to ensure the proper exercise of contact and to ensure the return of the child at the end of a period of contact.[105] A non-exhaustive list of safeguards and guarantees is set out in Article 10, paragraph 2, and States are obliged to provide under their laws for at least three categories of safeguards and guarantees. The safeguards to ensure that a contact order is carried into effect include supervised contact, the obligation of a person (either the parent seeking contact or the person with whom the child lives, or both) to provide for travelling and accommodation expenses for the child, the deposit of a security to ensure that contact is not frustrated, or the imposition of a fine.[106] Safeguards to ensure that the child is not improperly removed or retained when contact occurs include the surrender of passports or identity documents, the provision of financial guarantees, and charges on property.[107] Other safeguards or guarantees mentioned are undertakings (*i.e.* specific promises or assurances given to a court by a litigant), a requirement that the person having contact report regularly to a competent body, the issuing of a certificate in the country in which contact is to take place recognising in advance the custody or residence order in favour of the parent with whom the child usually lives, an advance declaration of enforceability of the contact order in that State, and restrictions as to the place where contact is to be exercised.

5.4 Taking account of traditions of the parties

The guarantees and safeguards at the disposal of the court should include ones which are appropriate and may be particularly effective within the cultural, religious and legal traditions of the parties.[108]

5.5 Proportionality

Where safeguards or guarantees are applied which place limits or restraints on the exercise of contact, these should be proportionate to the risks of abuse and no more than are necessary to achieve the protection of the child.[109]

5.6 Specifying the terms and conditions

It is important that the court specifies the terms and conditions on which contact is to take place. Where the relationship between the parents is highly conflictual, the terms and conditions may need to be specified in considerable detail.

---

[105] Article 1 *b)*.
[106] Article 10(2) *a)*.
[107] Article 10(2) *b)*.
[108] See First Malta Declaration, at para. 4. See also *Re L* (Removal from the Jurisdiction: Holiday) [2001] 1 FLR 241, in which the mother, her father and her eldest brother were required to enter into solemn declarations under the Koran to guarantee that a child would be returned safely after a period of visitation abroad.
[109] See above, at para. 1.2.

5.7 Modern means of preserving contact

Judges should be aware of the value of modern means of communication – including the Internet (e-mail) – in preserving contact between parents and children who are separated by great distances, and should be prepared to stipulate their use.

5.8 Enforceability abroad

Safeguards may include measures to ensure that the terms and conditions of contact will be enforceable in another country. Where the terms and conditions are entitled to be recognised and enforced in the other country this may not be necessary. Where the child is to travel for a period of visitation to another country and the terms and conditions of contact are not enforceable in that country, it may be appropriate for the court to stipulate as a condition that an order be obtained in that other country which "mirrors" the terms and conditions of the original order.[110]

5.9 Financial arrangements and child support

In order to facilitate contact courts should have a broad discretion to order financial arrangements tailored to the particular needs and resources of family members.

The costs involved in organising and exercising transfrontier contact should be capable of being taken into account in the assessment of child support.

Courts often make precise orders concerning the payment of travel and other costs associated with transfrontier contact. The arrangements may include the establishment of a fund or account to be used to meet the travel costs of the child or the contact parent. Where there has been a long period of disruption and professional assistance is needed to restore the relationship between the child and the contact parent, an order which assigns the costs may be appropriate. With regard to child support, the costs associated with the exercise of contact should be taken into account in assessing the needs of the child and may also be relevant in assessing the means of the debtor, particularly where the debtor is a contact parent who incurs heavy expenditure in exercising contact.

[110] For an example of the use of a mirror order in guaranteeing that the "custodial" parent will respect the access rights granted to the "non-custodial" parent, see *Gumbrell* v. *Jones* [2001] NZFLR 593 (New Zealand Family Court (Papakura), 2001). [INCADAT cite: HC/E/NZ 446]). In that case, the English High Court granted the mother a residence order in respect of 2 children, with leave to remove the children from the UK permanently to New Zealand, subject to a number of undertakings designed mainly to ensure respect for the father's access rights. The mother also undertook to obtain orders in New Zealand which would mirror the orders of the English court. The mother did not obtain the mirror orders in New Zealand, but, on the application of the father, the New Zealand court made an access order in terms which gave effect to the English order.

Chapter 6 – Relocation and contact

The problems surrounding relocation are ever more frequently being considered by the courts in many Contracting States to the 1980 Convention. "Relocation" involves a permanent move of the child, usually together with the child's primary carer, to live in a new country. The result often is that the chid will live at a much greater distance from the "left-behind" parent and that the exercise of contact by that parent will become more difficult and expensive.

Approaches to relocation under national law differ in several respects. These differences relate, *inter alia*, to –

(a) The circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child. This will depend on how parental responsibilities are attributed, and how they may be exercised, within particular States;

(b) the factors to be taken into account by a court in determining whether relocation should be permitted; and

(c) the approach taken by the court to guaranteeing and securing the contact rights of the "left-behind" parent.

While strictly it is only the third of these matters that is relevant here, the degree to which contact rights may be preserved should always be a relevant factor for a court in deciding whether or not to permit relocation. This is not the place to discuss the other factors which should be taken into account. However, it is appropriate to recall the obvious links between the problems of abduction and relocation and, in particular, paragraph 7.3 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001):

6.1 Decisions on relocation

Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention."[111]

6.2 Respect for terms and conditions

It is important that the terms and conditions of a contact order made in the context of relocation are given maximum respect in the country in which relocation occurs.

Two reasons for the principle are (a) that the court deciding upon relocation will have been in the best position to determine what are the best interests of the child with regard to continuing contact with the "left-behind" parent, and (b) the knowledge that a contact order will not be respected will have a negative impact on the judge who is considering whether to permit relocation. The following are ways in which the above general principle may be given effect.

[111] See also para. 9 of the conclusions adopted at the Common Law Judicial Conference on International Parental Child Abduction, Washington, DC, 17-21 September 2000.

6.3 Advance recognition

Contact orders made in the context of relocation should be entitled to be recognised and enforced in the country of relocation. There should be provision for advance recognition of such orders.

6.4 Mirror orders and direct judicial communications

Where advance recognition is not possible, an application should be possible in the country of relocation for an order which "mirrors" the contact arrangements ordered by the judge deciding upon relocation. This implies that it should be possible to exercise jurisdiction to make a "mirror" order before the child has entered the country. In these circumstances, it should also be considered whether the obtaining of a mirror order should be made a condition of relocation. This is an area in which direct judicial communication may play an important role.

Another concern is the effect of a change in jurisdiction, which may come about relatively quickly after relocation. Under the 1996 Hague Convention, primary jurisdiction resides in the court of the country of relocation as soon as the child becomes habitually resident there. The concern is that the parent who has applied for and been given permission to relocate may take advantage of the change in jurisdiction and apply to modify, limit or even terminate the contact rights of the left-behind parent. The following are guidelines, which should help to avoid this risk.

6.5 Applications to vary contact conditions, and the 1996 Convention

(a) When a contact order is made in the context of relocation (by a court in the country where the child is habitually resident), that order is entitled, under Article 23(1) of the 1996 Convention, to be recognised by operation of law in the State where relocation is to occur, provided that both States are Contracting States. It is entitled to be enforced in that State, according to Article 28, as if it had been made in that State. It follows that a court of the country of relocation should regard the contact order, once recognised, as having the same status as an order made by the courts of that country, and should allow review and variation of the order only in the circumstances in which it would allow such review or variation of its own domestic orders. The order should continue to enjoy this status even after the child's habitual residence has changed and until such time as the courts in the country of the child's new habitual residence order otherwise.

(b) In a case in which the 1996 Convention applies, a court in the State to which the child has been relocated, when dealing with an application to review or vary a contact order made shortly after relocation has occurred, should be very slow to disturb arrangements concerning contact made by the court which decided upon the relocation. The court should in particular:

(i) consider whether it may be appropriate to make a request, in accordance with Article 9 of the 1996 Convention, that the court which decided upon the relocation should assume jurisdiction in the matter;

(ii) consider whether adjournment of proceedings is appropriate in accordance with Article 35, paragraph 3, of the Convention; and

(c) where appropriate, give due weight to a finding made by the court permitting relocation concerning the suitability of the "left-behind" parent to exercise access and the conditions under which access should be exercised, in accordance with the procedure set out in Article 35, paragraph 2. However, such a finding should not be necessary where contact arrangements have recently been made in the context of relocation.

Chapter 7 – The meaning of rights of access / contact

The 1980 Convention does not give a full definition of rights of access. Instead, in Article 5, which distinguishes between rights of "custody" and "rights of access", it gives a partial definition.

> *"Article 5*
>
> *For the purposes of this Convention –*
>
> *a)* "rights of custody" *shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;*
>
> *b)* "rights of access" *shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."*

This partial definition has given rise to several problems of definition and divisions of opinion in the case law among and within Contracting States. The first concerns the precise dividing line between rights of custody and rights of access. The second problem is whether rights of custody include rights of access. The third issue is whether, for the purposes of Article 21 of the 1980 Convention, rights of access are limited to those which have been recognised or established by a court order, or whether they extend to rights arising by operation of law.

The dividing line between access and custody rights

Within national law systems the dividing line between custody and access is sometime indistinct. In some systems which retain the language of "custody" and "access" the access parent may in fact retain important responsibilities of decision making concerning the child which go beyond a mere right of access. This may, for example, be the case in systems where the access parent remains a joint "guardian" of the child or the holder of *patria potestas*. At the same time, reflecting a movement towards shared parenting, some systems have abandoned the language of custody and access and have accepted a general principle of joint parental responsibility, combined with residence or contact orders where needed in the case of parental separation.

7.1 "Custody rights" and joint parenting

The tendency towards shared parenting following separation often makes it difficult to distinguish clearly between a "custodial" parent and an "access" parent. This has been recognised in interpreting the 1980 Convention and a parent who has substantial joint parenting responsibilities will usually be regarded as having custody rights rather than access rights for Convention purposes.

Thus the remedy of a return order will be available in the case of unlawful removal or retention of the child even though the applicant parent may not be the principal custodian in the sense that the child may reside mainly with the other parent.

A more difficult case is one in which there is a clearer dividing line between a parent with exclusive custody rights and a parent with access rights who nevertheless retains a right to veto the removal of the child from the jurisdiction. The right of veto may arise by operation of law, by court order or by agreement between parents. In this case there is a division of judicial opinion as to whether an access right, combined with the right of veto, may be regarded for Convention purposes as a custody right.

7.2 Veto on removal

The preponderance of the case law[112] supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for Convention purposes.[113]

As a result a left behind "access" parent may nevertheless, because of the right of veto, be able to employ the Convention to bring about the return of the child to the country of his or her habitual residence. The opposing view[114] is that this constitutes an improper use of the return order, which was not intended as a mechanism for supporting access rights.

7.3 Approach to interpretation

Concepts such as access rights and rights of custody should be interpreted having regard to the autonomous nature of the Convention and in the light of its objectives.

A further complication arises from the fact that the courts in the two countries concerned may arrive at differing views on whether access rights or rights of custody are in question. This may happen when the court which is deciding upon a return application uses the Article 15 mechanism to request a decision or determination from the authorities of the State of the child's habitual residence that the removal or retention was wrongful within the meaning of Article 3 (*i.e.* that is was in breach of rights of custody attributed under the law of the State of the child's habitual residence). It has been held that the court deciding upon the return application is not bound by such decision or determination, but must determine for itself whether the rights attributed to the applicant parent do or do not constitute "custody rights" within the autonomous Convention meaning of that concept.[115]

---

[112] See, for example, *C. v. C.* [1989] 2 All E.R. 465 (English Court of Appeal, 1988) [INCADAT cite: HC/E/UKe 34]; *Foxman v. Foxman*, c.a. 5271/92 (High Court of Israel, 1992); several US cases prior to the decision in *Croll* v. *Croll*, including for example, *David S.* v. *Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S. 2d 429 (Family Court of New York, 1991) [INCADAT cite: HC/E/USs 208]. See also *Ministère Public* c. *MB* Cour d'appel d'Aix-en-Provence, 23 March 1989 (France); *DG* v. *EG* Judicial Register, CA 5532/93 (Supreme Court, Israel); *Director General, Department of Families Youth and Community Care* v. *Hobbs* (unreported, Fam CA, 2059/1999), 24 September 1999 (Australia). The broad approach was also followed by the delegates at the Second Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, held at the Hague in 1993. The Report of that meeting is available on the Hague Conference website at: < www.hcch.net > => Child Abduction Section => Special Commission related documents.

[113] This trend is confirmed by a number of decisions in which the veto arose not by order of a court but by operation of law. *See*, for example. 2 BvR 1126/97, *Bundesverfassungsgericht*, 18 July 1997 (Germany); *Secretary for Justice* v. *Abrahams*, *ex parte Brown*, Family Court at Taupo, 15 August 2001 (New Zealand); TR 132/1999, *Tribunal civil de l'Arrondissement de la Sarine*, 17 May 1999 (Switzerland); *DG* v. *EG*, Judicial Register, CA 5532/93 (Supreme Court, Israel); *Thorne* v. *Dryden Hall* (1997) 28 RFL (4th) 297 (British Columbia Court of Appeal); *Furnes* v. *Reeves* 362 F3d102 (11th Cir 2004) (USA). For a contrary view, see *Fawcett* v. *McRoberts* 326 F3d 491 (4th Cr. 2003) (USA).

[114] *See Croll* v. *Croll* 229 F3d 133 (2d Cir. 2000) (United States Court of Appeals for the Second Circuit, 2000) [INCADAT cite: HC/E/USf 313] disapproved as "contrary to the weight of authority in *Sonderup* v. *Tondelli* SA 2000 No CCT 53/00, a decision of the Constitutional Court of South Africa." The negative position also finds some support in the French decision in *Ministère Public* v. *Mme. Y.,* (19 March 1992) T.G.I. de Perigueux, D. 1992, at p. 315 and in the Canadian Supreme Court decisions in *Thomson* v. *Thomson* [1994] 119 D.L.R. (4th 253) [INCADAT cite: HC/E/CA 11] and *D.S.* v. *V.W.* [1996] 134 D.L.R. (4th) 481 [INCADAT cite: HC/E/CA 17] where the Canadian Supreme Court indicated that, while custody rights may arise from a *ne exeat* order made in interim or pending proceedings, it would be redundant to interfere with the freedom that a custodial parent enjoys with a final custody order, even one containing a restriction on removal. For a detailed analysis of these two cases, *see* Martha Bailey, "Rights of Custody under the Hague Convention", 11 B.Y.U.J. Pub. L. 33, 42-50 (1997). For doubts as to whether the Convention cases support the approach in *Croll* v. *Croll see* Linda Silberman, "Patching up the Abduction Convention: A call for a new international protocol and a suggestion for amendments to ICARA", June 2002, *the Texas International Law Journal*. See also *Fawcett* v. *McRoberts* 326 F3d 491 (4th Cir. 2003) and *Gonzalez* v. *Gutierrez* 311 F3d 942 (9th Cir. 2002), both US cases following *Croll* v. *Croll*.

[115] See *Fawcett* v. *McRoberts*, above, where the US court disagreed with the Scottish authorities and decided that Scots legislation which gives the contact parent the right to withhold consent to removal of the child from the UK does not give rise to rights of custody under the Convention.

7.4 Rights of custody include rights of access / contact

Rights of custody should, for the purpose of applications under Article 21, generally be regarded as including rights of access / contact.

There are occasions on which a parent with custody rights may wish to exercise rights of access / contact and make application for that purpose under Article 21 of the 1980 Convention. For example, a parent with custody rights whose application for the return of a child is refused under Article 13 *b)* may wish to apply for access / contact to the child.[116] Or a parent with joint custody, with whom the child does not normally reside, may need a detailed contact order. There may even arise a situation in which a custodial parent seeks access / contact in respect of a child during a lengthy of period of visitation with the access / contact parent.

7.5 Rights of access not confined to those already established by court order

The right to apply under Article 21 of the 1980 Convention to make arrangements for recognising or securing the effective exercise of "rights of access" should not be limited to cases where there is an existing court order recognising or establishing rights of access, but should include cases where the applicant relies on access rights which arise by operation of law. For further explanation of this principle, see above under paragraph 2.5.

[116] See, *e.g.*, *Director General, NSW Department of Community Service* v. *O.*, 17 March 2000, Family Court of Australia, Justice Lawrie, unreported, referred to in Final Report, para. 40. This situation should not arise if it is accepted that Article 21 may be used to establish, and not merely recognise and enforce, access / contact rights.

POSTSCRIPT – CONSIDERATION OF A PROTOCOL AND FUTURE WORK CONCERNING TRANSFRONTIER CONTACT

It remains to be considered whether the general principles and good practices set out in this Report can be achieved within the framework of the Hague Convention of 1980 or whether additions to or amendments of that framework need to be envisaged. This Chapter sets outs briefly some of the relevant considerations and questions. It does so under some of the broad headings used in the previous Chapters.

(a) The importance of contact

Multilateral instruments such as the *UN Convention on the Rights of the Child* and the *Council of Europe Convention on Contact Concerning Children* already address some of the broad substantive principles to be observed. Would good practice under the 1980 Convention be enhanced by requiring Contracting States to ensure respect for these general principles in the application and interpretation of the 1980 Convention?

(b) Promoting parental agreement

Central Authorities under Article 7 *d)* of the 1980 Convention are already required to take all appropriate measures to bring about an amicable resolution of the issues and, for those States which are Parties to the 1996 Convention, Article 31 of that Convention contains a more specific requirement to take appropriate steps to facilitate, by mediation, conciliation or similar means agreed solutions for the protection of the child. Special mediation programs are being developed in a number of Contracting States, and a feasibility study is currently being prepared by the Hague Conference on international family mediation with a view to help determine, *inter alia*, whether an international instrument may be of value in this area.

It may be argued that the most useful work for the Hague Conference at this stage is to continue to monitor the development of mediation, conciliation and other similar schemes, to keep Contracting States informed of developments, and to complete the current feasibility study.

(c) Co-operation among Central Authorities and the scope of Central Authority services

The widely different levels of services currently provided by Central Authorities to overseas applicants under Article 21 is arguably not the best basis for the development of international co-operation which should demonstrate some level of reciprocity. The situation is made worse by differing interpretation, arising from Articles 1, 4 and 21, as to the circumstances in which a Central Authority is required to provide services. The narrow view is that such services need only be offered where there has been breech of a contact order made in another Contracting State. The wording of Article 35 of the 1996 Convention does not lend itself so easily to the narrow interpretation, but it does little to clarify the level or range of services, which should be offered by Central Authorities.

There is therefore a case for suggesting that a Protocol might be useful which would make more specific (a) the range of services which should be made available by Central Authorities and (b) the circumstances in which these services should be made available.

On the other hand, the difficulty of achieving agreement on a matter which has direct resource implications for Contracting States should not be underestimated. Experience thus far with the child protection Conventions which use the Central Authority model (including the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance) has been that it is difficult to achieve great precision in defining Central Authority functions and, that some flexibility is needed to accommodate the different capacities of different countries.

(d) The framework of international legal co-operation

Common rules of jurisdiction and rules for the recognition and enforcement of decisions concerning contact constitute a vital supplement to the 1980 Convention. The 1996 Convention supplies this omission. Nevertheless, it has been suggested that a Protocol to the 1980 Convention might more directly fill this need and that the Protocol might be based on the 1996 Convention principles, being at same time much narrower in its scope of application.

Of the 76 States that are Parties to the 1980 Convention, 29 have now signed, ratified or acceded to the 1996 Convention,[117] and many others are studying its implementation. In the circumstance it has been argued[118] that energies should be concentrated on securing the effective implementation of the 1996 Convention and not dissipated on what could be lengthy and time-consuming process of devising a Protocol based on the 1996 Convention. Another problem, given the integrated approach adopted in the 1996 Convention, is that attempts to "carve out" specific elements from its scope may lead to inconsistencies in the treatment of different measures of protection concerning the same child.[119]

(e) The processing of applications concerning contact

Differences in the interpretation of Article 21 of the 1980 Convention have led to many inconsistencies between States in the processing of transfrontier contact cases before courts, and the question arises whether these might be addressed in a Protocol to the Convention. A number of distinct issues need to be examined:

(i) Effective access to procedures and legal assistance

A number of elements might be considered for a Protocol on this subject matter, *e.g.*:

- a requirement that Central Authorities should themselves be responsible for initiating applications in certain transfrontier contact cases;

- a requirement that the same free legal aid entitlement should be afforded to applicants as are made available in applications for the return of a child under the Convention.

[117] Australia, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Monaco, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland. Morocco has also ratified the Convention, and on 18 May 2006 Albania deposited its instrument of accession to the Convention. The Convention will enter into force for Albania on 1 April 2007.

[118] This was, for example, the preponderant view among the Group of Experts that met at The Hague in September 2005.

[119] This was one of the factors, which led the European Union to abandon plans for a separate instrument dealing with contact and to develop instead an instrument dealing more generally with parental responsibility.

With regard to the first suggestion, it has already been argued that it is not appropriate to require all Contracting States to adopt an identical model in respect of the role of the Central Authority in initiating proceedings. As for free legal aid, given the considerable flexibility (including the possibility of reservations under Art. 26) allowed to Contracting States in the area of abduction, it would be difficult to achieve a more uniform approach in contact cases. Indeed, there is also a danger that a rule requiring equality of treatment between the two categories of cases might lead to a diminution in the generous provisions which certain States are prepared to make in international abduction cases.

(ii) Speed

Already the 1980 Convention requires use of "the most expeditious procedures available" in ensuring effective respect for right of access under the law of another Contracting State. In many States transfrontier contact applications are dealt with under domestic procedures and are subject to the same provisions, with regard to expedition, as domestic cases. In all cases, domestic and international, where there is disruption in the relationship between parent and child, speed is essential. In international cases, whether dealt with through domestic or special procedures, there is a need for understanding of the additional risks that are occasioned by delay. The question is whether more explicit provisions in the 1980 Convention would help to achieve this.

In answering this question special attention needs to be given to appeal procedures, which are often the cause of delay, including the procedures which permit challenges at the enforcement stage. The question of possible limits on appeals or the grounds upon which appeals are permitted would need to be addressed. Similar problems arise in respect of applications for the return of a child under the 1980 Convention.

(f) Safeguards and guarantees

While more extensive use of safeguards and guarantees would be of great value in helping to secure the effective exercise of contact rights, it is difficult to see how a Protocol to the 1980 Convention would advance this goal. The one international instrument which already promotes their use (the Council of Europe Convention on Contact Concerning Children) provides an illustrative list, but requires only that States Parties provide under their laws for at least three categories of safeguards and guarantees. It may be difficult to achieve greater consensus than this in a Protocol.

The goal of achieving the international recognition and enforcement of safeguards and guarantees, especially in the context of relocation or visitation abroad, may be largely achieved through adoption of the 1996 Hague Convention.

(g) Relocation and contact

Whether provisions in a Protocol dealing with aspects of relocation would be of value should perhaps await a broader discussion of the three general areas of differences referred to at the beginning of Chapter 6 above. With regard to the third of these, namely the approach taken to guaranteeing and securing the contact rights of the "left-behind" parent, what has already been stated in this Chapter, especially in the preceding section, is relevant.

(h) The meaning of rights of access / contact

The idea of a Protocol which would make clearer the dividing line between rights of custody and rights of access / contact appears, in the light of the conflicting case-law mentioned in Chapter 7, to be attractive. The idea might be to build upon the partial definitions given in Article 5 and at the same time to underline the need for courts to regard these as autonomous concepts to be further defined in the light of the objects of the Convention.

However, careful thought needs to be given to the difficulties that might be encountered in achieving consensus on the matter of definitions. In one of the areas of controversy (whether on rights of access combined with a veto on the removal of the child may constitute a right of custody for Convention purposes) the conflicting case law to some extent reflects a broader and unresolved debate about the proper function of the return order, and the circumstances in which it should be available where the principal objective of the applicant is to secure rights of contact. Other issues would also presumably have to be confronted surrounding the definition of "rights of custody" which have not been so relevant to this Report, such as the circumstances in which a court may possess custody rights.

(i) Enforcement of contact orders

The possibility that certain aspects of enforcement procedures, which at present are left to national law, might be harmonised in a Protocol will need to be considered in the light of the more general discussion of enforcement of orders under the 1980 Convention.

General arguments for and against a Protocol to the 1980 Convention

Some of the more general arguments for and against a Protocol, which emerged from responses to the 2002 Consultation Paper, remain relevant today and were summarised thus in *the Final Report* on Transfrontier Access / Contact:

> *"Several respondents were of the opinion that a Protocol to the 1980 Convention should be contemplated.*[120] *The primary reason is concern about the wide divergences in the interpretation of and practice under Article 21 of the 1980 Convention, and a view that a clear set of common binding rules is needed. There was general recognition at the same time that the development of a binding instrument would be a lengthy exercise, and most of those who favour the idea of a Protocol were prepared also to consider other techniques, either in their own right or as a first step.*
>
> *On the other hand, a number of respondents expressed opposition to the development of a Protocol.*[121] *Among the reasons given were doubts about the feasibility of achieving agreement, given the differences among judicial systems and the uneven enforcement of orders under the 1980 Convention, the danger that work on a new instrument might inhibit States from ratifying the 1996 Convention, concern that it would take many years before a Protocol could be become effective in the relationships among the [76] States Parties to the 1980 Convention and that the exercise might weaken the Convention itself …"*

[120] Including Argentina, Canada, Denmark, France, Iceland, Switzerland and the United Nations High Commission for Human Rights (UNHCHR).
[121] Austria, Germany, Netherlands, the United Kingdom and the United States of America.

Future work

Without prejudice to any decision to be taken by the Special Commission concerning a possible Protocol to the 1980 Convention, the Permanent Bureau would like to suggest the following programme of work:

1. If the Special Commission is ready to give a general endorsement to the General Principles and Good Practice set out in Chapters 1 to 7, it is proposed that a small group of experts be established to work with the Permanent Bureau to amend the document in the light of discussions within the Special Commission and to prepare it for publication. This work could be carried out via e-mail.

2. The Permanent Bureau will continue to make every effort to assist States in this consideration of the 1996 Convention and to promote its widespread ratification. This applies both to States which are Parties to the 1980 Convention and those which are not.

3. The Permanent Bureau will continue to keep States informed of developments in the mediation of transfrontier disputes concerning contact. It will also continue its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006.[122]

4. The Permanent Bureau will continue, through international judicial conferences and by other means, to stimulate discussion of and good practice in respect of the problems surrounding transfrontier contact and international relocation of children.

[122] See the Conclusions of the Special Commission of 3 to 5 April 2006 on General Affairs and Policy of the Conference, on the Hague Conference website at: < www.hcch.net/upload/wop/genaff_concl2006.pdf>.

ANNEXE / APPENDIX

Extract from the Guide to Good Practice under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Part I – Central Authority Practice

CHAPTER V – ACCESS APPLICATIONS

A. ROLE OF REQUESTING CENTRAL AUTHORITY

5.1 Obtain information about procedures in the requested country

The guidelines at Chapter 3.1 are relevant for step 5.1.

5.2 Check that the application is complete and in an acceptable form for the requested country

The guidelines at Chapter 3.2 are relevant here. It is important to be aware of the procedures for access applications in the requested country to ensure that the application fulfils any specific legal or administrative requirements of the requested country.

If it is known that a separate application for legal aid is required for Convention access cases, send the legal aid application with the access application to save time. Copies of the necessary legal aid form should be provided by the requested Central Authority, with guidance on how to complete the form, where it is unclear to a foreign applicant.

5.3 Check that the application satisfies Convention requirements

This is explained in Chapter 5.21.

The guidelines in Chapters 3.5 to 3.9 are relevant for steps 5.4 to 5.8.

5.4 Provide information about relevant laws

5.5 Ensure all essential supporting documents are included

See Checklist at Appendix 3.7.

5.6 Provide a translation of the application and all essential documents

5.7 Ensure the application is sent to the correct address or fax or email number of the requested Central Authority

5.8 Send the original application by priority mail, and fax or email an advance copy of the application

5.9 Urgent applications

It is generally agreed that access applications do not have the same degree of urgency as requests for return. This does not make access applications any less important, given their role as a preventive measure for abductions.

Access applications may become urgent in situations where:

- a child is supposed to travel abroad alone for an access visit and the custodial parent refuses, or will refuse to honour the arrangements;

- the access parent has travelled or intends to travel to visit the child and the custodial parent has indicated the child will not be available for the visit;

- a child has been located after a long period of searching, and the access parent is anxious to re-establish contact.

The guidelines in Chapters 3.11 to 3.13 are relevant for steps 5.10 to 5.12.

5.10 If the requested Central Authority requires additional information, ensure that all the information is provided promptly

5.11 Advise the requested Central Authority if there are difficulties in meeting their deadlines

5.12 Be reasonable about requests for follow-up information

5.13 Monitor progress of the application

See Chapters 3.14 and 4.18 for a discussion of the requested and requesting Central Authorities' monitoring responsibilities. If there is no progress because of the intransigence of the custodial parent, discuss enforcement options with the requested authority.

5.14 Assistance available in the requesting country

Some of the measures of "Assistance with implementing or enforcing access orders" discussed in Chapter 5.33 apply equally to requesting and requested Central Authorities.

5.15 Assistance if access is to take place in the requesting country

If the child is to travel to the requesting country for an access visit, there are a number of steps the requesting authority can take, including:

- advising the custodial parent to obtain a written programme or itinerary for the access visit, with names, addresses and telephone numbers of people and places to be visited. If the child is not returned, and the parent and child go into hiding, the programme details may assist to locate the child;

- obtaining a copy of this programme or itinerary;

- ensuring that the parent and child have the telephone numbers of support services, should any problems arise during the visit.

5.16 Co-operate with the requested Central Authority to ensure agreed arrangements are observed

Where conditions or safeguards have been attached to the exercise of access or contact, take whatever steps are possible to ensure that the conditions are observed.
It is necessary to ensure that the access parent understands that a failure to observe any agreed conditions may result in the court or custodial parent refusing future visits.

B. ROLE OF REQUESTED CENTRAL AUTHORITY

Article 21 makes clear that an access application may be presented to a requested Central Authority in the same way as a request for return. It is apparent from the outline of procedures in the Summary at the beginning of this chapter that administratively, there is little difference in handling incoming abduction and access applications up to the point of accepting the application.

Steps 5.17 to 5.20 are similar to the abduction procedures in Chapter 4.1 to 4.4. Those steps have been described in detail in Chapter 4, and that information need not be repeated.

5.17 Establish timeframes for dealing with applications

5.18 Applications may be received by mail, fax or email

5.19 Register the receipt of the application on an internal register

5.20 Acknowledge receipt of the application

5.21 Ensure Convention requirements are satisfied

The good practice guidelines for checking and processing of return applications apply equally to access applications.

The basic, commonly agreed requirements to be satisfied are:

- the child is habitually resident in a Convention country; and
- the child is not yet 16 years of age.

Sample checklists are at Appendices 3.7 and 3.8. However, any checklist must reflect the different requirements and approaches taken in Contracting States.

After acceptance of the application and reporting on the next procedural or legal steps to the requesting Central Authority, there is considerable divergence of practice between States in handling access applications.

Steps 5.22 to 5.25 below are similar to the abduction procedures in Chapter 4.6, 4.9 to 4.11. Those steps have been described in detail in Chapter 4, and that information need not be repeated here. A sample voluntary access letter is at Appendix 4.5.

5.22 If additional information or documents are required, advise the requesting Central Authority in the acknowledgement letter/email or in a follow-up letter/email

5.23 If the Central Authority decides not to accept the application, inform the requesting Central Authority of the reasons

5.24 Take steps to locate the child and confirm that he/she is actually in the requested country

5.25 If the child is not located, return the application

5.26 If the application meets the Convention requirements, consider if voluntary contact arrangements are appropriate and feasible

5.27 Access to legal aid and advice, or legal representation

Central Authorities should do everything possible to provide or facilitate legal aid and advice to the access parent.

The role of the Central Authorities in providing or facilitating the provision of legal aid and advice varies considerably. Many countries require the applicant to apply for legal aid, on the same terms and conditions as a resident or citizen of that country. Other Central Authorities treat access applications the same as return applications in terms of legal representation for the applicant: in other words, the applicant may have to bear all the legal costs, or none of them, depending on the country in question.

Various practices of Central Authorities regarding legal aid for access applications include:

- information provided on methods of obtaining legal aid and advice, and options for assistance;
- applications for legal aid are facilitated;
- referral to reduced fee or *pro bono* attorney;
- representation by the Central Authorities or State Attorneys;
- access proceedings are free of cost;
- legal costs met by Central Authorities or Legal Aid Offices.

5.28 Provide follow-up information

The comments at Chapter 4.14 are relevant for step 5.28.

5.29 Ensure that the procedures permitted by the administrative and judicial system of the requested country are followed

The guidelines at Chapter 4.15 and 4.17 are relevant for steps 5.30 and 5.31.

5.30 Take steps to prevent further harm to the child or prejudice to interested parties, if feasible and appropriate

5.31 Attendance of applicants at court hearings in the requested country will depend on the individual circumstances of the case

5.32 Monitor progress of the application

Access can be difficult to monitor according to any set timeframes. Like domestic access disputes, transfrontier disputes have particular difficulties:

- they may drag on for long periods;
- there may be little or no progress over that time;

- the custodial parent can easily undermine planned access arrangements (even court ordered arrangements);

- undermining arrangements or breaching court orders is especially problematic when the access parent from abroad is visiting the child's country and only has a limited time there;

- the custodial parent can exhaust the access parent's emotional, physical and financial resources by constant failure to observe agreed arrangements.

5.33 Assistance with implementing or enforcing access orders

The extent to which the requested Central Authority can assist with implementing or enforcing access orders will vary from country to country. Some of the measures of assistance offered by different Central Authorities include:

- support from social or youth/child welfare services, for example, where supervision of access is required;

- support from social or youth/child welfare services when measures are needed to accustom a child to contact after a long period of separation;

- contacting the International Social Service (ISS) for assistance;

- use of supervised visitation centres;

- arranging and funding supervised access in certain difficult cases;

- arranging and funding telephone access;

- acting as a post box for letters where the child's address cannot be disclosed.