

**PROJET REVISÉ DU MANUEL PRATIQUE SUR LE FONCTIONNEMENT DE LA CONVENTION
DE LA HAYE DU 19 OCTOBRE 1996 CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE, LA
RECONNAISSANCE, L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE DE RESPONSABILITÉ
PARENTALE ET DE MESURES DE PROTECTION DES ENFANTS**

établi par le Bureau Permanent

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**REVISED DRAFT PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION
OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW, RECOGNITION,
ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND
MEASURES FOR THE PROTECTION OF CHILDREN**

drawn up by the Permanent Bureau

*Document préliminaire No 4 de mai 2011 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 4 of May 2011 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

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1. Introduction

1.1 The 1996 Hague Child Protection Convention¹ has the potential to become a widely ratified and used instrument. It addresses a very wide range of international child protection issues. The breadth of the Convention's scope therefore ensures that it has universal relevance. Furthermore, the Convention responds to a real, and evidenced, global need for a better international framework in relation to cross-border issues of child protection. The work of the Permanent Bureau of the Hague Conference on Private International Law continues to reveal situations of vulnerable children which could be eased by the application of the 1996 Convention. In addition, this Convention follows the innovation of the 1980 and 1993 Hague Children's Conventions² in that it combines an international legal framework with co-operation mechanisms. This inclusion of co-operation structures within the Convention is crucial for the Convention to achieve its objectives. Such structures promote better information exchange and mutual assistance across borders and ensure that, across a diverse range of States, mechanisms are in place to enable the legal rules to have their full practical effect.

1.2 The children who could benefit from an implementation of the 1996 Convention include, amongst others:

- (a) Those who are the subject of international parental disputes over custody or contact;
- (b) Those who are the subject of international abduction (including in those States which are not able to join the 1980 Hague Child Abduction Convention);
- (c) Those who are placed abroad in alternative care arrangements which do not come within the definition of adoption and are therefore outside the scope of the 1993 Hague Inter-country Adoption Convention;
- (d) Those who are the subject of cross-border trafficking and other forms of exploitation, including sexual abuse;³
- (e) Those who are refugees or unaccompanied minors.

1.3 The extensive cross-border movement of children in many regions of the world raises problems ranging from the sale and trafficking of children, the exploitation of unaccompanied children, to the plight of refugee children and the sometimes unregulated placement of children abroad. This cross-border movement of children could be assisted by the general framework for co-operation which the 1996 Convention puts in place. This applies, for example, to Southern and Eastern Africa,⁴ the Balkans, some of the States of

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

² The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, hereinafter "the 1980 Hague Child Abduction Convention", or "the 1980 Convention". For further information on the practical operation of the 1980 Convention, please see the Guides to Good Practice under the 1980 Convention: available on the Hague Conference website at < www.hcch.net >, under "Child Abduction Section" then "Guides to Good Practice". The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption*, hereinafter "the 1993 Hague Inter-country Adoption Convention", or "the 1993 Convention". For further information on the practical operation of this Convention, please see Guide to Good Practice No 1, *The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention* (Jordan Publishing, 2008) (hereinafter "Guide to Good Practice on the 1993 Hague Inter-country Adoption Convention"). Also available at < www.hcch.net >, under "Inter-country Adoption Section" then "Guides to Good Practice".

³ In this regard, it should be noted that the provisions of the 1996 Convention complement the provisions of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (New York, 25 May 2000), which entered into force on 18 January 2002 (full text available at < http://treaties.un.org/doc/Treaties/2000/05/20000525%2003-16%20AM/Ch_IV_11_cp.pdf > (last consulted 18 April 2011)). See, in particular, Arts 9(3) and 10(2) of the Optional Protocol.

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

Eastern Europe and the Caucuses, parts of South and Central America, as well as many parts of Asia.

1.4 The early ratification of the 1996 Convention by Morocco was an important sign of the Convention's potential value in States whose laws are influenced by, or based upon, Islamic law. Indeed, that the 1996 Convention was sensitive to this particular use can be seen by the explicit reference to the institution of *kafala* in Article 3. Further, those involved in the Malta Process⁵ have called for all States to give careful consideration to ratification of / accession to the 1996 Convention.⁶ Within Europe, the European Union has long recognised the benefit of the Convention for its Member States.⁷ Indeed, the EU's own Regulation concerning parental responsibility was, in a large part, based upon the 1996 Convention.⁸ At the time of publication of this Handbook, 20 EU Member States have ratified the Convention and the remainder are committed to ratifying the Convention in the near future.⁹

1.5 The global appeal of the 1996 Convention is also perhaps attributable to the fact that it takes account of the wide variety of legal institutions and systems of child protection that exist around the world. It does not attempt to create a uniform international law of child protection: indeed, the basic elements of such a law are already to be found in the *United Nations Convention on the Rights of the Child* (hereinafter, the "UNCRC").¹⁰ Instead, the function of the 1996 Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems with diverse cultural or religious backgrounds.

1.6 With an increasing global understanding of the strengths of the 1996 Convention,¹¹ and with the number of Contracting States¹² due to rise significantly in the near future,¹³ it is an apt time for this Handbook to be published. The Handbook responds to the request made to the Permanent Bureau in 2006 at the Fifth meeting of the Special Commission on the 1980 and 1996 Conventions.¹⁴ In the responses to the Questionnaire¹⁵ circulated prior to the Special Commission meeting there had been

⁵ The "Malta Process" is a process of dialogue involving certain 'Hague Convention' States and certain 'non-Hague Convention' States from the Islamic world. The dialogue involves discussions on how to secure better protection for cross-frontier rights of access for parents and their children and the problems posed by international abduction between the States concerned. The Process commenced at the Judicial Conference on Cross-frontier Family Law issues, which took place in St. Julian's, Malta, on 14-17 March 2004. The Process continues to date: see < www.hcch.net >, under "Child Abduction Section", then "Judicial Seminars on the International Protection of Children".

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

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

⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, hereinafter the "Brussels II a Regulation".

⁹ There are seven remaining EU Member States who will ratify / accede imminently.

¹⁰ The *United Nations Convention on the Rights of the Child* (20 November 1989). Text available at < <http://www2.ohchr.org/english/law/crc.htm> > (last consulted 15 April 2011).

¹¹ See, e.g., the Declaration of the International Judicial Conference on Cross-Border Family Relocation (23-25 March 2010) at para. 7 which, in the context of cross-border family relocation cases, recognises the framework of the 1980 and 1996 Conventions as "an integral part of the global system for the protection of children's rights"; the Conclusions of the Morocco Judicial Seminar on Cross-Border Protection of Children and Families, Rabat (Morocco), 13-15 December 2010; the Conclusions and Recommendations of the Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction, held in Mexico, DF, 23-25 February 2011; all available at < www.hcch.net > (path indicated *supra*, note 5).

¹² Where a reference is made to a "Contracting State" in this Handbook, unless stated otherwise, the reference is to a Contracting State to the 1996 Hague Child Protection Convention (*op. cit.* note 1).

¹³ As well as the remaining EU Member States, Canada, New Zealand, and Russia are also actively considering ratification of / accession to the Convention. Further, the USA signed the 1996 Convention on 10 October 2010.

¹⁴ Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006).

¹⁵ Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil*

strong support for a guide on the 1996 Convention. Following consultation at the meeting, the following 'Conclusion and Recommendation' was adopted (para. 2.2):

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

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

1.7 The Permanent Bureau began its work by drafting a document focusing on practical advice for States that were considering implementing the Convention into national law (in accordance with para. 2.2(a)). The 'implementation checklist' was finalised in 2009 and now appears as an Annex to this Handbook. A first draft of the Handbook was circulated to States¹⁶ in 2009. The Handbook was intended to be of assistance to States, even in draft form. States were requested to provide comments on the draft Handbook so that further refinements and improvements could be made prior to final publication. The Permanent Bureau is grateful for the comments subsequently received from Australia, Canada, the European Union, Portugal, the Netherlands (Office of the Liaison Judge, International Child Protection), New Zealand and the experts Nigel Lowe, Peter McEleavy and The Rt. Hon. Lord Justice Mathew Thorpe. Following receipt of these comments, the draft Handbook was further revised and submitted to the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention in June 2011 for final approval.

1.8 As commented at the Special Commission meeting in 2006,¹⁷ the focus of this Handbook is necessarily different from that of the Guides to Good Practice under the 1980 Hague Child Abduction Convention.¹⁸ This Handbook does not focus to the same degree upon previously established 'good practice' under the Convention to guide future practice because, as yet, there is little practice to draw upon. Instead, it aims to be an accessible and easily digestible **practical guide** to the Convention. Through the use of plain language, relevant and comprehensive case examples and simple flowcharts, it is hoped that the Handbook will promote a clear understanding of how the Convention is intended to operate in practice, thereby ensuring that good practice under the Convention is established and fostered from the outset in Contracting States.

1.9 This Handbook is **aimed at all users** of the 1996 Hague Child Protection Convention, from **States, to Central Authorities, to judges, practitioners and the general public.**

1.10 Please note that any guidance provided in this Handbook is not legally binding and nothing in it may be construed as binding on Contracting States to the 1996 Hague Child Protection Convention.

Aspects of International Child Abduction, Prel. Doc. No 1 of April 2006 for the attention of the Special Commission of October / November 2006 on the Civil Aspects of International Child Abduction, available at < www.hcch.net >, under "Child abduction section", then "Questionnaires and responses".

¹⁶ The draft Handbook was circulated to the National and Contact Organs of the Members of the Hague Conference on Private International Law, as well as to the Central Authorities of Contracting States to the 1996 and 1980 Conventions. A hard copy of the draft Handbook was also sent to Ambassadors of non-Member States Parties to the 1996 and 1980 Conventions.

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

¹⁸ All Guides to Good Practice published under the 1980 Convention are available at < www.hcch.net >, under "Child abduction section", then "Guides to Good Practice".

2. Objectives of the 1996 Convention

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

2.2 The Preamble makes clear that the Convention aims to improve the protection of children in international situations and, to this end, seeks to avoid conflicts between legal systems in relation to measures taken for the protection of children.

2.3 The Preamble sets these objectives in an historical context by making reference to the 1961 Hague Convention on the Protection of Minors¹⁹ and its need for revision²⁰ and by placing the 1996 Hague Child Protection Convention in the context of the UNCRC.²¹ The Preamble also sets out broad statements of principle which inform the provisions of the Convention; namely the importance of international co-operation for the protection of children and the confirmation that the best interests of the child are a primary consideration in matters related to the protection of the child (the principle of 'best interests of the child' being referenced several times elsewhere in the body of the Convention).

2.4 Against this backdrop, Article 1 sets out the objectives of the Convention in a specific form. As the Explanatory Report to the Convention states, Article 1 acts in a similar way to a 'table of contents' for the Convention²² with Article 1 a) to e) broadly reflecting the aims of Chapters II to V of the Convention.²³

2.5 The first objective of the Convention, as set out at Article 1 a), is to determine the Contracting State whose authorities have **jurisdiction** to take measures directed to the protection of the person or the property of the child. It should be noted that the Convention determines only the relevant Contracting State whose authorities have jurisdiction and not the competent authorities within that State. Rules relating to jurisdiction are found in Chapter II of the Convention and are discussed below in **Chapters 4 to 7** of this Handbook.

2.6 The second and third objectives, described in Article 1 b) and c), relate to determining **applicable law**. The second objective is to identify the law to be applied by authorities when exercising their jurisdiction. The third objective is to identify the law applicable specifically to parental responsibility²⁴ arising without intervention by a judicial or administrative authority. Rules concerning these issues are set out in Chapter III of the Convention, and are discussed below in **Chapter 9** of this Handbook.

2.7 The fourth objective, set out at Article 1 d), is to provide for the **recognition and enforcement** of such measures of protection in all Contracting States. Rules regarding both recognition and enforcement are set out in Chapter IV of the Convention and are discussed below in **Chapter 10** of this Handbook.

2.8 The fifth, and last, objective, set out at Article 1 e), is to establish such **co-operation** between the authorities of Contracting States as may be necessary in order to achieve the purposes of the Convention. This co-operation is provided for in Chapter V of the Convention and is discussed in **Chapter 11** of this Handbook.

¹⁹ The Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors. Full text available at < www.hcch.net >, under "Conventions", then "Convention 10".

²⁰ See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998 at para. 1. This document is available at < www.hcch.net > under "Publications" then "Explanatory Reports". Hereinafter, simply "the Explanatory Report".

²¹ *Ibid.*, at para. 8.

²² *Ibid.*, at para. 9.

²³ Though it should be noted that Art. 1 b) and c) of the Convention are both dealt with in Chapter III of the Convention (Applicable Law).

²⁴ As defined in Art. 1(2) of the Convention – see *infra*, at paras **3.16 et seq.**

3. Scope of application

a. Entry into force provisions

In which States and from what date does the Convention apply?

Articles 53, 57, 58, 61

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

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

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

3.1 The 1996 Hague Child Protection Convention applies only to measures of protection²⁵ which are taken in a Contracting State *after* the entry into force of the Convention in that State.²⁶

3.2 The recognition and enforcement provisions of the Convention (Chapter IV) apply only to measures of protection taken *after* the entry into force of the Convention *as between* the Contracting State where the measure of protection was taken *and* the Contracting State in which it is sought to recognise and / or enforce the measure of protection.²⁷

3.3 To understand whether the Convention applies in a particular case, it is therefore important to be able to ascertain:

- (1) Whether the Convention has entered into force in a particular State and upon which date it did so (see **section i** below); and
- (2) Whether the Convention has entered into force *as between* a particular Contracting State and another Contracting State and upon which date it did so (see **section ii** below).

i. Entry into force provisions

3.4 The rules regarding whether the Convention has entered into force in a particular State differ depending upon whether the State has *ratified* or *acceded* to the Convention:

- *Ratification* of the Convention is only open to those States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session, *i.e.*, States which were Members of the Hague Conference on or before 19 October 1996.²⁸

²⁵ "Measures directed to the protection of the person or property of the child" in accordance with Art. 1 are hereinafter referred to as "measures of protection" or simply "measures". No comprehensive definition of such measures of protection is given in the Convention but see Arts 3 and 4 and, *infra*, paras **3.14-3.51**.

²⁶ Art. 53(1).

²⁷ Art. 53(2).

²⁸ Art. 57.

- All other States may *accede* to the Convention.²⁹

3.5 The Convention will enter into force in a State as follows:

- (a) For States that *ratify* the Convention, the Convention enters into force on the first day of the month following the expiration of three months after the State deposits its instrument of ratification.³⁰
- (b) For States that *accede* to the Convention, the Convention enters into force on the first day of the month following the expiration of nine months after the State deposits its instrument of accession.³¹

ii. Objecting to an accession

3.6 For States that *accede* to the Convention there is a longer waiting period prior to the Convention entering into force because, for the first six months following the accession, all other Contracting States have the opportunity of raising an objection to their accession. Three months after the expiry of that six-month period (*i.e.*, after a total of nine months) the Convention will enter into force in the acceding State. However, the accession will have effect only as regards relations between the acceding State and those Contracting States who have not raised an objection to its accession in that six-month period.³²

3.7 A State which *ratifies* the Convention after another State has already *acceded* to it can raise an objection to the accession of that State at the time of its ratification.³³ If such an objection is notified to the depositary by the ratifying State, the Convention will not affect relations *as between* the ratifying State and the State which has previously acceded to the Convention (unless and until the objection of the ratifying State is withdrawn).

3.8 In terms of the application of the Convention *as between* Contracting States, this means that the Convention will apply *as between* Contracting States when: (1) it has entered into force in *both* Contracting States; and (2) in the case of an acceding State, provided that, if another Contracting State has the option of raising an objection to the accession, that Contracting State has not done so.

3.9 Objections to accessions should be rare. At the time of publication of this Handbook, there have been none.³⁴

Example 3 (a)

*State A accedes to*³⁵ *the Convention on 18 April 2010. State B ratifies*³⁶ *the Convention on 26 August 2010. Upon ratification, State B does not object to the accession of State A.*³⁷

*The Convention enters into force in State A on 1 February 2011.*³⁸ *The Convention enters into force in State B on 1 December 2010.*³⁹ *The Convention enters into force as between the two States on 1 February 2011.*

²⁹ Art. 58. Accession is only available to States once the Convention itself has entered into force in accordance with Art. 61(1). The Convention entered into force, in accordance with Art. 61(1), on 1 January 2002, following the third ratification of the Convention (which was that of the Czech Republic, Monaco and Slovakia having been the first and second States to ratify the Convention). Since 1 January 2002 it has therefore been open to any State to accede to the Convention.

³⁰ Art. 61(2) *a*).

³¹ Art. 61(2) *b*).

³² Art. 58(3).

³³ Art. 58(3).

³⁴ April 2011.

³⁵ Art. 58(1).

³⁶ Art. 57(2).

³⁷ Art. 58(3).

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

Since the order has been made after the entry into force of the Convention as between State B and State A, the provisions of Chapter IV of the Convention will apply and the order will be recognised by operation of law in State A.⁴⁰

Example 3 (b)

State C **ratifies** the Convention on 21 March 2009; State D **accedes to** the Convention on 13 April 2009. State C does not object to State D's accession.

The Convention enters into force in State C on 1 July 2009.⁴¹ The Convention enters into force in State D on 1 February 2010.⁴² The Convention therefore enters into force as between the States on 1 February 2010.

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

As the custody and contact order has been made in State C before the Convention enters into force in State D (and therefore before the Convention enters into force as between the two States), the Convention mechanisms regarding recognition and enforcement will not apply.⁴³

However, if both States are Parties to the 1961 Hague Convention on the Protection of Minors, then the order may have to be recognised under that Convention.⁴⁴ If not, it should be checked whether there is any bilateral agreement between State C and State D governing the recognition/enforcement of such custody/contact orders. If there is no bilateral agreement either, there may still be existing provisions of domestic law in State D that will assist the parties.⁴⁵

Example 3 (c)

State E **ratifies** the Convention on 5 March 2007. State F **accedes to** the Convention on 20 March 2008. In April 2008, State E notifies the depositary of its objection to the accession of State F.⁴⁶

The Convention enters into force in State E on 1 July 2007.⁴⁷ The Convention enters into force in State F on 1 January 2009.⁴⁸ However, State F's accession will not affect relations between State F and State E due to State E's objection to its accession.⁴⁹ The Convention will not enter into force as between the two States unless and until State E withdraws its objection to State F's accession.

In July 2009, an unmarried couple with two children who are habitually resident in State F, but nationals of State E, separate. There is a dispute about where the children

³⁸ Art. 61(2) b).

³⁹ Art. 61(2) a).

⁴⁰ Art. 23(1) (unless any of the grounds for refusal of recognition are established, in which case recognition may, but not *must*, be refused – see Art. 23(2) and, *infra*, **Chapter 10**).

⁴¹ Art. 61(2) a).

⁴² Art. 61(2) b).

⁴³ Art. 53(2).

⁴⁴ Art. 51. See, in particular, Art. 7 of the 1961 Convention on the Protection of Minors. See, also, *infra*, paras **12.2-12.3** for discussion of the relationship between this Convention and the 1961 Hague Convention. See also the Explanatory Report (*op. cit.* note 20), at para. 169.

⁴⁵ *Ibid.*, at para. 178, which states, “[n]aturally, the requested State may always recognise the decisions taken previously, but this would be by virtue of its national law and not of the Convention”.

⁴⁶ Art. 58(3).

⁴⁷ Art. 61(2) a).

⁴⁸ Art. 61(2) b).

⁴⁹ Art. 58(3).

should live, and with whom. The father brings proceedings in respect of this issue in State F. Since the Convention has entered into force in State F, State F has jurisdiction to take measures of protection in respect of the children in accordance with Article 5 of the Convention.⁵⁰

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

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

Whilst the Convention has entered into force in both State E and State F, since State E objected to the accession of State F, the Convention has not entered into force as between the two States. The Convention mechanisms as regards recognition and enforcement will not therefore apply in this case.⁵¹

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

Example 3 (d)

State G **accedes to** the Convention on 13 August 2008. State H **ratifies** the Convention on 30 October 2009 and, upon ratification, notifies the depositary of its objection to State G's accession.⁵²

The Convention enters into force in State G on 1 June 2009.⁵³ The Convention enters into force in State H on 1 February 2010.⁵⁴ However, the Convention will not have effect in relations between State G and State H, including after 1 February 2010, due to State H's objection to State G's accession.⁵⁵ The Convention will not enter into force as between the two States unless and until State H withdraws its objection to State G's accession.

⁵⁰ See, *infra*, **Chapter 4**.

⁵¹ Art. 53(2).

⁵² Art. 58(3).

⁵³ Art. 61(2) b).

⁵⁴ Art. 61(2) a).

⁵⁵ Art. 58(3).

b. Personal scope

To which children does the Convention apply?

Article 2

3.10 The Convention applies to all⁵⁶ children from the moment of their birth until they reach the age of 18 years.⁵⁷

Can the provisions of the Convention apply in respect of children who are not habitually resident in a Contracting State?

3.11 Yes, sometimes. Unlike the 1980 and 1993 Hague Children's Conventions, a child does not have to be habitually resident in a *Contracting State* to fall within the scope of the 1996 Convention. For example, a child may have his / her habitual residence in a *non-Contracting State* but still fall within the scope of Articles 6, 11 or 12 of the 1996 Convention.⁵⁸

3.12 However, it should be noted that where a child does have his / her habitual residence in a *Contracting State*, the rules of jurisdiction contained in Chapter II form a complete and closed system which applies as an integral whole in Contracting States. A Contracting State is not therefore authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention.⁵⁹

3.13 In contrast, where a child does not have his or her habitual residence in a Contracting State, the authorities of a Contracting State may exercise jurisdiction upon the basis of the rules of the Convention where possible; but, in addition, there is nothing to prevent the authorities from exercising jurisdiction on the basis of the non-Convention rules of their State.⁶⁰ In this case, the obvious benefit of exercising jurisdiction on the basis of the rules of the Convention, where possible, is that the measure will be recognised and enforceable in all other Contracting States in accordance with the provisions of Chapter IV of the Convention.⁶¹ On the other hand, where jurisdiction is exercised on the basis of non-Convention grounds of jurisdiction, measures of protection are not entitled to be recognised and enforced under the Convention.⁶²

Example 3 (e)

A child is habitually resident and present in non-Contracting State X. The authorities in Contracting State A exercise jurisdiction to take a measure of protection in respect of the child under their non-Convention rules of jurisdiction on the basis that the child is a

⁵⁶ It should be noted that the Convention may apply even if the child concerned is neither habitually resident in, nor a national of, a Contracting State, e.g., Art. 6 of the Convention which relies solely on the presence of the child in the Contracting State. See the Explanatory Report (*op. cit.* note 20) at para. 17, and paras **3.11-3.13**, *supra*.

⁵⁷ For persons aged 18 years or over who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests, the *Hague Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, "2000 Hague Protection of Adults Convention") will apply if the relevant States are Contracting States to that Convention.

⁵⁸ As regards Art. 6, see, *infra*, paras **4.13-4.18** and **13.53 et seq.**; as regards Arts 11 and 12, see **Chapters 6 and 7**, *infra*.

⁵⁹ Save, of course, where Art. 52 applies, see paras **12.5-12.8**, *infra*. See also the Explanatory Report (*op. cit.* note 20), at para. 84.

⁶⁰ *Ibid.*, at paras 39 and 84.

⁶¹ Provided that the other criteria contained in Chapter IV are satisfied – see, *infra*, **Chapter 10**.

⁶² Art. 23(2) *a*) – where the measure of protection is taken by an authority whose jurisdiction is not based on one of the grounds provided for in the Convention, this is a ground upon which recognition may be refused under the Convention. See the Explanatory Report (*ibid.*), at para. 122.

*national of Contracting State A. Contracting State A is entitled to do so but the measure of protection may not be recognised under the Convention in other Contracting States.*⁶³

Example 3 (f)

*A child is habitually resident in non-Contracting State Y. The child has recently arrived in neighbouring Contracting State B as a result of the civil war which is ongoing in non-Contracting State Y. There was a massacre in his village and he has been left an orphan. The authorities in Contracting State B take measures of protection in relation to the child under Article 6(1) of the Convention. These measures of protection will be recognised by operation of law in all other Contracting States.*⁶⁴

c. Material scope

Which matters are covered by the Convention?

Article 3

3.14 The Convention sets down rules in respect of “measures directed to the protection of the person or property of the child”.⁶⁵ The Convention does not provide a precise definition as to what these “measures of protection” may include. However, examples of the issues on which such measures of protection may bear are set out in Article 3. This is not intended to be an exhaustive list of examples.⁶⁶

3.15 Measures of protection may, therefore, in particular deal with:

- a) **the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation**⁶⁷

What is meant by “parental responsibility”?

3.16 The term “parental responsibility” is defined in Article 1(2) of the Convention and includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.⁶⁸ The description of the term in the Convention is purposely broad.⁶⁹ The term covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and, generally, the legal representation of the child, whatever name is given to the legal institution in question.

3.17 Regarding the person of the child, the “rights and responsibilities” referenced in Article 1(2) include those which belong to parents, guardians or legal representatives in

⁶³ Art. 23(2) a). See also **Chapter 13**, paras **13.53-13.55** regarding children who are refugees, internationally displaced or without a habitual residence.

⁶⁴ Art. 23(1). This will be the case unless a ground for refusal of recognition is made out under Art. 23(2) – see further, *infra*, **Chapter 10**.

⁶⁵ Art. 1.

⁶⁶ For further discussion of a number of measures found in Art. 3, see, *infra*, **Chapter 13** on special topics. It should be noted that the examples given in Art. 3 are not rigid categories: measures of protection may well encompass one or more of the examples given, e.g., in some Contracting States’ domestic laws, the placement of a child in a foster family (Art. 3 e)) may also involve a restriction of parental responsibility (Art. 3 a)). Such a measure of protection will clearly fall within the scope of the Convention.

⁶⁷ Art. 3 a).

⁶⁸ Art. 1(2).

⁶⁹ See the Explanatory Report (*op. cit.* note 20), at para. 14. The expression draws its inspiration from Art. 18 of the UNCRC. However, this concept of parental responsibility was not precise enough for certain delegations; hence the elaboration in Art. 1(2) of the 1996 Convention.

relation to the upbringing and development of the child. These rights and responsibilities could be to do with, for example, custody, education, health care decisions, determination of the residence of the child or the supervision of the child's person and, in particular, his or her relationships.

3.18 The term "powers" in Article 1(2) has to do more specifically with the representation of the child. This representation is usually undertaken by parents but may be exercised, in whole or in part, by third parties, for example in cases of death, incapacity, unsuitability or unfitness of the parents, or where a child has been abandoned by his or her parents or has been placed with a third party for another reason. Such "powers" could be exercised in relation to the person or property of the child.

3.19 The terminology used for these concepts varies among States, with guardianship, parental authority, *patria potestas*, as well as "parental responsibility" itself, being some examples. Even where the term "parental responsibility" is itself found in a State's domestic law, the interpretation given to the term in domestic law is not necessarily to be relied upon as being equivalent to its interpretation in the Convention. The Convention term should be given an autonomous Convention meaning.

The attribution, exercise, termination, restriction or delegation of parental responsibility

3.20 There may be several different ways by which individuals can acquire parental responsibility under a State's domestic law. Often the holders of parental responsibility are identified by operation of law: for example, in many States parental responsibility is granted by operation of law to married parents on the birth of their child and, in some States, this is extended to, for example, unmarried cohabiting parents. In some States the holders of parental responsibility can be identified on the completion of a particular act, such as recognition of the child by an unmarried father, the subsequent marriage of the child's parents or a parental agreement. Parental responsibility can also be assigned by the decision of a judicial or administrative authority. The term "attribution" of parental responsibility in Article 3 a) is intended to cover all these methods of acquiring parental responsibility.

3.21 There may also be many different ways by which States' domestic laws provide for the exercise, termination, restriction and delegation of parental responsibility. The broad scope of Article 3 ensures that all such methods are included within this provision, and therefore within the scope of the Convention.

Example 3 (g)

The law of Contracting State A provides that if a parent indicates in a testamentary disposition who he / she wishes to care for the person and / or property of the child upon his / her death, this will give that person parental responsibility on the execution of the disposition. This attribution of parental responsibility falls within the scope of the Convention.⁷⁰

Example 3 (h)

In a case of severe neglect and abuse of a child, the authorities of Contracting State B take measures to remove the child from the care of his parents and to terminate their parental responsibility. This termination of parental responsibility falls within the scope of the Convention.⁷¹

⁷⁰ Art. 3 a).

⁷¹ *Id.* It is also possible that in certain Contracting States, in cases of abuse / neglect, the child may be removed from the parent(s) or legal guardian(s) but the parental responsibility of the parent(s) or legal guardian(s) will remain, subject to certain restrictions. This "restriction" of parental responsibility will also fall within the scope of the Convention (Art. 3 a)).

b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence⁷²

3.22 This section incorporates all measures relating to the care and upbringing of, and access to or contact with, the child. Such measures may determine with which parent, or other person, a child should live and how access to the parent with whom the child does not live, or other person, will be organised. Measures such as these are within the scope of the Convention irrespective of the titles given to them in a State's domestic law.

c) guardianship, curatorship and analogous institutions⁷³

3.23 These institutions are systems of protection, representation or assistance which are established in favour of a child when his / her parents are deceased or are no longer authorised to represent him / her.⁷⁴

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child⁷⁵

3.24 In addition to a parent or guardian, the "person or body" referred to here could also be a guardian *ad litem* or a children's advocate, or a person who has authority for the child in particular circumstances (e.g., a school or person running a vacation resort who is called upon to take decisions concerning medical treatments to be provided to a child in the absence of a legal representative⁷⁶).

e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution⁷⁷

3.25 This paragraph refers to forms of alternative care that can be provided for children. These usually apply where the child has been orphaned or the parents are unable to care for the child.⁷⁸

3.26 It should be noted that this paragraph does not refer to adoption or measures preparatory to adoption, including the placement⁷⁹ of a child for adoption. These measures are expressly excluded from the scope of the Convention by Article 4.⁸⁰

3.27 The institution of *kafala* is widely used in some States as a form of care for children when they cannot be cared for by their parents. Under *kafala*, children are cared for by new families or relatives but the legal link with their birth parents is generally not severed.⁸¹ *Kafala* can take place across borders but since it is an arrangement which

⁷² Art. 3 b). In so far as "rights of access" and "rights of custody" are defined in Art. 3 b), the wording replicates that of Art. 5 b) of the 1980 Convention. This is intentional and the terms "rights of custody" and "rights of access" should be interpreted consistently to ensure the complementarity of the two Conventions. See, further **Chapter 13**, paras **13.15-13.29** regarding access / contact. See also INCADAT < www.incadat.com > for the leading domestic jurisprudence on the meaning of these terms under the 1980 Convention. These terms have autonomous Convention meanings and should be interpreted independently of any domestic legal concepts.

⁷³ Art. 3 c).

⁷⁴ See the Explanatory Report (*op. cit.* note 20), at para. 21.

⁷⁵ Art. 3 d).

⁷⁶ *Ibid.*, at para. 22.

⁷⁷ Art. 3 e).

⁷⁸ When interpreting similar provisions of the Brussels II a Regulation, the European Court of Justice found that both the decision to remove children from their original family and the decision to place them in foster care fall within the scope of the Regulation (see Case C-435/06 of 27 November 2007 [2007] ECR I-10141 and, further, Case C-523/07 of 2 April 2009 [2009] ECR I-0000).

⁷⁹ See, *infra*, para. **3.37** regarding the meaning of the word "placement" in this context.

⁸⁰ See, *infra*, paras **3.31 et seq.** regarding Art. 4 of the Convention and paras **3.37-3.38** regarding adoption. See also the Explanatory Report (*op. cit.* note 20), at para. 28.

⁸¹ However, the rules regarding the institution of *kafala* differ as between the States in which it is found.

does not constitute an adoption it is not within the scope of the 1993 Hague Inter-country Adoption Convention. However, where used, the institution of *kafala* clearly constitutes a measure of protection in respect of a child and is therefore expressly within the scope of the 1996 Convention.⁸²

f) the supervision by a public authority of the care of a child by any person having charge of the child⁸³

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

g) the administration, conservation or disposal of the child's property⁸⁴

3.29 This category includes all measures of protection concerned with the property of a child.⁸⁵ It may include, for example, the required authorisations or approvals for the sale or purchase of a child's property.

3.30 However, it should be noted that the Convention does not encroach on systems of property law. The Convention does not therefore cover the substantive law relating to rights over property, for example, disputes in relation to the ownership / title of property.

Which matters are not covered by the Convention?

Article 4

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

a) the establishment or contesting of a parent-child relationship⁸⁶

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

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

- a. Whether a child who is recognised must consent to such recognition and must be represented for this purpose if below a certain age;
- b. Whether a guardian *ad litem* must be designated to represent or assist the child in the proceedings; or

⁸² See *ibid.*, at para. 23.

⁸³ Art. 3 f).

⁸⁴ Art. 3 g).

⁸⁵ For further discussion of the application of the Convention to measures directed to the protection of the property of the child, see *infra*, paras **13.60-13.64**.

⁸⁶ Art. 4 a).

- c. Whether the underage mother of a child must herself be represented in connection with any declarations of recognition or consent or any proceedings concerning her child's status.⁸⁷

However, the question as to the *identity* of the legal representative of the child concerned and as to whether, for example, the designation of that person results by operation of law or requires the intervention of an authority, falls within the scope of the Convention.⁸⁸

3.34 The exclusion in Article 4 a) of the Convention also extends to the status of a child born as a result of an international surrogacy agreement.⁸⁹

3.35 The establishment or contestation of a parent-child relationship is not dealt with by other Hague Conventions (except, as an incidental point, in the 2007 Hague Child Support Convention⁹⁰ where the question of parentage arising in the context of maintenance proceedings is covered).

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

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of an adoption⁹¹

3.37 This exclusion is very broad and applies to all aspects of the adoption process, including the placement of children for adoption.⁹² It should be noted that the word "placement" in this context implies intervention by a public authority and does not refer to less formal arrangements regarding the care of the child.⁹³

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

c) the name and forenames of children⁹⁴

3.39 Measures relating to the names and forenames of a child are not included within the scope of the Convention since they are not considered matters concerned with the protection of the child.⁹⁵

d) emancipation⁹⁶

3.40 Emancipation is the releasing of a minor from the control of his or her parents or guardians. Emancipation can occur by operation of law, for example, upon marriage, or by the decision of a competent authority. Emancipation is intended to free a child from

⁸⁷ See the Explanatory Report (*op. cit.* note 20), at para. 27.

⁸⁸ See para. 3.24, *supra*, on Art. 3 d).

⁸⁹ For further information on this issue see Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements" (available at < www.hcch.net >, under "Work in Progress", then "General Affairs").

⁹⁰ The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance – see Arts 6(2) h) and 10(1) c). See also Art. 1 of the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, as well as Art. 2 of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations and Art. 3 of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

⁹¹ Art. 4 b).

⁹² See, *infra*, paras 13.38-13.40 on adoption.

⁹³ This also applies in relation to Art. 33 of the Convention, see, *infra*, paras 11.12-11.16.

⁹⁴ Art. 4 c).

⁹⁵ The Explanatory Report (*op. cit.* note 20), at para. 29.

⁹⁶ Art. 4 d).

parental authority, making it the converse to a measure of protection. This explains its exclusion from the scope of the Convention.

e) maintenance obligations⁹⁷

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

f) trusts or succession⁹⁸

3.42 Questions of private international law concerning trusts have already been dealt with in the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*.

3.43 Succession is the subject matter of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*.

g) social security⁹⁹

3.44 Social security is paid for by bodies whose determination depends upon connecting factors such as, for example, the place of work of, or the habitual residence of, the person(s) with social insurance. These connecting factors will not necessarily correspond with the habitual residence of the child. It was therefore thought that the rules of the Convention would have been poorly adapted to such measures.¹⁰⁰

h) public measures of a general nature in matters of education or health¹⁰¹

3.45 Not all matters relating to health or education are excluded from the scope of the Convention. Only *public* measures of a *general nature* are excluded, for example, measures which require school attendance or which institute vaccination programmes.

3.46 In contrast, the placement of a specific child in a specific school or the decision to have him or her undergo a surgical operation are examples of measures which will fall within the scope of the Convention.¹⁰²

i) measures taken as a result of penal offences committed by children¹⁰³

3.47 The Explanatory Report states that this exclusion allows Contracting States to take appropriate measures, whether punitive or educational, in response to the commission of penal or criminal offences by children without needing to ensure that they have jurisdiction under the Convention.¹⁰⁴ It goes on to state that for this exclusion to apply it is not necessary that the child actually be subject to criminal prosecution (since often children below a certain age cannot be prosecuted under domestic criminal procedure). Instead, this exclusion requires that the act of the child was an act which is a criminal offence under a State's penal law when committed by an individual above the age of criminal responsibility. Jurisdiction to take measures responding to these acts is not covered by this Convention and is a matter for the internal law of each State.

3.48 However, it should be noted that this interpretation of Article 4 *i*) is disputed. Another interpretation of this provision has been given by one State in its response to the draft version of this Handbook. The view of Canada is that this exclusion should only

⁹⁷ Art. 4 e).

⁹⁸ Art. 4 f).

⁹⁹ Art. 4 g).

¹⁰⁰ *Ibid.*, at para. 33.

¹⁰¹ Art. 4 h).

¹⁰² *Ibid.*, at para. 34.

¹⁰³ Art. 4 i).

¹⁰⁴ *Ibid.*, at para. 35.

cover measures taken as a result of penal proceedings actually instituted against the child. Further, it is their view that where a child commits an act which amounts to a criminal offence under domestic law, but which is reacted to by the State either exclusively or in addition to penal measures as a child protection concern, any measure of protection taken under the child protection legislation falls within the scope of the Convention.

3.49 There is no settled practice on this issue as yet.

3.50 Measures responding to behaviour which is deviant, but not criminal, such as running away or refusing to attend school, are covered by the Convention.¹⁰⁵

j) decisions on the right of asylum and on immigration¹⁰⁶

3.51 Decisions on the right of asylum and on immigration are excluded from the scope of the Convention because they are decisions which derive from the sovereign power of States. However, only the substantive decisions on these matters are excluded. In other words, the decision as to whether asylum or a residence permit will be granted or denied is excluded from the scope of the Convention. However, measures regarding the protection and / or representation of a child who is applying for asylum or for a residence permit will fall within the scope of the Convention.¹⁰⁷

¹⁰⁵ *Ibid.*

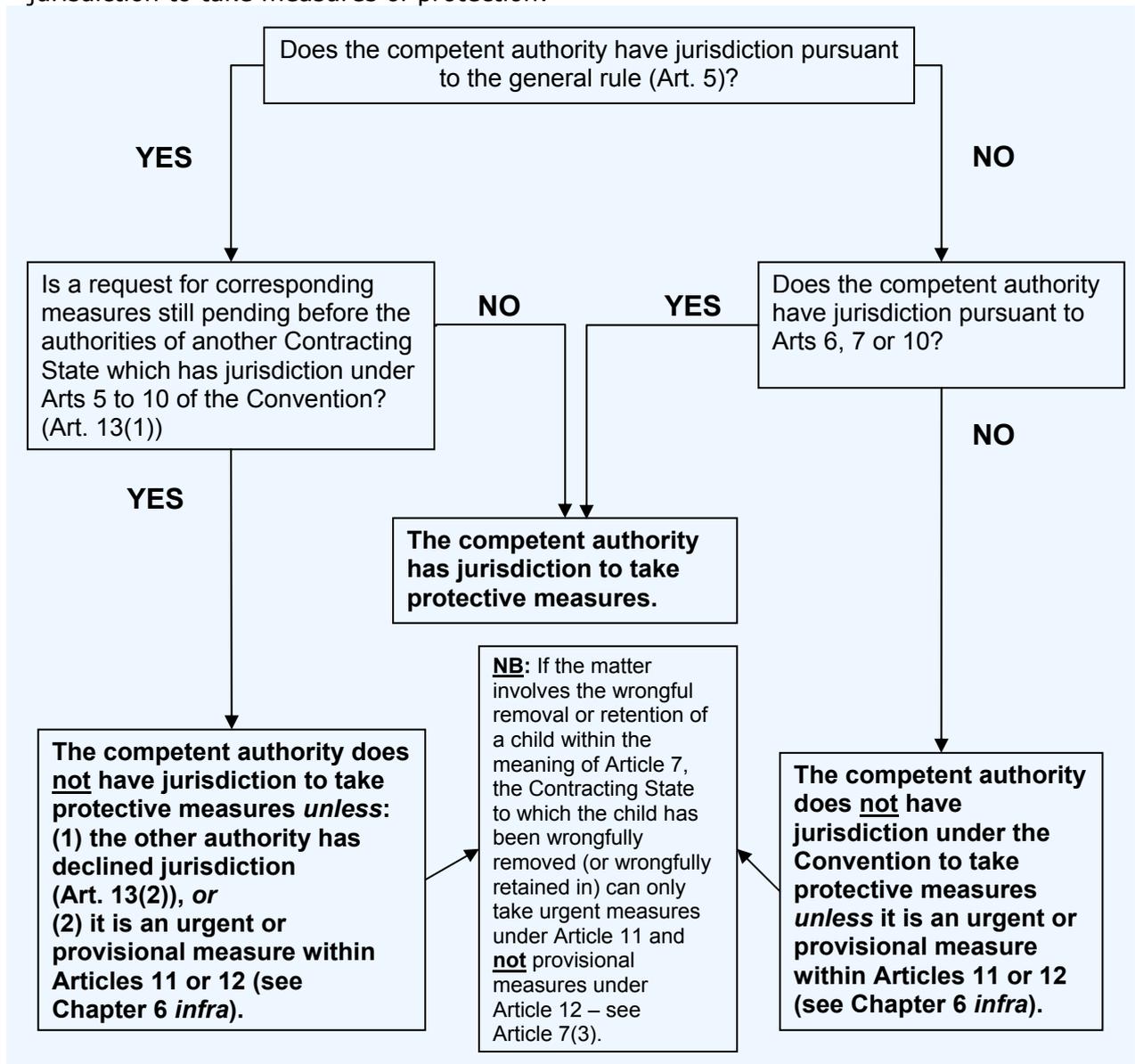
¹⁰⁶ Art. 4 j).

¹⁰⁷ *Ibid.*, at para. 36.

4. When do the authorities of a Contracting State have jurisdiction to take measures of protection?

4.1 The rules on jurisdiction are set out in Articles 5 to 14 of the Convention. The Convention determines the Contracting State whose authorities have jurisdiction, but not the authority which is competent within that Contracting State. This question is left to domestic procedural law.

4.2 When an application concerning measures directed to the protection of the person or property of a child is made to a competent authority of a Contracting State, the following analysis should be carried out to determine if that competent authority has jurisdiction to take measures of protection:¹⁰⁸



¹⁰⁸ This chart applies only to Contracting States not bound by alternative rules agreed under Art. 52(2) of the Convention, which take precedence – see, *infra*, **Chapter 12**. As an example, EU Member States (excluding Denmark) will need to consider the provisions of the Brussels II a Regulation. This chart also does not deal with the situation where the child’s habitual residence changes at a time when the competent authorities of the State of the child’s original habitual residence are seized of a request for a measure of protection (see Art. 5(2) and, *infra*, paras **4.10-4.11**).

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

a. The general rule – the authorities of the Contracting State of the habitual residence of the child

Article 5

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

The meaning of "habitual residence"¹⁰⁹

4.5 The concept of "habitual residence", the common primary connecting factor in all of the modern Hague Children's Conventions, is not defined in the Convention but has to be determined by the relevant authorities in each case on the basis of factual elements. It is an autonomous concept and should be interpreted in light of the objectives of the Convention rather than under domestic law constraints.

4.6 There are an extensive number of cases from Contracting States to the 1980 Hague Child Abduction Convention dealing with the determination of the habitual residence of children.¹¹⁰ However, it must be remembered that since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of a child for the purposes of this Convention.

4.7 The concept of "habitual residence" is considered in detail in **Chapter 13** of this Handbook.¹¹¹

What happens when a child's "habitual residence" changes?

4.8 Jurisdiction follows the habitual residence of the child so that when the child's habitual residence changes to another Contracting State, the authorities of the State of the new habitual residence will have jurisdiction.¹¹²

4.9 Although the Convention does not provide for the concept of 'continuing jurisdiction', it should be remembered that a change of the habitual residence of the child does not terminate any measures already taken.¹¹³ These measures remain in force until, if necessary, other appropriate measures are taken by the authorities of the Contracting State of the child's new habitual residence.

4.10 Where the child's habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seized of a request for a measure of protection (*i.e.*, during pending proceedings), the Explanatory Report suggests that the principle of "*perpetuatio fori*" does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child's new habitual residence.¹¹⁴ However, this is likely to be a very rare situation. Where it does occur,

¹⁰⁹ For further discussion as to the meaning of the term "habitual residence", see **Chapter 13**, *infra*, at paras **13.72-13.76**.

¹¹⁰ For some of these decisions, see the International Child Abduction Database (INCADAT) < www.inciadat.com >.

¹¹¹ The concept of habitual residence is discussed further, *infra*, at paras **13.72-13.75**.

¹¹² Art. 5(2).

¹¹³ Art. 14. For further discussion on the continuation of measures, see, *infra*, **Chapter 8**.

¹¹⁴ At para. 42 (*op cit.* note 20). Note that a different solution was reached under the Brussels II a Regulation, see Art. 8: "*The courts of a Member State shall have jurisdiction in matters of parental responsibility over a*

consideration might be given to use of the transfer of jurisdiction provisions (see **Chapter 5, *infra***).

4.11 Where the child's habitual residence changes from a Contracting State to a *non*-Contracting State during proceedings for a measure of protection, the principle of "*perpetuatio fori*" also does not apply.¹¹⁵ However, Article 5 of the Convention will cease to be applicable from the time of the change of the child's habitual residence. Nothing therefore stands in the way of a retention of jurisdiction by the authorities of the Contracting State under their non-Convention rules (*i.e.*, outside the scope of the Convention).¹¹⁶ However, it is important to remember that in this scenario other Contracting States will not be bound by the Convention to recognise the measures which may be taken by this authority.¹¹⁷

b. Exceptions to the general rule

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

a) Refugee or internationally displaced children

Article 6

4.13 Jurisdiction in cases of refugee children or children internationally displaced due to disturbances occurring in their country is based on the presence of the children in a Contracting State. The use of the phrase "internationally displaced children" is intended to be sufficiently broad to surmount limits that individual States may place on the definition of "refugee".¹¹⁸

4.14 The children covered under this heading are those who have left their States because of conditions arising there and who may or may not be accompanied and may or may not be temporarily or permanently deprived of parental care.

4.15 This exception is not intended to apply to other children who have been internationally displaced, such as runaway or abandoned children. Other solutions under the Convention should be applied in cases involving these children.¹¹⁹

Example 4 (a)

Two children aged 6 and 8 leave Contracting State A, which is in a state of civil war, with their 18 year old maternal aunt. Their mother was killed in the violence and their father is a political prisoner. They arrive in Contracting State B and seek asylum there. Under Article 6 of the Convention, Contracting State B has jurisdiction to take measures directed to the protection of the children, such as placing them in public care or giving their aunt parental responsibility. This does not affect the procedures in Contracting State B for assessing their claim for asylum.¹²⁰ However, the Convention will apply to the question of arranging representation for the children in any asylum claim.¹²¹

child who is habitually resident in that Member State at the time the court is seised" (emphasis added).

¹¹⁵ See the Explanatory Report (*op cit.* note 20), at para. 42.

¹¹⁶ However, it should be noted that in such a case, the Contracting State of the child's former habitual residence may still be able to take measures of protection in respect of the child *under the Convention* if, for example, Arts 11 or 12 of the Convention apply (see **Chapters 6 and 7** below). See also, *supra*, para. **3.13**.

¹¹⁷ See, *supra*, paras **3.11-3.13**.

¹¹⁸ For further discussion, see, *infra*, **Chapter 13**, paras **13.53-13.55**.

¹¹⁹ For further discussion, see, *infra*, **Chapter 13**, paras **13.56-13.59**.

¹²⁰ Art. 4 j), discussed at para. **3.51**, *supra*.

¹²¹ *Id.*

b) Children whose habitual residence cannot be established**Article 6**

4.16 When the habitual residence of a child cannot be established, jurisdiction is based on the presence of the child in the territory of a Contracting State. This is a jurisdiction of necessity. It should not be lightly concluded that a child's habitual residence cannot be established.¹²²

4.17 However, there are circumstances where it might not be possible to establish the habitual residence of a child. Such circumstances could include, for example: (1) when a child moves frequently between two or more States, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish his / her habitual residence and (3) where a child's previous habitual residence has been lost and there is insufficient evidence to support the acquisition of a new habitual residence.¹²³

4.18 This jurisdiction ceases when it is established that the child has a habitual residence somewhere.

4.19 The concept of "habitual residence" is considered in detail in **Chapter 13** of this Handbook.¹²⁴

c) Jurisdiction in cases of international child abduction**Article 7*****The general rule***

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

4.21 The definition of wrongful removal or retention used in the Convention is the same as that found in the 1980 Hague Child Abduction Convention, indicating the complementary nature of the two Conventions in this regard. This means that the interpretation and the application of the 1980 Convention provisions relating to wrongful removal and retention may offer assistance in the interpretation of these terms under this Convention.¹²⁵

The circumstances in which jurisdiction may change

4.22 There are two sets of circumstances in which jurisdiction can change and vest in the authorities of the State to which the child was wrongfully removed or in which the child was wrongfully retained.

¹²² See further **Chapter 13**, at paras **13.72-13.76**.

¹²³ *Id.*

¹²⁴ At paras **13.72-13.75**.

¹²⁵ For case law and commentary, see the International Child Abduction Database (INCADAT) < www.incadat.com >.

Situation A

- The child has acquired a habitual residence in the State to which he / she was wrongfully removed or retained

and

- Each person, institution or other body having rights of custody has acquiesced in the removal or retention.

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

Situation A may occur where either:

- (a) No application has been made for the return of a child under the 1980 Convention. (NB: This includes the situation where the 1980 Convention is not in force between the two States concerned, or does not apply for any other reason);

Or

- (b) An application under the 1980 Convention has been made but the authorities of the requested State have refused to return the child in accordance with Article 13 of the 1980 Convention, based upon the applicant's acquiescence in the wrongful removal or retention.

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

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

OR

Situation B

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

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

However, the important difference between the provisions of the two Conventions in this regard arises from the fact that in the 1980 Convention the period of one year starts with the wrongful removal or retention of the child. In contrast, in the 1996 Convention, as indicated above, the period of one year commences from the date that the person, institution or body having rights of custody has or should have had knowledge of the child's whereabouts. (See further, the Explanatory Report, *op. cit.* note 20, at para. 49.)

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

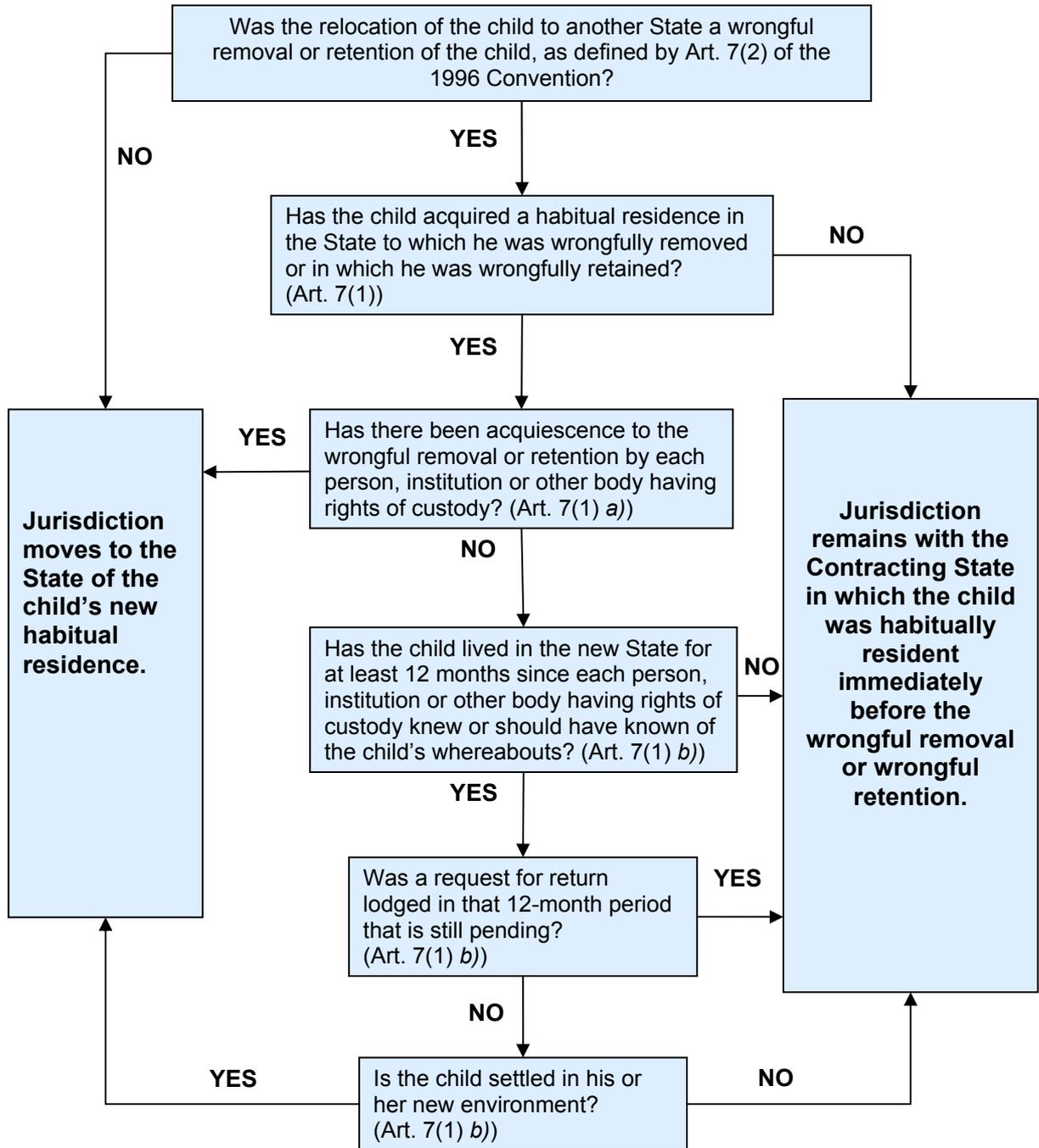
4.23 Whilst jurisdiction remains with the authorities of the Contracting State from which the child was wrongfully removed or retained, the authorities of the Contracting State to which the child is removed or in which he or she is retained can only take measures under Article 11¹²⁶ (necessary measures of protection, where the case is one of urgency) and cannot take provisional measures under Article 12.¹²⁷

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

¹²⁶ Discussed more fully in **Chapter 6**, *infra*.

¹²⁷ Art. 7(3).

Abduction Cases: Operation of Article 7



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

Example 4 (b)

In the following example both States X and Y are Contracting States to the 1996 Convention. However, State X is not a Contracting State to the 1980 Convention.

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

the father's wishes, the mother unilaterally, and in breach of the father's rights of custody, moves with the child back to State X.

The father spends the first six months following the removal of the child attempting to trace the mother and child (he does not consult a lawyer and is unaware of the 1996 Convention and the support which may be available in this regard¹²⁸). Finally, he traces the mother and child. He then spends another five months attempting to agree custody arrangements with the mother.

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

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

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

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

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

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

Example 4 (c)

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

Although the husband has not acquiesced in the removal, because the children have been in State B for more than one year from the date when the husband had knowledge

¹²⁸ Art. 31 c): see further **Chapter 11**, *infra*.

of their whereabouts, the authorities of State B will have jurisdiction if the children are now both habitually resident and settled in that State.¹²⁹

Example 4 (d)

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

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

However, if the authorities in State A consider that the authorities in State B are better placed to assess the best interests of the child and that State A is a State falling within Article 8(2) of the 1996 Convention in the particular case, they can request (directly or with the assistance of the Central Authority of State A) that the authorities in State B assume jurisdiction, or they can suspend consideration of the case and invite the father to introduce such a request before the authorities of State B. The authorities in State B can assume jurisdiction in the case if they consider that it is in the child's best interests.¹³⁰

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

Article 10

4.26 It is possible for the authorities of a Contracting State exercising jurisdiction in an application for divorce, legal separation or an annulment of the marriage of the parents of a child habitually resident in another Contracting State to take measures directed to the person and property of such a child if certain conditions are met.¹³¹ These are:

The child is habitually resident in a Contracting State

AND

The law of the Contracting State of the authorities exercising such jurisdiction allows them to take such measures in the circumstances

AND

At the time the proceedings commence at least one of the parents habitually resides in that State

AND

At the time the proceedings commence at least one of the parents has parental responsibility in relation to the child

AND

The jurisdiction of the authorities to take these measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child

¹²⁹ Art. 7(1) b).

¹³⁰ See further **Chapter 5**, *infra*, on transfer of jurisdiction.

¹³¹ Such a situation might occur, for example, where a parent lawfully relocates with a child from one Contracting State to another following the breakdown of the marriage and the other parent remains in the first Contracting State and issues proceedings for divorce in that State. Of course, it is a matter for the law of the State where proceedings are issued to determine whether it has jurisdiction to hear the divorce proceedings and to determine whether its law permits it to take such measures directed to the person and / or property of a child in these circumstances.

AND

It is in the best interests of the child that jurisdiction be exercised on this basis.

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

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

Example 4 (e)

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

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

This would not be the case if the husband refused to accept the jurisdiction of the authorities of Contracting State A to take such measures, or if those authorities did not consider the taking of such measures to be in the best interests of the children.¹³²

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

Once the divorce proceedings are concluded in Contracting State A, if it becomes apparent that the arrangements ordered by Contracting State A are not working in the interests of the children concerned, then the courts in Contracting State B will have jurisdiction to take measures of protection in respect of the children (under Art. 5, as the State of the children's habitual residence).

¹³² Art. 10(1) b).

c. Solution in cases where the same proceedings are brought in two Contracting States

What happens if the authorities of two, or more, Contracting States have jurisdiction?

Article 13

4.29 As there may be cases where the authorities of more than one Contracting State have jurisdiction to take measures of protection in respect of a child, Article 13 provides for the resolution of possible conflicts of jurisdiction.

4.30 Article 13 provides that the authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of a child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, “corresponding measures” have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and those measures are still under consideration.

4.31 The term “corresponding measures” is not defined in the Convention but it appears that, for Article 13 to apply, the requests before both Contracting States must be the same or similar in substance.¹³³ For example, if one Contracting State is seized of custody proceedings in respect of a child and another Contracting State is requested to take measures of protection in relation to certain property of the child, this Contracting State may decide that “corresponding measures” have not been requested from the other Contracting State and it can therefore proceed to hear the request regarding the child’s property.¹³⁴

4.32 Article 13 applies for as long as the proceedings in respect of the “corresponding measures” in the other Contracting State are still under consideration.

4.33 However, it should be noted that Article 13(1) does *not* apply if the authorities of the Contracting State initially seized have declined jurisdiction.¹³⁵ The Explanatory Report states¹³⁶ that the ability of the authorities of the Contracting State first seized to decline, or renounce, their jurisdiction enables that Contracting State to give precedence to the Contracting State *second* seized, despite Article 13(1), if it is considered a more appropriate forum. In this way, this renunciation of jurisdiction is reminiscent of the transfer of jurisdiction provisions (Arts 8 and 9, see **Chapter 5, infra**). However, the important differences between Article 13(2) and the transfer provisions are that, in this scenario, (1) the Contracting State *second* seized already has jurisdiction under Articles 5 to 10 of the Convention;¹³⁷ and (2) the renunciation of jurisdiction by the Contracting State first seized under Article 13(2) may result from a unilateral decision.¹³⁸ However, to ensure the protection of the child, where a Contracting State is considering declining jurisdiction under Article 13(2), it will usually be good practice for communication to take place between the two Contracting States involved (either via Central Authorities¹³⁹ or through direct judicial communications¹⁴⁰) to ensure that no gap in the protection of the

¹³³ See the Explanatory Report (*op. cit.* note 20), at para. 79.

¹³⁴ *Ibid.*

¹³⁵ Art. 13(2).

¹³⁶ *Op. cit.* (note 20), at para. 80.

¹³⁷ In contrast, where a transfer of jurisdiction takes place, the basis for jurisdiction of the transferee Contracting State resides solely in the transfer – see **Chapter 5, infra**.

¹³⁸ Compare the procedure set out in Arts 8 and 9 for a transfer of jurisdiction – see **Chapter 5, infra**.

¹³⁹ See **Chapter 11, infra**.

¹⁴⁰ Work is ongoing in relation to the Draft General Principles for Judicial Communications, which are being developed to provide guidance and safeguards for engaging in direct cross-border judicial communications. See further, Prel. Docs Nos 3A and 3B of March and April 2011 for the attention of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, “Emerging rules regarding the development of the International Hague Network of Judges and Draft General Principles for Judicial Communications, including commonly accepted safeguards for direct judicial

child results (e.g., from the Contracting State *second* seized refusing to exercise jurisdiction on the basis of Art. 13(1) at the same time as the Contracting State *first* seized declines jurisdiction under Art. 13(2)).

4.34 As is apparent from the text of Article 13(1) itself,¹⁴¹ it does not apply to measures taken under Article 11 (cases of urgency) or Article 12 (provisional measures).¹⁴²

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

Example 4 (f)

Two children are habitually resident in Contracting State A with their mother. Divorce and custody proceedings are underway in Contracting State B. The father is habitually resident in Contracting State B and the mother has accepted the jurisdiction of the authorities of that Contracting State regarding these matters and those authorities consider that it is in the best interests of the children for them to hear the case.¹⁴³ The proceedings in Contracting State B appear to be going unfavourably for the mother. The mother therefore commences proceedings in Contracting State A seeking an order granting her custody of the children.

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

However, if the authorities in Contracting State B had declined jurisdiction, for example because they believed that it was not in the best interests of the children for them to hear the case, then the authorities of Contracting State A could exercise jurisdiction in the matter. In such circumstances, and as a matter of good practice, the authorities of Contracting State B may communicate their decision to decline jurisdiction to the competent authorities of Contracting State A.¹⁴⁴

Example 4 (g)

The children are habitually resident in Contracting State A. They are the subject of an application for measures of protection in Contracting State B where the requirements of Article 10 of the Convention have been fulfilled. While these proceedings are ongoing, an application is made in Contracting State A¹⁴⁵ concerning the administration of property the children have inherited from their grandparents. The authorities in Contracting State A have jurisdiction to decide on this issue once they determine that no similar request is being made to the authorities of Contracting State B.

communications in specific cases, within the context of the International Hague Network of Judges”, drawn up by the Permanent Bureau, and “Report on Judicial Communications in relation to International Child Protection”, by Philippe Lortie, First Secretary.

¹⁴¹ Art. 13(1): “The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State *having jurisdiction under Articles 5 to 10* at the time of the request and are still under consideration.” (Emphasis added.)

¹⁴² Discussed more fully, *infra*, **Chapters 6** and **7**.

¹⁴³ Giving the authorities of Contracting State B jurisdiction (in accordance with Art. 10 of the 1996 Convention – see, *supra*, paras **4.26-4.28**) to take measures directed to the protection of the children, such as making a decision on custody and contact.

¹⁴⁴ See para. **4.33**.

¹⁴⁵ On the basis of Art. 5 of the Convention.

5. Transfer of jurisdiction

Articles 8 and 9

5.1 By way of exception to the general rules of jurisdiction,¹⁴⁶ Articles 8 and 9 provide mechanisms by which jurisdiction to take measures directed to the protection of the person and property of the child can be transferred from authorities of Contracting States which have general jurisdiction under the Convention,¹⁴⁷ to authorities of Contracting States which do not. Jurisdiction will only be transferred where certain conditions are satisfied¹⁴⁸ and only to authorities in another Contracting State with which the child has a particular connection.¹⁴⁹

5.2 It should be noted that under the Convention jurisdiction can only be transferred between authorities of *Contracting* States and cannot be transferred to the authorities of *non-Contracting* States.

5.3 A request to transfer jurisdiction can arise in two ways:

- Article 8: an authority having general jurisdiction¹⁵⁰ under the Convention, if it considers that another authority without jurisdiction would be better placed in the particular case to assess the best interests of the child, can request to transfer jurisdiction to that authority.
- Article 9: an authority which does not have jurisdiction but believes that it is better placed in the particular case to assess the child's best interests can request that it be allowed to exercise jurisdiction.

5.4 These articles permit a transfer of jurisdiction when the authority that has jurisdiction is not the best placed to assess the best interests of the child. The best interests of the child should be assessed "in the particular case", *i.e.*, at the moment when the need for protection is being felt and for the purpose of responding to that need.¹⁵¹

5.5 The transfer can be for an entire case or for a specific part of a case. Although the Convention does not expressly state that a specific part of a case can be transferred, Articles 8 and 9 do state that a Contracting State receiving a case can be requested (Art. 8) or can request (Art. 9) to take the measures of protection it considers "necessary": presumably this may, or may not, involve a transfer of the entire case. This interpretation of the Convention would bring the Convention into line with other international instruments such as the 2000 Hague Protection of Adults Convention or

¹⁴⁶ See, *supra*, **Chapter 4**.

¹⁴⁷ It should be noted that whilst Art. 8 refers explicitly to a Contracting State which has jurisdiction under Arts 5 *or* 6 of the Convention being able to make a request to another Contracting State to transfer a case, Art. 9 suggests that another Contracting State may only request a transfer of jurisdiction from the Contracting State of the child's habitual residence (*i.e.*, only from the Contracting State having jurisdiction under Art. 5 and not from a Contracting State with jurisdiction under Art. 6). The Explanatory Report (*op. cit.* note 20), at para. 58, states that it considers this to be an "oversight" and that Art. 9 should be aligned with Art. 8. The Explanatory Report states: "If the authorities of the State of the child's nationality are entitled to ask those of the State of the habitual residence to authorise them to exercise protective jurisdiction, for even stronger reasons they ought to be able to ask the same of the authorities of the State to which, due to disturbances occurring in the country of the child's habitual residence, the child has been provisionally removed." However, at the current time the language of the Convention is clear and it seems that a request under Art. 9 may only be made to the Contracting State of the child's habitual residence.

¹⁴⁸ See, *infra*, para. **5.8**.

¹⁴⁹ Art. 8(2).

¹⁵⁰ *I.e.*, under Art. 5 or Art. 6 of the Convention.

¹⁵¹ See the Explanatory Report (*op. cit.* note 20), at para. 56.

Article 15 of the Brussels II a Regulation, both of which explicitly provide for the possibility of transferring a specific part of a case.

5.6 Once the transfer has been agreed to by both authorities, the authorities from which jurisdiction was transferred cannot exercise jurisdiction in the particular matter which was the subject of the transfer. They must wait until the decision by the other authorities becomes final and enforceable.

5.7 The transfer does not, however, institute a permanent transfer of jurisdiction. Nothing allows it to be decided in advance that under future circumstances the authority which has jurisdiction under Articles 5 or 6¹⁵² might not be better placed to decide in the best interests of the child.¹⁵³

5.8 Once it has been decided that a request can and should be made, there are two options provided for in the Convention for the making of the request.

- The request is made by the authorities themselves to the competent authorities of the other Contracting State. This can be done directly or with the assistance of the Central Authorities.¹⁵⁴
- OR**
- The parties to the proceedings can be invited to make the request before the competent authorities of the other Contracting State.¹⁵⁵

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

a. What conditions must be fulfilled before a transfer of jurisdiction can take place?

5.9 Under both Articles 8 and 9 jurisdiction may only be transferred when certain conditions are fulfilled.

1. Connection between the child and the Contracting State to whose authorities it is permissible to transfer jurisdiction

The Contracting States whose authorities may have jurisdiction transferred to them, or who can request that jurisdiction be transferred to them, must have a connection with the child. The Contracting State must be one of the following:¹⁵⁶

- a. A State of which the child is a national;
- b. A State in which property of the child is located;
- c. A State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for an annulment of their marriage;
- d. A State with which the child has a substantial connection.

¹⁵² In relation to Art. 9, see note 147, *supra*.

¹⁵³ See the Explanatory Report (*op. cit.* note 20), at para. 56.

¹⁵⁴ Art. 8(1), first indent, and Art. 9(1), first indent.

¹⁵⁵ Art. 8(1), second indent, and Art. 9(1), second indent.

¹⁵⁶ Art. 8(2) and Art. 9(1).

2. The best interests of the child

The authority making the request that jurisdiction be transferred must consider that this will allow for a better assessment of the child's best interests.¹⁵⁷ The authority asked to assume or cede jurisdiction can only do so if it believes this is in the child's best interests.¹⁵⁸

3. Agreement of the authorities of both Contracting States

Both authorities must agree to the transfer.

- a. In the case where the decision to undertake a transfer comes from the authorities of the Contracting State which has jurisdiction, the agreement of the other authorities can be indicated through assuming jurisdiction.¹⁵⁹
- b. However, when the authorities of the Contracting State that does not have jurisdiction initiate the transfer by making a request, or inviting the parties to make a request, the agreement of the authorities of the Contracting State which has jurisdiction must be expressly received. Silence cannot be taken as an acceptance of the transfer.¹⁶⁰

Example 5 (a)

A child is habitually resident in Contracting State A. Both his parents die when he is 10 years old and proceedings are ongoing in Contracting State A concerning his care and the administration of the property he has been left by his parents. This property includes property located in Contracting State B. An issue arises regarding the disposal of this property and the authorities in Contracting State B make a request to the authorities of Contracting State A that they be authorised to assume jurisdiction in this specific matter.¹⁶¹ The authorities in Contracting State A may accept the request for a partial transfer of jurisdiction relating only to the protection of the property of the child located in Contracting State B.¹⁶² If a partial transfer of jurisdiction is agreed between the Contracting States,¹⁶³ the authorities in Contracting State A may continue to take measures regarding the care of the child and regarding the property of the child, excluding the property in Contracting State B. The authorities of Contracting State B may take measures regarding the property of the child that is located in Contracting State B.

¹⁵⁷ Art. 8(1) and Art. 9(1).

¹⁵⁸ This is stated explicitly in relation to the assumption of jurisdiction – see Art. 8(4). It is not stated explicitly in relation to ceding jurisdiction (see Art. 9(3), which refers only to the acceptance of the request). However, it is hard to imagine that a Contracting State would accept a request to transfer jurisdiction to another Contracting State where it did not consider it in the best interests of the child to do so.

¹⁵⁹ Art. 8(4).

¹⁶⁰ Art. 9(3).

¹⁶¹ Art. 9(1), as the State in which property of the child is located (Art. 8(2) b)). Depending on the circumstances of the case, additionally or alternatively, it may be appropriate for the authorities in Contracting State B to take provisional measures regarding the property on the basis of Art. 12, or, if the case is one of urgency, necessary measures of protection in relation to the property on the basis of Art. 11. Such measures would, however, lapse as soon as the authorities in Contracting State A had taken the measures required by the situation (see **Chapters 6 and 7, *infra***). Where Contracting State B wishes to take general jurisdiction in relation to the property, a transfer of jurisdiction may therefore be more appropriate (and benefits from the explicit co-operative support provided for in Art. 31 a), see **Chapter 10, *infra***).

¹⁶² See, *supra*, para. **5.4** regarding the possibility for a partial transfer of a case.

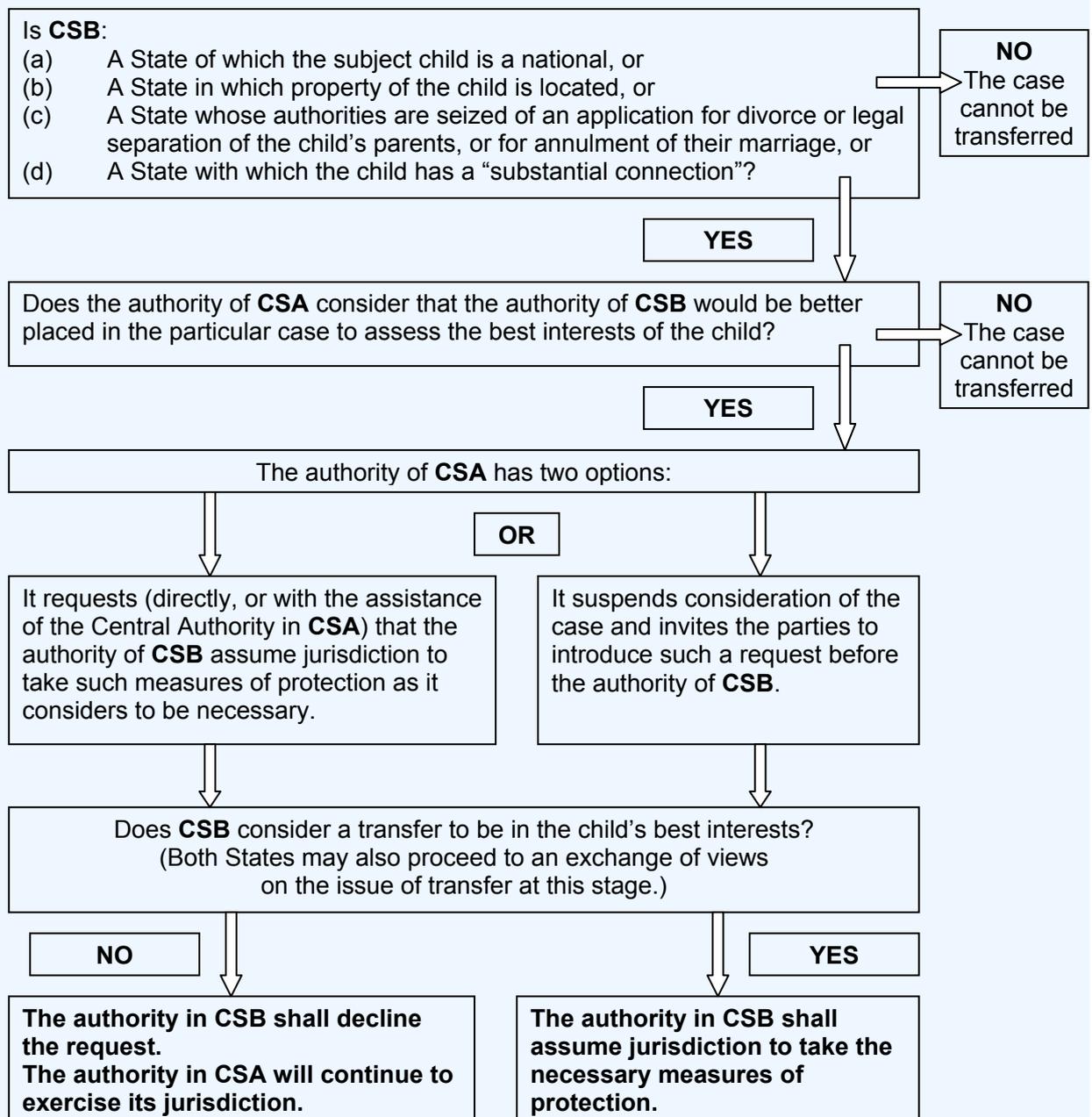
¹⁶³ See, *infra*, paras **5.15-5.18** regarding the explicit communication which should take place between the authorities on this issue.

b. The procedure for transfer

How can jurisdiction be transferred from Contracting State A ("CSA") to Contracting State B ("CSB")?

5.10 There are two options regarding the transfer of jurisdiction. Where an authority in Contracting State A is considering the question of a transfer to Contracting State B, the following analysis should be undertaken:

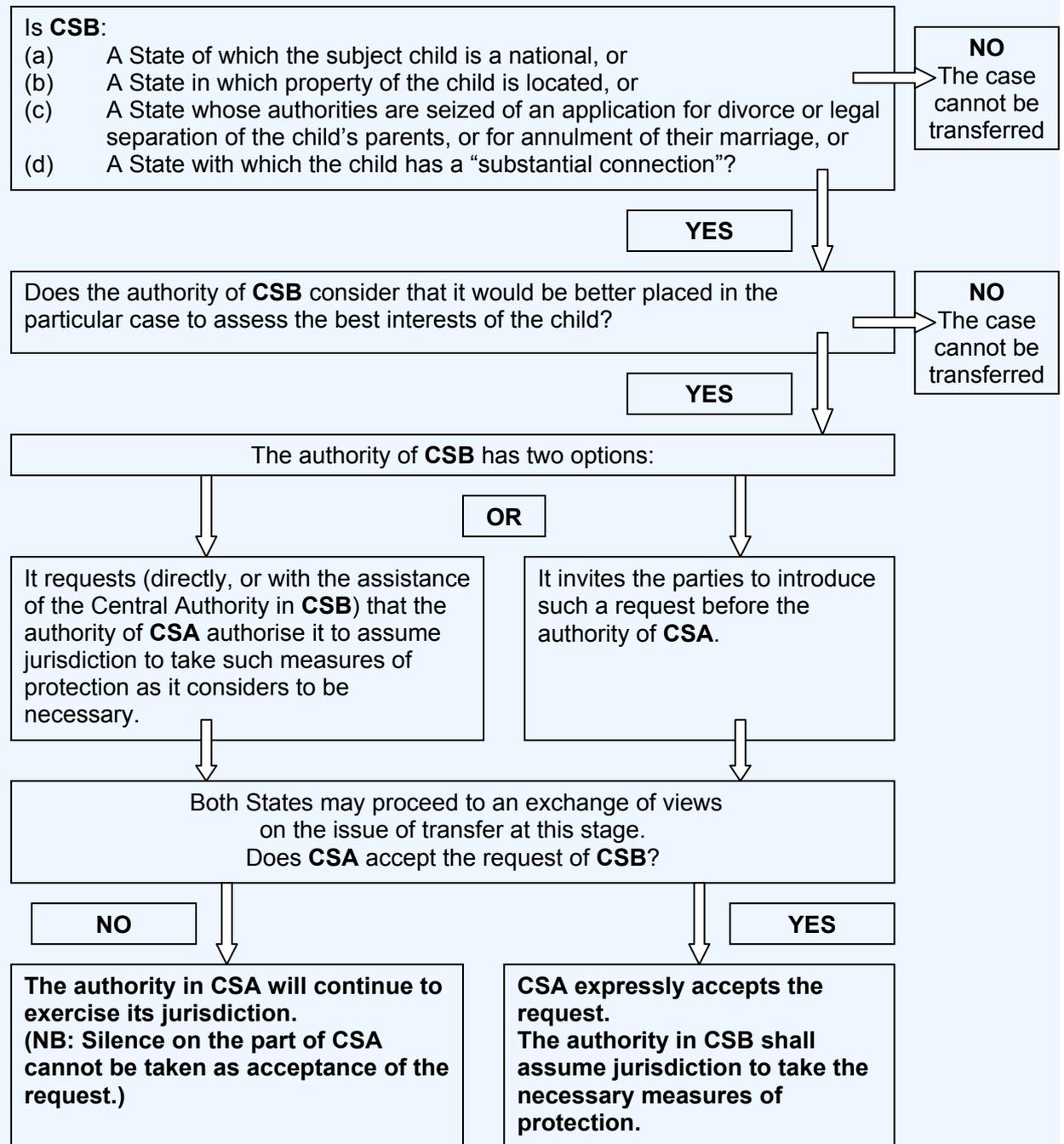
Option 1 - Request from, or initiated by, the authority of Contracting State A, which has jurisdiction under Articles 5 or 6 of the Convention, to the authority of Contracting State B (Art. 8)



OR

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

Option 2 - Request from, or initiated by, the authority of Contracting State B to the authority of Contracting State A, which is the Contracting State of the habitual residence of the child (Art. 9)



c. Certain practical aspects of a transfer

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

5.11 An important practical question facing authorities wishing to use these transfer provisions is how to locate the competent authority in the other Contracting State. This is an especially difficult question if no application has been made by the individual parties to any authorities in the other Contracting State.

5.12 Contracting States may decide to make a specific designation of the authorities to which requests under Articles 8 and 9 are to be addressed.¹⁶⁴ If the State concerned has made such a designation then all requests concerning the transfer of jurisdiction should be sent to the designated authorities. These designations must be communicated to the Permanent Bureau of the Hague Conference on Private International Law.¹⁶⁵ They will be placed on the Hague Conference website (< www.hcch.net >, under "Convention 34" then "Authorities").

5.13 However, if no such designation has been made, there are two other routes through which the authorities may be able to obtain assistance. The first is the Central Authority of the other Contracting State, which the authorities can contact directly or through their own Central Authority. The possible role of Central Authorities in this regard is specifically mentioned in Articles 8 and 9 of the Convention and Article 31 a) of the Convention.¹⁶⁶ The second is the International Hague Network of Judges, if members have been appointed from both States. Members of this Network are contact points within their jurisdiction and can provide information on various aspects of the law and procedure in their jurisdiction, including assisting with locating the competent authority.¹⁶⁷ A list of the members of the International Hague Network of Judges is available on the Hague Conference website (< www.hcch.net >, under "Child Abduction Section" then "Direct Judicial Communications").

5.14 Central Authorities can also be useful in helping to transmit documents between authorities, and some Central Authorities may assist with the interpretation or translation of documents or with locating such services in their State. The members of the International Hague Network of Judges may also provide a useful means to obtain information on the best way to proceed, for example regarding the information or documentation that the competent authority might require before considering the transfer.

How should the authorities communicate?

5.15 Both Articles 8 and 9 also provide that the authorities may proceed to an exchange of views on the issue of transfer. This exchange of views will often be necessary so that the requested authority can assess whether the request should be accepted. Once again, both the Central Authorities and the International Hague Network of Judges could provide assistance in this regard.¹⁶⁸

¹⁶⁴ Art. 44.

¹⁶⁵ Art. 45.

¹⁶⁶ See para. **11.10**, *infra*.

¹⁶⁷ See *supra*, note 140.

¹⁶⁸ Art. 31 a) requires the Central Authority of a Contracting State to take all appropriate steps, either directly or through public authorities or other bodies, to facilitate the communications and offer the assistance provided for in Arts 8 and 9. See further, *infra*, **Chapter 11**.

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

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

5.17 Due to the fact that a transfer of jurisdiction does not institute a permanent transfer of jurisdiction (see para. 5.7, *supra*) and that a transfer may be in relation to a specific part of a case only (see para. 5.5, *supra*), it will be important for both competent authorities involved to be as explicit as possible in their communications regarding the envisaged scope of any transfer of jurisdiction.

5.18 This means that any *requesting* competent authority (whether requesting to assume or transfer jurisdiction) should ensure that its request is explicit as to:

- a. The scope of the transfer envisaged (*i.e.*, in respect of which matters it is envisaged that jurisdiction will be transferred and in what circumstances it is envisaged that the competent authority assuming jurisdiction will continue to exercise jurisdiction in relation to such matters in future); and
- b. Why it is considered in the child's best interests for this transfer of jurisdiction to take place.

5.19 It may be useful in some cases for views to be exchanged on the envisaged scope of the transfer. If it is possible, and following the submissions of the parties where necessary, attempts should be made to conclude these matters between competent authorities and each competent authority should record this conclusion in a manner appropriate to its jurisdiction.

5.20 An explicit conclusion and / or record in the above terms may avoid confusion at a future date as to which authority has jurisdiction and in relation to which matters.

Example 5 (b)

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

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

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

interests for the issue of contact to be dealt with in Contracting State A.¹⁶⁹ Both authorities in Contracting States A and B record that the transfer of jurisdiction is limited to the issue of the children's contact with their father and paternal grandparents and that they consider it to be in the best interests of the children for the authorities in Contracting State A to determine this issue because:

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

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

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

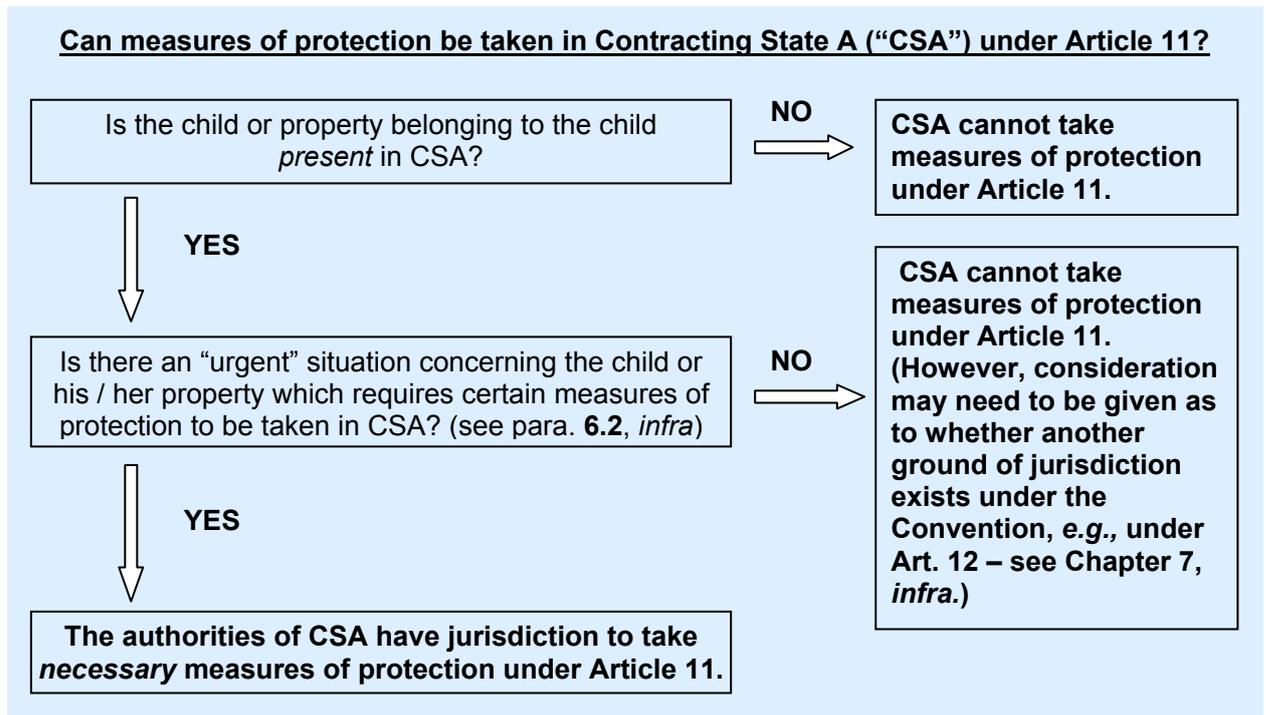
¹⁶⁹ Note that another approach would be for the authorities in Contracting State B to retain jurisdiction and instead invite the father to request that the authorities in Contracting State A, in accordance with Art. 35(2) of the Convention, provide a report on his circumstances (and possibly also the paternal grandparents' circumstances) and to make findings on his (or their) suitability to exercise access and on the conditions under which access should be exercised, for use in proceedings in Contracting State B. In accordance with Art. 35(3), Contracting State B may adjourn the proceedings pending the outcome of the father's request. For further information on Art. 35, see, *infra*, **Chapters 11** and **13**.

6. Taking necessary measures of protection in cases of urgency

Article 11

When can measures of protection be taken under Article 11?

6.1 In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is *present* have jurisdiction to take any necessary measures of protection.¹⁷⁰



When is a case “urgent”?

6.2 The Convention does not provide a definition as to what constitutes a “case of urgency”.¹⁷¹ It will therefore be a matter for the judicial / administrative authorities in the Contracting State in question to determine whether a particular situation is “urgent”. The Explanatory Report states that a situation of urgency may be said to exist where, if measures of protection were only sought through the normal channels of Articles 5 to 10 (the general bases of jurisdiction), irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised.¹⁷² A useful approach for authorities may therefore be to consider whether the child is likely to suffer irreparable harm or to have his / her protection or interests compromised if a measure is not taken to protect the him / her in the period that is likely to elapse before the authorities with general jurisdiction under Articles 5 to 10 can take the necessary measures of protection.

6.3 It should be noted that it is the situation of “urgency” which justifies the derogation from the general rules of jurisdiction under the Convention (Arts 5 to 10). In

¹⁷⁰ Art. 11 is an almost exact reproduction of Art. 9(1) of the 1961 Hague Convention on the Protection of Minors.

¹⁷¹ Nor was the concept of “urgency” defined in the 1961 Hague Convention on the Protection of Minors.

¹⁷² Explanatory Report (*op. cit.* note 20), at para. 68.

light of this, it has been stated that the concept of “urgency” ought to be interpreted strictly.¹⁷³

6.4 Examples of cases involving such a situation of “urgency” might include: (1) the child is outside the State of his / her habitual residence and medical treatment is required to save the child’s life (or to prevent irreparable harm occurring to the child or his interests being compromised) and parental consent cannot be obtained for the treatment; (2) the child is exercising contact with a non-resident parent outside his / her State of habitual residence and makes allegations of physical / sexual abuse against the parent such that contact needs to be suspended immediately and / or alternative temporary care found for the child; (3) it is necessary to make a rapid sale of perishable goods belonging to the child; or (4) there has been a wrongful removal or retention of a child¹⁷⁴ and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, interim measures need to be put in place to ensure the safe return of the child to the Contracting State of his / her habitual residence.¹⁷⁵

What are “necessary” measures of protection?

6.5 The “measures of protection” which may be taken under Article 11 of the Convention have the same material scope as the measures which may be taken under Articles 5 to 10 of the Convention, *i.e.*, they are measures directed to the protection of the person or property of the child of which a non-exhaustive list is set out in Article 3, and an exhaustive list of excluded matters is set out in Article 4.¹⁷⁶

6.6 However, the drafters of the Convention deliberately avoided setting out what particular “necessary” measures of protection might be taken on the basis of urgency under Article 11. It was decided that the urgency should dictate in each situation the “necessary” measures.¹⁷⁷ It will therefore be a matter for the judicial or administrative authorities in each Contracting State to determine, based upon the facts of each particular case, what measures (within the scope of the Convention) are “necessary” to deal with the urgent situation at hand.

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

6.7 The jurisdiction of a Contracting State based on urgency is a concurrent jurisdiction,¹⁷⁸ *i.e.*, concurrent with the State having *general* jurisdiction under Articles 5 to 10, but it is strictly subordinate to the latter jurisdiction. Article 11(2) and (3) ensures this by providing that the necessary measures of protection taken under Article 11 are temporally limited.¹⁷⁹ If the child is habitually resident in a *Contracting* State, the necessary measures taken under Article 11 will lapse once the authorities of the Contracting State which has general jurisdiction (usually the authorities of the State of the child’s habitual residence) have taken the measures required by the situation.¹⁸⁰ If the child is habitually resident in a *non-Contracting* State, the necessary measures taken under Article 11 will lapse as soon as the measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.¹⁸¹

6.8 It should be noted that if proceedings have started for measures of protection in a case of urgency in one Contracting State (under Art. 11), the competent authorities seized in another Contracting State on the basis of Articles 5 to 10 do *not* have to stay

¹⁷³ *Ibid.*

¹⁷⁴ See Art. 7(2).

¹⁷⁵ See, further, *infra*, the **Examples** at the end of this Chapter. In relation to point (4), see also paras **13.5-13.12**, *infra*.

¹⁷⁶ See **Chapter 3**, *supra*, regarding the scope of the Convention.

¹⁷⁷ *Ibid.*, at para. 70.

¹⁷⁸ Art. 13 (*lis pendens*) does not apply where necessary measures of protection are taken under Art 11 (see text of Art. 13 itself which refers to Contracting States with jurisdiction “under Articles 5 to 10”) – see para. **4.34**, *supra*. As regards the operation of Art. 13, see further, *supra*, paras **4.29-4.34**.

¹⁷⁹ For a general discussion regarding the continuation of measures, see, *infra*, **Chapter 8**.

¹⁸⁰ Art. 11(2).

¹⁸¹ Art. 11(3).

proceedings until a measure is taken.¹⁸² Further, as any measures which might be taken by the first Contracting State on the basis of Article 11 will lapse as soon as the authorities with jurisdiction under Articles 5 to 10 have taken a decision (Art. 11(2)), in this situation the Contracting States should discuss together (either via Central Authorities or through direct judicial communications) the most effective way to proceed to best protect the child.¹⁸³

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

6.9 In cases where necessary measures of protection under Article 11 have been taken in a Contracting State, it will usually be good practice for the Central Authority of this Contracting State (and / or the relevant judicial¹⁸⁴ / administrative authorities in the Contracting State) to co-operate and communicate with any other relevant Contracting State with a view to ensuring the continued protection of the child.¹⁸⁵ This may involve the Central Authority in the Contracting State where measures have been taken under Article 11 informing the Central Authority in the Contracting State of the child's habitual residence of the child's situation and the measures which have been taken.¹⁸⁶ This will enable the Contracting State of the child's habitual residence to ensure that, where necessary, the situation of the child is investigated fully and any measures of protection required are taken for the long-term protection of the child.

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

Are measures of protection taken under Article 11 entitled to recognition and enforcement under the Convention?

6.11 Yes, measures of protection taken in cases of urgency are entitled to recognition and enforcement in accordance with Chapter IV of the Convention.¹⁸⁷ It should be noted that Article 23(2) specifically limits the grounds of non-recognition in cases of urgency (see Art. 23(2) b) and c)).¹⁸⁸

Example 6 (a)

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

¹⁸² This is because the rules on *lis pendens* set out in Art. 13 of the Convention do not apply to proceedings under Art. 11. See, *supra*, note 178.

¹⁸³ See further, *infra*, **Chapter 11**.

¹⁸⁴ For judicial authorities, this may involve direct judicial communications, see *supra*, note 139.

¹⁸⁵ See further, *infra*, **Chapter 11**.

¹⁸⁶ The Explanatory Report (*op. cit.* note 20) provides, at para. 72, that the text of the Convention did not wish to impose on the authority basing its jurisdiction on urgency the obligation to inform the authorities of the State of the child's habitual residence about the measure taken, for fear of overburdening the operation of the Convention and furnishing a pretext for refusal of recognition of such a measure in the other Contracting States in the case where this was not done. However, despite the absence of an explicit obligation in the text of the Convention in this regard, it is still considered that it will usually be good practice for Contracting States to co-operate and communicate in this way to ensure the continued protection of the child where such measures have been taken.

¹⁸⁷ Arts 23 *et seq.*

¹⁸⁸ See further, *infra*, **Chapter 10**.

Example 6 (b)

Three children are habitually resident in Contracting State A where they live with their mother and have regular contact with their father. In the summer vacation the mother and children visit the maternal grandparents in Contracting State B. Whilst they are in Contracting State B, the car they are travelling in crashes and the mother is left in a coma in intensive care. The authorities in State B have jurisdiction to take an urgent measure providing that the children should be temporarily placed in the care of the maternal grandparents.¹⁸⁹ A week later the mother dies. A court in Contracting State A subsequently makes an order which provides that the children shall live with their father.¹⁹⁰ The order from Contracting State B therefore lapses (no longer has effect) since the measures required by the situation have now been taken by the authorities in Contracting State A.¹⁹¹

Example 6 (c)

Two children, habitually resident in Contracting State A, lawfully travel with their father to Contracting State B for a holiday. Whilst in Contracting State B, the father is arrested on suspicion of drug trafficking. He is subsequently charged with a criminal offence and remanded in custody pending trial. The authorities in Contracting State B have jurisdiction to take urgent measures to provide for the care of the children.¹⁹²

Example 6 (d)

A child is habitually resident in non-Contracting State A and owns a property located in Contracting State B. This property is in decline and, due to severe structural problems, will likely collapse if no action is taken to repair it. The authorities of Contracting State B take urgent measures to authorise a company to carry out the necessary repairs (estimated to take 5-6 months). A month later, the authorities of non-Contracting State A authorise the parents of the child to sell the property. The parents seek recognition in Contracting State B of non-Contracting State A's decision. The measure is recognised in Contracting State B (under its non-Convention rules¹⁹³). The urgent measure taken by Contracting State B therefore lapses and the property can be sold.¹⁹⁴

Example 6 (e)

A child is habitually resident in Contracting State A, where she lives with her parents. Her parents own a property in Contracting State B, which she is to inherit when they die. The family travel to Contracting State C on holiday. Whilst on holiday in Contracting State C, the family are involved in a serious boat accident. Both parents are killed and the child is severely injured. The child requires urgent, expensive medical treatment and the only source of funds available to finance such treatment is the property in Contracting State B. The authorities in Contracting State C contact the authorities in Contracting States A and B to inform them of the situation of the child.¹⁹⁵ The authorities in Contracting State B, considering the case one of urgency, take measures of protection under Article 11: (1) to appoint a legal representative for the child to deal with the property in Contracting

¹⁸⁹ Art. 11.

¹⁹⁰ As the Contracting State where the children are habitually resident, in accordance with Art. 5. It should be noted that a number of the co-operation provisions of the Convention may also be relevant in a case of this nature (e.g., Arts 32 and 34); see further, *infra*, **Chapter 11**.

¹⁹¹ Art. 11(2), Contracting State A being the Contracting State which has general jurisdiction over the children in accordance with Art. 5.

¹⁹² Art. 11. The co-operation provisions of the Convention should also be used in this situation to quickly alert the authorities in Contracting State A to the children's situation and to provide them with all relevant information. The authorities in Contracting State A (the Contracting State of the children's habitual residence) will then be able to take measures of protection for the children (which, if the children have a mother with custody in Contracting State A, may include their repatriation to Contracting State A into the care of their mother).

¹⁹³ Since it is the decision of a non-Contracting State.

¹⁹⁴ Art. 11(3).

¹⁹⁵ Art. 30(1). See, further, **Chapter 11**, *infra*.

State B; and (2) to enable funds to be urgently obtained from the property (by way of re-mortgage) for the specific purpose of funding the child's medical treatment. These measures are recognised by operation of law in Contracting State C.¹⁹⁶ Contracting State C, considering the case one of urgency, takes the necessary measures of protection under Article 11 to enable the child's medical treatment to proceed. Contracting States B and C communicate to inform each other, as well as Contracting State A, of the measures taken in respect of the child.

Contracting State A can act to take the long-term measures of protection required by the situation, at which point the measures taken under Article 11 in Contracting States B and C will lapse.¹⁹⁷

Example 6 (f)

A child is habitually resident in Contracting State A where he lives with his mother and father. The relationship between the parents breaks down and the mother wrongfully removes¹⁹⁸ the child from Contracting State A to Contracting State B. The father makes an immediate application for the return of the child under the 1980 Hague Child Abduction Convention (to which both States are Parties). The mother is not permitting any contact to take place between the child and the father and it appears that the return proceedings in Contracting State B will take a couple of months. The authorities in Contracting State A are not in a position to take measures regarding the father's interim contact in this timeframe. Depending upon the particular facts of the case, the judge in Contracting State B may consider that the lack of contact between the father and child will cause irreparable harm to the child or otherwise compromise the protection or interests of the child.¹⁹⁹ The judge may determine that this is a situation of urgency requiring him to take measures to ensure some form of interim contact between the father and the child pending the conclusion of the return proceedings.²⁰⁰

Example 6 (g)

Three children are habitually resident in Contracting State A where they live with their mother and father. The relationship breaks down and the mother wrongfully removes²⁰¹ the children to Contracting State B. A return application is made by the father under the 1980 Hague Child Abduction Convention (to which both States are Parties). Allegations of sexual abuse are made against the father in the return proceedings in Contracting State B and the mother relies on Article 13(1) b) of the 1980 Convention as a defence to return. The judge in Contracting State B dealing with the return application considers that, on the facts of this case, there is not a grave risk of harm to the children if returned to Contracting State A, provided that the children are not left alone in the care of the father pending an investigation of the allegations of sexual abuse in Contracting State A. The judge considers it necessary that any contact between the children and their father

¹⁹⁶ See para. 6.11, *supra*.

¹⁹⁷ However, see the Explanatory Report (*op. cit.* note 20), at para. 72, regarding the fact that any action completed in accordance with a measure of protection taken under Art. 11 will, of course, continue to have effect. As para. 72 states, "[i]t is obvious ... that one cannot go back on a surgical operation or a sale of property which has already taken place".

¹⁹⁸ In accordance with the meaning of "wrongful removal" set out in Art. 7(2) of the 1996 Convention.

¹⁹⁹ See para. 6.2, *supra*.

²⁰⁰ See also *General Principles and Guide to Good Practice – Transfrontier Contact Concerning Children* (Jordan Publishing, 2008) (hereinafter "Guide to Good Practice on Transfrontier Contact"), particularly at para. 5.1, regarding contact for a left-behind parent in the context of a wrongful removal / retention. This publication is also available on the Hague Conference website at < www.hcch.net >, under "Child Abduction Section", then "Guides to Good Practice". It should be noted that whether a lack of contact between the father and child may result in irreparable harm to the child or compromise the child's interests and whether the situation is one of urgency will be factual determinations for the judge to make based on the particular case before him / her. It should also be noted that any determination made by the judge in the Contracting State where the return proceedings are pending will be without prejudice to any decision which the Contracting State of the child's habitual residence may take, as and when it is able to. Contracting State B's decision regarding the father's contact will lapse as soon as Contracting State A takes a decision regarding the matter (Art. 11(2)).

²⁰¹ In accordance with the meaning of "wrongful removal" set out in Art. 7(2) of the 1996 Convention.

take place in a supervised environment until a decision on the merits of the custody issues, including contact, can be taken in Contracting State A.²⁰² The judge therefore orders the return of the children but also takes an urgent measure to protect the children by providing that the father's contact with the children must be supervised until a decision on the matter can be taken in Contracting State A.²⁰³ This urgent measure will be recognised by operation of law in Contracting State A and will be enforceable under Chapter IV of the Convention.²⁰⁴ It will lapse as soon as Contracting State A takes the necessary measures of protection in this regard.²⁰⁵

²⁰² Contracting State A, as the Contracting State where the children were habitually resident immediately before the wrongful removal / retention of the children, retains jurisdiction to take measures of protection in respect of the children until the conditions set out in Art. 7 are met (see, *supra*, **Chapter 4**, at paras **4.20-4.25** regarding Art. 7 of the Convention and, *infra*, **Chapter 13**, at paras **13.1-13.14** on international child abduction). This means that it is Contracting State A that will determine the merits of any custody issue for the children. In this scenario, Contracting State B would be taking an interim decision in an urgent situation until Contracting State A is able to take a decision regarding the issue.

²⁰³ The co-operation mechanisms provided for in the Convention would also be of crucial importance in a case such as this (see, *infra*, **Chapter 11**). For example, if the authorities in Contracting State A wish to take a decision regarding the father's interim contact they may, under Art. 34, request the competent authorities of Contracting State B to provide them with all information regarding the allegations of sexual abuse and any other information relevant to the issue of contact.

²⁰⁴ See, *infra*, **Chapter 10**.

²⁰⁵ Art. 11(2).

7. Provisional measures

When can provisional measures be taken?

Article 12

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

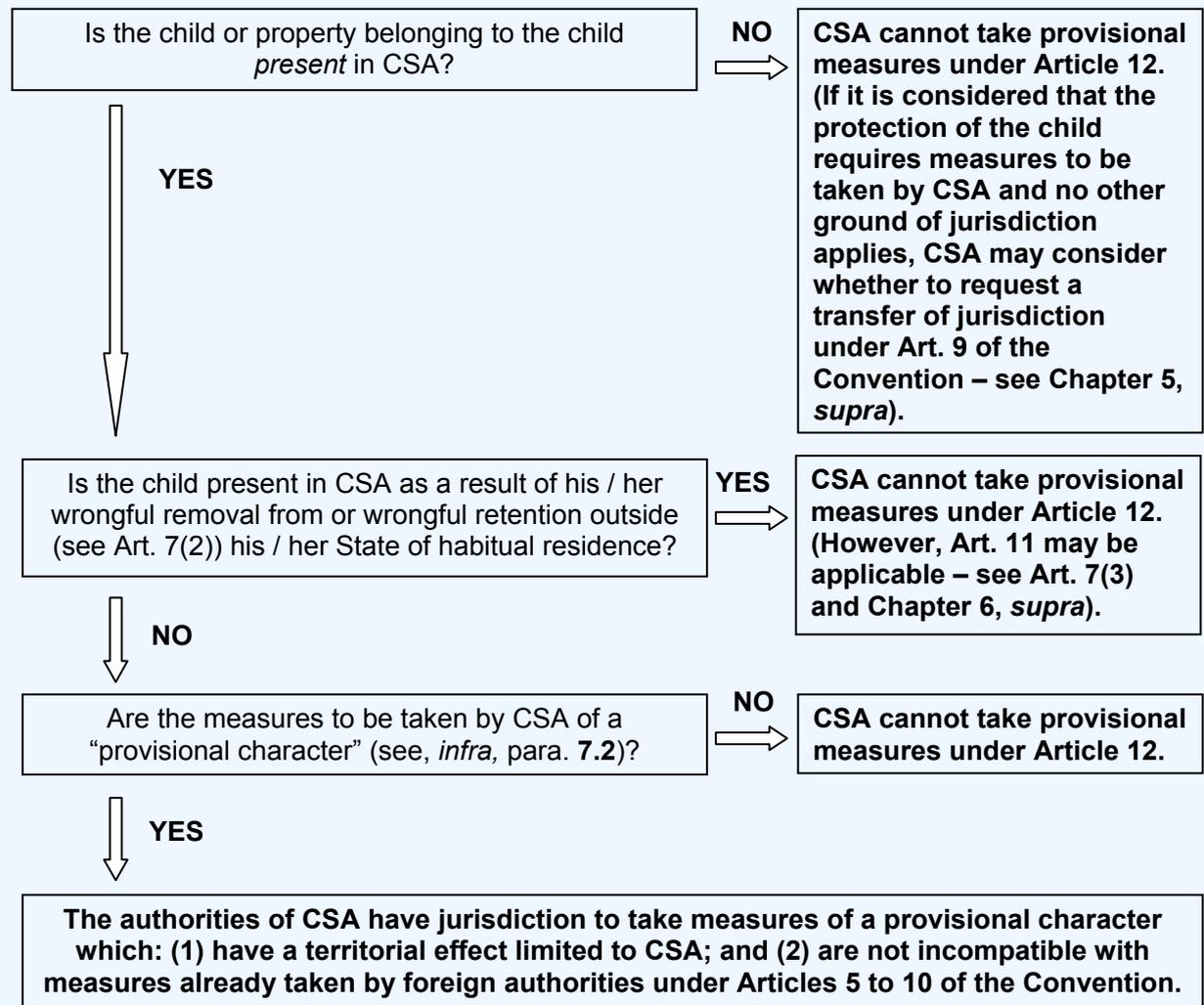
- (a) The effect of provisional measures taken under Article 12 is limited to the territory of the Contracting State whose authorities take these measures.²⁰⁶
- (b) The authorities of a Contracting State can only take measures under Article 12 that are not incompatible with measures that have already been taken by the authorities which have jurisdiction under Articles 5 to 10.²⁰⁷
- (c) In a case where there has been a wrongful removal or retention²⁰⁸ of a child, a provisional measure cannot be taken by the Contracting State to which the child has been wrongfully removed, or in which the child has been wrongfully retained, if the Contracting State from which the child was wrongfully removed or retained still has jurisdiction.²⁰⁹ This is expressly excluded under the terms of Article 7(3).

²⁰⁶ Art. 12(1).

²⁰⁷ Art. 12(1). In contrast, under Art. 11, the situation of urgency permits the Contracting State exercising jurisdiction, where necessary, to set aside the measures taken previously by the authorities which normally have jurisdiction.

²⁰⁸ In accordance with Art. 7(2) of the Convention.

²⁰⁹ As to whether the authority of the Contracting State from which the child was wrongfully removed (or outside which the child was wrongfully retained) still has jurisdiction, see Art. 7(1) and, *supra*, paras **4.20-4.25**.

Can Contracting State A (“CSA”) take provisional measures under Article 12?**What are measures of a “provisional character”?**

7.2 The Convention provides no definition as to what may constitute measures of a “provisional character”. The Explanatory Report states that Article 12 was inspired by the need to ensure the protection of children present in a foreign State as a result of a stay of limited duration (e.g., on vacation, for short periods of schooling or for harvest, etc.).²¹⁰ It states that there was concern amongst some States that in the absence, strictly speaking, of any particular urgency (such that Art. 11 was applicable), it might be desirable for the Contracting State where the child was present to be able to take measures of protection if, for example, the family with whom the child was staying became overburdened and the child needed to be placed in alternative care under the supervision of the local State authorities.

How long do provisional measures taken under Article 12 last?

7.3 In the same manner as Article 11, Article 12 is a concurrent, but subordinate ground of jurisdiction to the general grounds of jurisdiction provided for by Articles 5 to 10 of the Convention. Therefore, Article 12 has similar provisions regarding the lapsing of any provisional measures taken by a Contracting State where the State with general jurisdiction under Articles 5 to 10 acts. If the habitual residence of the child concerned is in a *Contracting State*, the provisional measures will lapse when the authorities of a Contracting State which has jurisdiction under Articles 5 to 10 take such measures as are

²¹⁰ Explanatory Report (*op. cit.* note 20), at para. 74.

required by the situation.²¹¹ If the habitual residence of the child is in a *non*-Contracting State, the provisional measures will lapse only when the measures required by the situation are taken by the authorities of the other State which has jurisdiction and these latter measures are recognised in the Contracting State where the provisional measures have been taken.²¹²

7.4 It should be noted that if proceedings have started for provisional measures in one Contracting State, the competent authorities seized in another Contracting State on the basis of Articles 5 to 10 do *not* have to stay proceedings until a provisional measure is taken.²¹³ Further, as any provisional measures which might be taken by the first Contracting State will lapse as soon as the authorities with jurisdiction under Articles 5 to 10 have taken a decision (Art. 12(2)), in this situation the Central Authorities of both Contracting States should communicate and co-operate with each other with a view to avoiding duplication and determining the best way forward to ensure the protection of the child.²¹⁴

Once a Contracting State has taken provisional measures under Article 12, what other steps should it take to ensure the continued protection of the child?

7.5 In cases where provisional measures under Article 12 have been taken in a Contracting State, it will usually be good practice for the Central Authority of this Contracting State (and / or the judicial²¹⁵ / administrative authorities in this Contracting State) to co-operate and communicate with any other relevant Central Authority (usually, the Central Authority of the Contracting State of the child's habitual residence) regarding the situation of the child and / or the property belonging to the child and the measures which have been taken in this respect.²¹⁶ This will enable the Contracting State of the child's habitual residence to ensure that, where necessary, the situation of the child is investigated fully and any necessary measures of protection are taken for the long-term protection of the child.

7.6 Specific co-operation provisions of the Convention may also be relevant in these cases and should always be carefully considered.²¹⁷

Are provisional measures taken under Article 12 entitled to recognition and enforcement under the Convention?

7.7 Yes, provisional measures of protection are entitled to recognition and enforcement in accordance with Chapter IV of the Convention.²¹⁸

Example 7 (a)

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

²¹¹ Art. 12(2).

²¹² Art. 12(3).

²¹³ This is because the rules on *lis pendens* set out in Art. 13 of the Convention do not apply to provisional measures. See, further, *supra*, **Chapter 4**, at paras **4.29-4.35**.

²¹⁴ See further, *infra*, **Chapter 11**.

²¹⁵ For judicial authorities, this may involve direct judicial communications, see *supra*, note 143.

²¹⁶ See further, *infra*, **Chapter 11**.

²¹⁷ *Id.*

²¹⁸ Arts 23 *et seq.* See, *infra*, **Chapter 10**.

Example 7 (b)

A child living in Contracting State A owns a property located in Contracting State B. A guardian is appointed to deal with the property for the child and to ensure that the property is profitable. However, the child's uncle lives in Contracting State B and has recently seen that the property has fallen into some disrepair and is not currently let to tenants. In particular, a tree on the property is encroaching onto the neighbour's land and the neighbours have started to complain to the uncle about this situation. The uncle is aware that under the law of Contracting State B this could lead to legal proceedings being commenced against the child for trespass on the neighbour's property. The uncle contacts the authorities in both Contracting States A and B regarding the situation. The authorities of Contracting State B may decide to take provisional measures concerning the property located in their jurisdiction, in particular regarding the tree, until a longer-term decision is taken in Contracting State A concerning the guardian.

8. Continuation of measures taken

Article 14

8.1 Article 14 of the Convention ensures the continuation in force of measures taken by an authority having jurisdiction on the basis of Articles 5 to 10 of the Convention, even when the ground of jurisdiction upon which the measures were taken has subsequently disappeared as a result of a change of circumstances. The measures taken by the authority on the basis of Articles 5 to 10 will remain in force for so long as they have not been modified, replaced or terminated by measures taken by any authorities that have jurisdiction under the Convention as a result of the new circumstances.

8.2 Article 14 is aimed at providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made concerning the care of the child.²¹⁹ Article 14 also guards against 'gaps' in the protection of children resulting from factual changes in their circumstances.

8.3 The exact "change of circumstances" referred to in Article 14 will depend upon the Article of the Convention on which jurisdiction was based when measures of protection were taken. Thus:

- If jurisdiction to take a particular measure was based on Article 5, a "change of circumstances" will be a change in the child's habitual residence;
- If jurisdiction to take a particular measure was based on Article 6, it will be a change in the child's presence;
- Under Article 10, the change will be the conclusion of the divorce proceedings;
- Under Articles 8 and 9, the change will be whatever connection with the child the Contracting State to which jurisdiction was transferred relied upon for that transfer, or the conclusion of the proceedings which were transferred;²²⁰
- Lastly, the terms of Article 7 itself set out what changes must occur before jurisdiction can move from the authorities of the Contracting State from which a child has been wrongfully removed or outside of which a child has been wrongfully retained.

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

8.4 The maintenance in force of the previous measures of protection taken is ensured only "according to their terms" (Art. 14). This takes into account the fact that, in some cases, the duration of the measures of protection may be limited by the terms of the measures themselves. For example, a preventive measure designed to ensure that a child will be returned after a particular trip abroad with one parent may specify that the measure will cease to have effect once the child has been returned; similarly, measures designed to provide for the care of a child when a parent is ill or hospitalised may state that they will cease to have effect when the parent has regained his or her health. These measures will therefore lapse according to their own terms.²²¹

8.5 In relation to Articles 11 and 12 dealing with cases of urgency and provisional measures, as has been discussed in **Chapters 6** and **7** above, the terms of those Articles

²¹⁹ In cases of international relocation, a Contracting State to which the relocation has occurred should not allow review or variation of the contact order unless, in the circumstances, it would permit review or variation of a domestic contact order. For a further discussion of international relocation and contact under the Convention, see, *infra*, paras **13.22-13.26**. In addition, see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 200), particularly Chapter 8.

²²⁰ Depending upon the terms of the transfer – see, *supra*, **Chapter 5** regarding the need for close co-operation and clear communication between Contracting States on this issue.

²²¹ See also the Explanatory Report (*op. cit.* note 20), at para. 83.

themselves indicate the temporal scope of the measures²²² and Article 14 therefore does not apply to measures taken under these bases of jurisdiction.²²³

Example 8 (a)

A child is habitually resident in Contracting State A. The authorities in Contracting State A order that the child should have regular contact with his maternal grandparents, who also reside there.²²⁴ The child and parents move to Contracting State B and the child becomes habitually resident there. Despite the fact that the child is no longer habitually resident in Contracting State A and that there are no other grounds upon which the authorities of Contracting State A could have based jurisdiction, the measures taken by the authorities of Contracting State A will remain in force until such time as the authorities with jurisdiction under the Convention (e.g., the authorities of Contracting State B) modify, replace or terminate those orders.²²⁵ Therefore, in this case, after the move of the child to Contracting State B, the maternal grandparents can seek to have the contact order enforced in Contracting State B.²²⁶

Example 8 (b)

A child is habitually resident in Contracting State A but her parent's divorce proceedings are taking place before the authorities of Contracting State B. The requirements of Article 10 are fulfilled²²⁷ and the authorities of Contracting State B make a custody order. After the divorce proceedings are concluded, the authorities of Contracting State B will no longer have jurisdiction to take any measures of protection in respect of the child. However, the custody order that they have already made will remain in force, and will be recognised by operation of law and enforced in other Contracting States in accordance with Chapter IV of the Convention.²²⁸ The order will remain in force until such time as the authorities with jurisdiction under the Convention (e.g., the authorities of Contracting State A as the Contracting State of the child's habitual residence) modify, replace or terminate the order.

Example 8 (c)

The mother wishes to relocate from Contracting State A to Contracting State B with the children. The father objects, but the mother receives permission to relocate from the competent authority in Contracting State A.²²⁹ As a condition of the relocation, the competent authority makes an order setting out contact arrangements between the father and the children. This order is recognised by operation of law in Contracting State B²³⁰ and these contact arrangements remain in force after the move to Contracting State B and after the children become habitually resident there, until such time as the competent authority in Contracting State B modifies the arrangement.²³¹

²²² Art. 11(2) and (3) and Art. 12(2) and (3). See, *supra*, **Chapter 6** regarding taking necessary measures in cases of urgency and **Chapter 7** regarding provisional measures.

²²³ As is clear from the wording of Art. 14 itself which refers to measures taken "in application of Articles 5 to 10" (emphasis added) of the Convention.

²²⁴ As the child is habitually resident in Contracting State A, jurisdiction to take measures of protection will be based upon Art. 5 of the Convention.

²²⁵ Art. 14.

²²⁶ The order will be recognised by operation of law in Contracting State B (Art. 23, provided that no grounds for non-recognition are established). If the order is not complied with, the maternal grandparents can seek enforcement of the order in accordance with Arts 26 *et seq.* See further, *infra*, **Chapter 10**.

²²⁷ For these requirements, see, *supra*, paras **4.26-4.28**.

²²⁸ Art. 14 and Chapter IV of the Convention (discussed at **Chapter 10**, *infra*).

²²⁹ Jurisdiction based upon Art. 5.

²³⁰ Art. 23.

²³¹ See *supra*, note 219, regarding international relocation.

9. What law will be applied?

a. Law applicable to measures of protection taken by a judicial or administrative authority

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

Article 15(1), 15(2)

9.1 When exercising their jurisdiction²³² to take measures directed to the protection of the person or property of the child, the authorities of Contracting States will apply their “own law” (Art. 15(1)), that is, their domestic, internal, law.²³³ This rule applies irrespective of the ground in the Convention upon which jurisdiction is based. The rule has the advantage that the authorities of Contracting States are applying the law that they know best.²³⁴

9.2 However, Article 15(2) provides an exception to this general rule. Article 15(2) states that, in so far as the protection of the person or the property of the child requires, the authorities may, exceptionally, (1) apply, or (2) take into consideration, the law of another State with which the situation has a substantial connection. As an exception to the general rule, this provision should not be utilised too easily.²³⁵ The authorities should be sure that it is in the child’s best interests to apply or take into consideration foreign law.²³⁶

Example 9 (a)

The child lives with her mother in Contracting State A and has regular contact with her father. The mother wishes to relocate with the child to Contracting State B and the father objects. The mother seeks permission to relocate. The authority deciding on this issue grants permission to relocate and wishes to make an order regulating custody and contact following the relocation. Although the applicable law in this case will be the law of Contracting State A,²³⁷ the authority notes that the terminology used for custody and contact in Contracting State B differs from that in Contracting State A. Under Article 15(2), the authority in Contracting State A is entitled to take into consideration the law of Contracting State B and may consider framing the order in the terminology of Contracting State B.²³⁸

Example 9 (b)

A child is habitually resident in Contracting State A but owns property located in Contracting State B. The guardian of the child wishes to sell the property. Whilst no authorisation to sell the property is required by the law of Contracting State A, the

²³² It should be noted that Art. 15(1) refers to authorities exercising their jurisdiction “under the provisions of Chapter II” of the Convention. However, Art. 15 should not be interpreted restrictively. Where, for example, Art. 52(2) applies and Contracting States have entered into an agreement containing rules regarding jurisdiction in respect of children habitually resident in their Contracting States (e.g., for Member States of the EU, excluding Denmark, the Brussels II a Regulation), if jurisdiction is exercised on the basis of the agreement but the ground of jurisdiction relied upon exists in Chapter II of the Convention, Art. 15 of the Convention should be taken to apply. Avoiding a literal and overly narrow interpretation of the Convention in this regard will promote one of the overriding purposes of the Convention, as reflected in the third paragraph of the Preamble, that is: “to avoid conflicts between [...] legal systems in respect of [...] applicable law”.

²³³ Art. 21 makes it clear that this internal law is the law in force in a State other than its private international law rules (i.e., *renvoi* is not applicable). See, further, paras **8.23-8.24**, *supra*.

²³⁴ See the Explanatory Report (*op. cit.* note 20), at para. 86.

²³⁵ *Ibid.*, at para. 89.

²³⁶ *Ibid.*: “this paragraph constitutes a clause making an exception based not on the principle of proximity (the closest connection), but on the best interests of the child”.

²³⁷ Art. 15(1).

²³⁸ For a further discussion of international relocation, see, *infra*, paras **13.22-13.26**.

guardian knows that the law of Contracting State B does require such an authorisation. The guardian requests the court in Contracting State A (as the Contracting State with jurisdiction under Art. 5 of the Convention) to grant such an authorisation. If Contracting State A were to simply apply its own law,²³⁹ it would dismiss the request (stating that no such authorisation is required). However, an application of Article 15(2) in these circumstances would allow Contracting State A to apply the law of the situs of the property, Contracting State B, and grant the authorisation required (and provided for) under this law.²⁴⁰

Where a child's habitual residence changes from one Contracting State to another, what law governs the "conditions of application" of a measure of protection in the child's new habitual residence, where the measure was taken in the child's former habitual residence?²⁴¹

Article 15(3)

9.3 We have already seen earlier in this Handbook that a change in a child's habitual residence will result in a change of the authorities having jurisdiction to take measures of protection in respect of the child,²⁴² but that the change of habitual residence will leave subsisting the measures of protection already taken in respect of the child.²⁴³ However, a question left unanswered by the previous provisions is what law will govern the "conditions of application" of the subsisting measure of protection in the Contracting State of the child's new habitual residence.

9.4 Article 15(3) answers this question by providing that, in these circumstances, the "conditions of application" of the measure of protection will be determined by the law of the Contracting State of the child's new habitual residence.

9.5 The Convention does not define the "conditions of application" of measures of protection. However, the Explanatory Report makes clear²⁴⁴ that the "conditions of application" refer to the way the measure of protection is to be exercised in the Contracting State to which the child has moved.

9.6 The Explanatory Report refers to the difficulty in drawing a line between the existence of the measure of protection (which will subsist: Art. 14) and the "conditions of application" of the measure (which will be governed by the Contracting State of the new habitual residence and may, therefore, change: Art. 15(3)). For example, if the measure of protection is the designation of a guardian for a child but the guardian has an obligation to ask for court authorisation regarding certain acts under the original measure of protection, is the requirement for an authorisation to act part of the measure itself or a "condition of application" of the measure such that this may change when the child moves? Further, if a measure of protection is stated to exist until the child reaches 18 years but, in the new habitual residence the measure would cease at 16 years, is the duration of the measure part of the existence of the measure or a "condition of application" of the measure?

²³⁹ In accordance with Art. 15(1).

²⁴⁰ The only other way for the guardian to obtain the authorisation to sell the property (since Contracting State B on these facts does not have jurisdiction under Chapter II of the Convention) would be for Contracting State A to request a transfer of the case to Contracting State B, as a Contracting State in which property of the child is located (Art. 8(2) b)) - see, further, **Chapter 5, supra**. The application of Art. 15(2) avoids this rather more cumbersome process.

²⁴¹ Since the measure of protection will remain in force (in accordance with Art. 14) in the Contracting State of the child's new habitual residence - see **Chapter 8, supra**.

²⁴² Art. 5(2) - see **Chapter 4, supra**, at paras **4.8-4.11**.

²⁴³ Art. 14 - see **Chapter 8, supra**, at paras **8.1-8.5**.

²⁴⁴ *Op. cit.* note 20, at para. 90, by likening Art. 15(3) to Art. 17 as regards parental responsibility (see para. **8.16, supra**) and by stating "the measure taken before the change subsists after the change but the way it is 'exercised' is governed from the time when the change occurs by the law of the State of the new habitual residence".

9.7 The Explanatory Report states that such questions can only be answered on a case-by-case basis. Ultimately, if the measure appears to be impracticable to exercise in the Contracting State of the child's *new* habitual residence, or undermined by the "conditions of application" there, the authorities of this Contracting State may consider that the measure needs to be adapted or that a new measure needs to be taken (and will have jurisdiction to do so as the Contracting State of the child's habitual residence – Art. 5). In such circumstances, the co-operation provisions of the Convention may prove essential to ensure that the substance of the protection for the child which was sought by the original measure of protection is not lost.²⁴⁵

9.8 It should be noted that Article 15(3) does not apply if the child acquires a new habitual residence in a *non*-Contracting State. In this situation the internal private international law rules of the non-Contracting State would apply to determine if the measure of protection could be recognised in that State and the conditions under which it could be applied.

Example 9 (c)

Two children are taken into public authority care in Contracting State A due to the imprisonment of their father and drug abuse by their mother. Both parents maintain strong contact with the children and the mother successfully attends a drug addiction treatment programme. The public authority works with the mother to return the children to her care. Following the release of the father, the family wishes to move to Contracting State B to start a new life. The authorities of Contracting State A are willing to allow the relocation but only if the children remain under public authority supervision after the move abroad. The competent authorities in Contracting State A therefore, via the Central Authority in Contracting State A, communicate with the competent authorities in Contracting State B (Art. 30). They ascertain that supervision of the children by the public authorities in Contracting State B is available. The order for supervision, made under the law of Contracting State A, remains in force after the relocation.²⁴⁶ However, the conditions of application of the measure will be governed by the domestic law of Contracting State B.²⁴⁷

An example of possible differences in the conditions of application between the two States could be that the public authority in Contracting State A has the power to enter the family home unannounced at all times, while the public authority in Contracting State B can only require that the parents agree to meet with its officials on a regular basis.²⁴⁸ If the measure taken by the authorities of Contracting State A appears to be impracticable or undermined in its application in Contracting State B, the authorities of Contracting State B may take a new measure.²⁴⁹

²⁴⁵ For example, if the Contracting State of the child's new habitual residence is seized of an application for the adaptation of a measure of protection previously taken, it may request information from the Contracting State of the child's former habitual residence regarding the situation of the child which led to the taking of the measure and the specific purpose the measure was designed to achieve (e.g., using Art. 34; see **Chapter 10, *infra***, for a detailed discussion of the co-operation provisions of the Convention). This may assist the Contracting State seized in reaching an outcome which remains in line with the purpose of the original measure of protection.

²⁴⁶ Art. 14 – see **Chapter 8** above. However, it should be noted that the Explanatory Report (*op. cit.* note 21), at para. 83, did not consider that a measure of this sort would subsist under Art. 14. This is because the national protective body could only exercise its powers on the territory of the State to which it belongs and Art. 14 specifically states that measures will remain in force "according to their terms". This seems to be a very restrictive interpretation of Art. 14 and "according to its terms" could be interpreted in a purposive fashion in this context to mean that the measure would subsist according to its terms if the supervision of the family / child by a public (State) authority could continue in the moved-to Contracting State.

²⁴⁷ Art. 15(3) – see paras **9.3-9.8, *supra***.

²⁴⁸ In this situation there should be close co-operation and communication between the authorities in both Contracting States *prior* to the relocation being permitted by Contracting State A to ensure that all necessary information regarding the family is exchanged and to ensure that adequate supervision of the family will continue in Contracting State B.

²⁴⁹ As the authorities of the Contracting State of the child's habitual residence – Art. 5. As to the use of the co-operation mechanisms of the Convention which may be used in this situation, see *supra*, note 245.

b. Law applicable to parental responsibility where there has been no intervention by a judicial or administrative authority

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

Article 16(1), 16(2)

9.9 The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State²⁵⁰ of the habitual residence of the child.²⁵¹

9.10 In some cases, the attribution or extinction of parental responsibility may occur as a result of an agreement or unilateral act which, again, does not require the intervention of the judicial or administrative authorities. The law applicable to this attribution or extinction of parental responsibility is the law of the State of the child's habitual residence *at the time when the agreement or the unilateral act takes effect*.²⁵² An example of a unilateral act attributing parental responsibility might be a will or an expression of last intentions by the last parent of the child designating a guardian for the child.²⁵³

9.11 It should be noted that if the attribution or the extinction of parental responsibility by agreement or unilateral act has to be reviewed or approved by a judicial or administrative authority, this review or approval will be characterised as a "measure of protection" which must be taken by the authorities with jurisdiction under Chapter II of the Convention, applying the law designated by Article 15 of the Convention.²⁵⁴ However, if the intervention of the judicial or administrative authority is a purely passive intervention, *e.g.*, limited to registering a declaration, an agreement or a unilateral act without exercising any control over the substance of the matter, this should not be considered as an intervention amounting to a "measure of protection" and the attribution of parental responsibility will still fall within Article 16 as one arising "without the intervention of a judicial or administrative authority".²⁵⁵

Example 9 (d)

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

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

²⁵⁰ NB: This does not have to be a Contracting State to the 1996 Convention since Art. 20 states that the provisions of Chapter III on applicable law apply even if the law designated by them is the law of a non-Contracting State (*i.e.*, they are universal). See, para. **9.22**, *infra*.

²⁵¹ Art. 16(1).

²⁵² Art. 16(2).

²⁵³ See the Explanatory Report (*op. cit.* note 20), at para. 103.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, at para. 98.

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

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

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

Article 16(3), 16(4)

9.12 Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of the child's habitual residence to another State.²⁵⁶ This is the case even if the State of the child's new habitual residence would not provide for parental responsibility in the same circumstances.

9.13 The attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the child's new habitual residence.²⁵⁷

9.14 The purpose of these rules is to secure continuity in parent-child relationships. The result of the rules is that a change in a child's habitual residence, in and of itself, cannot result in a person *losing* parental responsibility for a child, but it *can* result in another person *gaining* parental responsibility for a child.

9.15 The co-existence of several holders of parental responsibility which may result from an application of these provisions can only work if the holders of parental responsibility generally agree. If there is disagreement between them, this can be resolved by a measure requested by one or more of them from the competent authority with jurisdiction (see **Chapter 4**, *supra*).

Example 9 (e)

A child is born in Contracting State A where both unmarried parents have parental responsibility for the child by operation of law. The mother moves with the child to Contracting State B where the law provides that an unmarried father can only acquire parental responsibility by court order. The parental responsibility of the father acquired in Contracting State A by operation of law will subsist after the move.²⁵⁸

Example 9 (f)

A child is born in Contracting State A. The child's parents divorce shortly after her birth. Under the law of Contracting State A, both parents retain parental responsibility for the child after the divorce. Two years later the mother re-marries and the new couple and the child move to Contracting State B. Contracting State B has a rule whereby a step-parent has parental responsibility for his or her step-children by operation of law. In this case, after the child acquires his or her habitual residence in Contracting State B, there will be three persons who have parental responsibility for her: her mother, father and step-father.²⁵⁹

²⁵⁶ Art. 16(3).

²⁵⁷ Art. 16(4).

²⁵⁸ Art. 16(3).

²⁵⁹ Art. 16(4).

Example 9 (g)

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

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

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

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

What law applies to the exercise of parental responsibility?**Article 17**

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

Example 9 (h)

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

The modification or termination of parental responsibility by measures of protection taken by judicial or administrative authorities**Article 18**

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

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

Example 9 (i)

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

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

*The mother applies to the court in Contracting State B requesting that the father's parental responsibility be terminated. Contracting State B has jurisdiction to hear this request as the Contracting State of the child's habitual residence.²⁶⁰ It will usually apply the *lex fori* to the dispute.²⁶¹ Further, as a result of Article 18, Contracting State B is able to terminate the father's parental responsibility even though that parental responsibility was attributed by operation of law as a result of Article 16 of the Convention.²⁶²*

c. Protection of third parties

Will third parties be held liable if they enter into a contract with a person whom they believe to be a holder of parental responsibility, but who is actually not?

Article 19

9.19 If a third party enters into a transaction with a person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded, the third party cannot be held liable on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the rules of the Convention.²⁶³

9.20 This protection does not apply, however, if the third party knew or should have known that the parental responsibility was governed by the designated law. The protection also only applies if the transaction was entered into between persons present on the territory of the same State.

9.21 This rule was inserted into the Convention since the cumulative application of the laws of habitual residence in relation to the holders of parental responsibility may cause confusion for third parties as to who is entitled to represent the child.

²⁶⁰ Art. 5.

²⁶¹ Art. 15(1) (unless it decides that the protection of the child requires it, by way of exception, to apply or take into consideration the law of another State with which the situation has a substantial connection: Art. 15(2) – see further, para 9.2).

²⁶² However, ultimately, whether it can do so and in what circumstances it *will* do so will be a matter for the *lex fori* (Art. 15(1): or any other law applied, by way of exception, under Art. 15(2)).

²⁶³ See, *infra*, para. 13.70 for further discussion of this provision.

d. General provisions on applicable law

Do these rules apply even if the designated law is not that of a Contracting State?

Article 20

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

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

Article 21

9.23 No, *renvoi* is expressly excluded by Article 21. This means that where there is a reference to the law of another State, only the internal laws of that State are being referred to and not the private international law rules of that State.

9.24 There is one exception to this rule and that is if the law applicable according to Article 16 is the law of a non-Contracting State. In this case, if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own rules, then the law of the latter State applies. However, if the second non-Contracting State would *not* apply its own law, then the law designated by Article 16 will apply. This is designed so as not to interfere with the private international law rules that apply between non-Contracting States.

Are there any circumstances where the law indicated by the Articles above does not have to be applied?

Article 22

9.25 There is a public policy exception provided for in Article 22. This means that if the application of the law designated under the rules described above is manifestly contrary to the public policy of the Contracting State, taking into account the best interests of the child, the authorities of that State can refuse to apply it.

9.26 It should be noted that the use of public policy to refuse the application of the designated law can only occur when the best interests of the child are taken into account.

Example 9 (j)

A female, married same-sex couple are habitually resident in Contracting State A. They have two children as a result of donor insemination. In Contracting State A both members of a female, married same-sex couple have, by operation of law, parental responsibility for any children born to one of them.

Five years later the family moves from Contracting State A to Contracting State B. Contracting State B permits only the birth mother to have parental responsibility for the children in this situation.

An application of Article 16(3) of the Convention would ensure that the parental responsibility attributed to the non-birth mother would subsist after the family's move to Contracting State B. However, the authorities of Contracting State B consider it manifestly contrary to public policy to apply a foreign law which permits both members of a female, married same-sex couple to have parental responsibility regarding the children born to one of them. Before deciding to refuse the application of the law of Contracting State A, the authorities in Contracting State B should give careful consideration to whether it would be in the best interests of the children to refuse to do so.

10. When will a measure of protection taken by one Contracting State be recognised and enforced in another Contracting State?

a. When will a measure of protection taken by one Contracting State be recognised in another Contracting State?

Article 23

10.1 Measures of protection taken in one Contracting State will be recognised by operation of law in all other Contracting States.²⁶⁴ Recognition "by operation of law" means that it is not necessary to commence proceedings for the measure to be recognised in the requested Contracting State²⁶⁵ and for it to produce its effects there.

10.2 However, in order for a measure to be recognised, its existence may need to be evidenced in the requested Contracting State. In order to avoid placing bureaucratic hurdles in the way of the protection of children, the Convention does not have any formal requirements in this regard. Usually, production of the written document incorporating the measure²⁶⁶ will be sufficient. However, in certain circumstances and particularly in cases of urgency, the authorities of the Contracting State which has taken the measure may inform the requested Contracting State of the measure by telephone.²⁶⁷ In such circumstances it will usually be good practice to follow up with a written document evidencing the measure as soon as possible.²⁶⁸

10.3 Recognition of the measure of protection by operation of law will be sufficient for a measure to produce its effects in circumstances where the measure is voluntarily complied with or where there is no opposition to it.²⁶⁹

Example 10 (a)

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

Example 10 (b)

The authorities of Contracting State A, the habitual residence of the child, appoint a legal representative to manage the child's property. This includes property in Contracting State B. The recognition of this appointment by operation of law enables the legal representative to enter into transactions on behalf of the child in Contracting State B without having to take any other steps to have his / her appointment recognised in Contracting State B.²⁷⁰

²⁶⁴ However, recognition may be refused under the strict and limited grounds described below at **Chapter 10, section b**.

²⁶⁵ The terminology of "requested Contracting State" is used in this Chapter to denote the Contracting State which is requested to recognise and / or enforce the measure of protection taken in another Contracting State.

²⁶⁶ Emanating from the authority of the Contracting State which took the decision.

²⁶⁷ See the Explanatory Report (*op. cit.* note 20), at para. 120.

²⁶⁸ *Ibid.*

²⁶⁹ Where there is no voluntary compliance with a measure, or where there is opposition to the measure, see below at **Chapter 10, section d** on enforcement.

²⁷⁰ In this case, if Contracting State A issues certificates in accordance with Art. 40 of the Convention, it may be useful for the legal representative to obtain such certificates – see, further, **Chapter 11, infra**.

Example 10 (c)

A teenager is travelling from Contracting State A to Contracting State B. The authorities in Contracting State A contact the authorities in Contracting State B by telephone to inform them of the urgent and dangerous situation the teenager is in and the measure of protection that they have just taken in respect of her.²⁷¹ The court in Contracting State A ordered that the teenager be placed temporarily in State care. This caused her to run away. The authorities in Contracting State A confirm that they will send the court order as soon as possible. They subsequently confirm the order by telefax.

The measure is recognised by operation of law in Contracting State B, without any further action being required. The authorities in Contracting State B are therefore able to take the teenager into temporary State care upon her arrival in Contracting State B in accordance with Contracting State A’s measure of protection.²⁷²

b. When can recognition of a measure of protection taken in one Contracting State be refused in another?

10.4 Article 23(2) provides an exhaustive list of the grounds upon which recognition may be refused. It should be noted that Article 23(2) permits the refusal of recognition on these grounds, but does not make it mandatory.²⁷³ Recognition *may* therefore be refused in the following circumstances:

<p>a) If the measure was taken by the authority of a Contracting State whose jurisdiction was not based on one of the grounds provided for in Articles 5 to 14 of the Convention.²⁷⁴</p>	<p>This means that authorities in the requested Contracting State are not obliged to recognise measures that are based on the non-Convention jurisdictional rules of the Contracting State which took the measures <i>if</i> these rules are not consistent with the jurisdictional rules found in Chapter II of the Convention.</p>
<p>b) If the measure was taken, except in the case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of</p>	<p>The Convention does not seek to amend national procedural rules regarding hearing children and this provision operates so as to allow a requested Contracting State to ensure that its fundamental principles in this regard will not be compromised when</p>

²⁷¹ Based upon Art. 11 of the Convention. It should be noted that, under Art. 36 of the Convention, if the child is considered by Contracting State A to be “exposed to a serious danger”, the competent authorities of Contracting State A, as they have been informed in this case that the child’s residence has changed (or is about to change) and / or the child is about to become present in Contracting State B, are *obliged* to inform the authorities in Contracting State B about the danger to the child and the measures taken by them. See, further, **Chapter 11, *infra***.

²⁷² Contracting State B will then, if necessary and if it considers the case urgent, be able to take any further / other necessary measures of protection in respect of the teenager under Art. 11 of the Convention. It will be very important that close co-operation continues to take place between Contracting State B, Contracting State A and the State of the child’s habitual residence (if this can be identified) so that it can be determined which State has general jurisdiction in respect of this teenager to take longer-term measures of protection for her. See, further, *infra*, **Chapter 11**.

²⁷³ See the Explanatory Report (*op. cit.* note 21), at para. 121. This means that even if a ground for non-recognition under Art. 23(2) is established, the Contracting State may still decide to recognise the measure of protection.

²⁷⁴ Art. 23(2) a): this paragraph implies that the requested authority has the power to verify the jurisdiction of the authority which took the measure for the purposes of recognition. It is bound in this verification, however, by the findings of fact upon which the authority which took the measure based its jurisdiction (see Art. 25 and, *infra*, para. **10.5**).

<p>fundamental principles of the requested Contracting State.²⁷⁵</p>	<p>recognising a decision from another Contracting State. The provision is influenced by Article 12 of the UNCRC, which sets out the right of the child to be heard in proceedings that concern him or her. However, it is important to emphasise that it is only where the failure to hear the child is contrary to the <i>fundamental principles</i> of the requested Contracting State that this may justify a refusal of recognition. This ground of refusal does not apply in cases of urgency, since it is accepted that the requirements of procedural due process ought to be interpreted more flexibly in such situations.²⁷⁶</p>
<p>c) On the request of any person claiming that the measure infringes his or her parental responsibility, if such a measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard.²⁷⁷</p>	<p>This ground of refusal reflects respect for the right to due process and fair procedures of any person whose parental responsibility is infringed by the measure.</p>
<p>d) If such recognition is manifestly contrary to the public policy of the requested Contracting State, taking into account the best interests of the child.²⁷⁸</p>	<p>Refusal of recognition on the basis of public policy is a standard provision in private international law. However, the use of the public policy exception is rare in private international law generally and in the international family law Hague Conventions. Under this Convention, as well as the other international family law Hague Conventions, this exception to recognition may only be used when the recognition would be "<i>manifestly contrary</i>" to public policy. Further, the best interests of the child must be taken into account when considering whether to rely on this ground.²⁷⁹</p>
<p>e) If the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested Contracting State.²⁸⁰</p>	<p>This ground of refusal gives preference to a later measure taken by the authorities of a <i>non-Contracting State</i>, where that measure has been taken in accordance with the primary principle of jurisdiction under the Convention (<i>i.e.</i>, it is the <i>non-Contracting State of the child's habitual residence</i>).</p>

²⁷⁵ Art. 23(2) b).

²⁷⁶ See the Explanatory Report (*op. cit.* note 20), at para. 123.

²⁷⁷ Art. 23(2) c): *e.g.*, if, on the basis of Art. 18 of the Convention, the competent authority terminated an individual's parental responsibility without hearing him / her, that individual may invoke this infringement of his / her parental responsibility in order to oppose recognition of the measure in another Contracting State.

²⁷⁸ Art. 23(2) d).

²⁷⁹ As in the 1993 Hague Intercountry Adoption Convention.

²⁸⁰ Art. 23(2) e).

	The measure taken by the non-Contracting State of the child's habitual residence must be later in time than the decision of the Contracting State for which recognition is being refused. It must also be capable of recognition in the requested Contracting State.
f) If the procedure provided in Article 33 has not been complied with. ²⁸¹	The procedure provided in Article 33 refers to the procedure in cross-border placements of children. This procedure requires co-operation between the authorities of all the Contracting States involved and is discussed further at paragraphs 11.12 to 11.16 , <i>infra</i> . ²⁸²

10.5 It should be noted that, when determining whether a ground for refusal of recognition is established, the authorities of the requested Contracting State are bound by the findings of fact upon which the authority in the State where the measure was taken based its jurisdiction.²⁸³ For example, if jurisdiction was based on habitual residence, the requested Contracting State cannot review the facts upon which the authority that took the measure of protection based its assessment of habitual residence. Similarly, where jurisdiction is grounded upon a preliminary assessment of the best interests of the child,²⁸⁴ this assessment binds the authority of the requested Contracting State. It will therefore be good practice for judicial or administrative authorities taking measures of protection under the Convention to set down clearly, wherever possible, the findings of fact upon which their jurisdiction is based.

10.6 There is also to be no review of the merits of the decision beyond what is necessary for the purposes of determining whether a ground for refusal of recognition is established.²⁸⁵

Example 10 (d)

The non-Convention rules of jurisdiction of Contracting State A provide that, where a child is not habitually resident in a Contracting State but is a national of Contracting State A, the authorities of Contracting State A will have jurisdiction to take measures of protection in respect of the child.²⁸⁶ The authorities of Contracting State A therefore make an order in respect of a child who is a national of Contracting State A but who is habitually resident in non-Contracting State B. Whilst Contracting State A is entitled to take this measure of protection,²⁸⁷ the authorities of Contracting State C (or any other Contracting State) may refuse to recognise it, since it was based upon a ground of jurisdiction not contained in the Convention.²⁸⁸

Example 10 (e)

A child, 11 years old, is habitually resident in Contracting State A. The authorities of Contracting State A make an order restricting contact between the child and his father, who lives in Contracting State B. The authorities of Contracting State A do not interview the child directly when taking this measure of protection; instead, a social worker

²⁸¹ Art. 23(2) f).

²⁸² See paras **11.1** and **13.30-13.37**, *infra*.

²⁸³ Art. 25.

²⁸⁴ See, e.g., Arts 8(4), 9(1) and 10(1) b).

²⁸⁵ Art. 27.

²⁸⁶ Obviously the authorities of Contracting State A would not be able to exercise jurisdiction on this ground in respect of a child who is habitually resident in another *Contracting State* – see, *supra*, paras **3.11-3.13**.

²⁸⁷ *Ibid*.

²⁸⁸ Art. 23(2) a).

observes the family and speaks to the parents (but not to the child). The Constitution of Contracting State B contains a provision on the rights of children, which states that children must be consulted and heard regarding decisions which concern them, provided they are of sufficient age and maturity. The authorities of Contracting State B determine that the child is of sufficient age and maturity and, according to their Constitutional rules, should have been heard regarding this decision. They may therefore refuse to recognise the measure taken in Contracting State A on the basis that the child was not given the opportunity to be heard, in violation of Contracting State B's own fundamental principles of procedure.²⁸⁹

Example 10 (f)

The authorities of Contracting State A make an order terminating the parental responsibility of the mother in respect of her two children. The mother was in Contracting State B at the time the decision was taken and was not given the opportunity to be heard before this decision was taken. Recognition of this decision may be refused in all other Contracting States.²⁹⁰

Example 10 (g)

A child and her mother are habitually resident in Contracting State B. The father is habitually resident in Contracting State A. The parents decide to divorce in Contracting State A and consent to the courts of Contracting State A dealing with all matters relating to the child's custody.²⁹¹ In the course of the divorce proceedings, the court of Contracting State A decides to terminate the father's parental responsibility and to cease all contact between the father and child on the sole basis that the father is responsible for the breakdown of the marriage. The measure may not be recognised in Contracting State B on the basis that it would be manifestly contrary to Contracting State B's public policy, taking into account the best interests of the child, to recognise a measure that is not based on an assessment of the interests of the child.²⁹²

Example 10 (h)

A family is habitually resident in Contracting State A. Following the breakdown of the marriage, the mother and child, with the agreement of the father, return to the State of their nationality, non-Contracting State B. The parents agree that the authorities of Contracting State A who are hearing their divorce case should also determine the custody issues relating to the child.²⁹³ The court in Contracting State A orders that the parents shall have shared custody in respect of the child and that the child shall divide his time more or less equally between the parents.

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

The mother and child then move to Contracting State C. The father applies (under Art. 24 of the Convention²⁹⁴) for the recognition of the order of Contracting State A in Contracting State C. The law of Contracting State C provides that it will recognise decisions from non-Contracting States as long as certain criteria are fulfilled. The decision from non-Contracting State B fulfils these criteria. Therefore Contracting State C may refuse to recognise the decision of the authorities of Contracting State A on the basis that it is incompatible with the later decision taken by non-Contracting State B.²⁹⁵

²⁸⁹ Art. 23(2) b) (and the case was not one of urgency).

²⁹⁰ Art. 23(2) c) (provided the measure was not taken in a case of urgency).

²⁹¹ Art. 10 – see, further, *supra*, **Chapter 4**.

²⁹² Art. 23(2) d): in these circumstances, if the authorities of Contracting State B did refuse recognition, the father could apply in Contracting State B for measures of protection in respect of the child (including custody / access) since Contracting State B is the Contracting State of the child's habitual residence (Art. 5).

²⁹³ Art. 10 – see, further, *supra*, **Chapter 4**.

²⁹⁴ See, paras **10.7-10.11**, *infra*.

²⁹⁵ Art. 23(2) e).

c. How can a person be sure that a decision will be recognised in another Contracting State?

("Advance recognition"²⁹⁶)

Article 24

10.7 If there is any possible doubt about whether a measure of protection taken in one Contracting State will be recognised by operation of law in another Contracting State, this issue may need to be resolved using the mechanism set down in Article 24 of the Convention.

10.8 Since recognition of measures from other Contracting States occurs by operation of law, it is only at the time when the measure is invoked that a possible dispute over the existence of a ground for non-recognition may be the subject of a ruling. It may cause inconvenience and hardship to have to wait until this point for a determination of whether or not an order can be recognised, and various people may have a legitimate interest in dispelling any doubt which may exist about recognition. Therefore, an interested person can apply to the competent authority of a Contracting State for a decision regarding the recognition of measures taken in another Contracting State.

10.9 Article 24 can be utilised, for example, by a parent whose child is relocating to another Contracting State, or by a parent whose child is travelling for a short period to another Contracting State with the other parent.²⁹⁷

10.10 This procedure permits a decision to be given regarding the recognition or non-recognition of *measures* of protection. This means that a declaration regarding the attribution or extinction of parental responsibility which has occurred without any intervention by a judicial or administrative authority (e.g., in accordance with Art. 16(3) or (4) following a change in the child's habitual residence) cannot be obtained.²⁹⁸

10.11 It is for the law of the requested Contracting State to set out the procedure that can be utilised to obtain such a decision.²⁹⁹

Example 10 (i)

Three children are habitually resident in Contracting State A. Their mother seeks to relocate to Contracting State B with them. The father does not object to the move on the condition that his contact with the children continues. He obtains a court order in Contracting State A which provides that the children will spend significant portions of their holidays with him. The father is concerned that the mother will not abide by this arrangement following the move and wishes to ensure that the authorities in Contracting State B will recognise the court order. Under Article 24 the father can make an application to Contracting State B to determine if the order will be recognised before the mother moves with the children to Contracting State B. If the decision is that the order will be recognised, everyone concerned knows that the recognised decision can be declared enforceable or registered for enforcement³⁰⁰ and enforced in accordance with the law of Contracting State B if the mother does not comply voluntarily.³⁰¹ If the decision is that the order will not be recognised,³⁰² the father will be aware of this before

²⁹⁶ For the use of "advance recognition" in international access / contact cases, see, *infra*, paras **13.19-13.21**.

²⁹⁷ *Ibid.*

²⁹⁸ See, further, **Chapter 9, section b**, *supra*, and the Explanatory Report (*op. cit.* note 20), at para. 129, where it states that Art. 24 "presupposes the existence of a decision in order to function".

²⁹⁹ *Ibid.*, at para. 130.

³⁰⁰ Art. 26.

³⁰¹ Art. 28, see also **section d**, *infra*.

³⁰² Art. 23(2).

*the move and can take steps to remedy whatever defect is in the original order made by the court in Contracting State A so that it will be recognised in Contracting State B.*³⁰³

d. When will a measure of protection taken in one Contracting State be enforced in another Contracting State?

Articles 26 and 28

10.12 If a measure of protection taken by one Contracting State is not being respected in another Contracting State, it may be necessary to commence enforcement proceedings in that latter Contracting State.³⁰⁴

10.13 The procedure set down by the Convention is that an interested party must, in these circumstances, request that the measure of protection be declared enforceable or registered for the purpose of enforcement in the requested Contracting State according to the procedure provided for in the law of that State.³⁰⁵

10.14 A simple and rapid procedure must be applied to the declaration of enforceability or registration.³⁰⁶ Importantly, this declaration or registration can only be refused by the requested Contracting State on the grounds listed above in relation to the non-recognition of a measure.³⁰⁷

10.15 Once the declaration or registration has been made, the measures are to be enforced in the requested Contracting State as if they had been taken by the authorities of that State.³⁰⁸

10.16 Enforcement is to take place in accordance with the law of the requested Contracting State and to the extent provided by such a law, taking into consideration the best interests of the child.³⁰⁹ The reference to “the extent provided by the law of” the enforcing Contracting State is an acknowledgment that Contracting States will have different internal laws regarding enforcement. Enforcement can only take place to the extent permitted by their internal laws.³¹⁰

10.17 The reference to “the best interests of the child” in Article 28 should not be interpreted as an invitation to a further enquiry on the merits.³¹¹

Example 10 (j)

A child is habitually resident in Contracting State A. Following the breakdown of his parents’ relationship, the father seeks the court’s permission to move with the child to Contracting State B. The court grants the permission to move but puts in place a comprehensive regime of contact for the mother.³¹² However, when the mother travels to

³⁰³ On this issue, co-operation between Central Authorities of the Contracting States involved or the decision-making authorities involved (e.g., direct judicial communications) may prove useful in order to efficiently remedy any defect in the order to ensure recognition in the requested Contracting State – see, further, **Chapter 11**, *infra*.

³⁰⁴ Art. 26.

³⁰⁵ Art. 26(1).

³⁰⁶ Art. 26(2).

³⁰⁷ Art. 26(3).

³⁰⁸ Art. 28.

³⁰⁹ *Ibid.*

³¹⁰ E.g., the Explanatory Report (*op. cit.* note 20) gives the example of a mature child who is absolutely refusing to go and live with the parent designated under the measure of protection as custodian of the child (at para. 134). If the internal law of the requested Contracting State permits in such a case that the judicial or administrative decision not be enforced, this rule may likewise be applied to a judicial or administrative decision taken in another Contracting State.

³¹¹ *Ibid.*, at para. 135.

³¹² If the mother was concerned about the recognition of the order before the father and child moved to Contracting State B, she could seek to have it recognised before they move. See *supra*, paras **10.7-10.11**.

Contracting State B to exercise contact with the child in accordance with the order of Contracting State A, the father will not allow the child to see the mother.

Under Article 26 of the Convention, the mother may request that the contact order of Contracting State A be declared enforceable or registered for the purpose of enforcement in Contracting State B.³¹³ Once the order has been declared enforceable or registered for enforcement in Contracting State B, enforcement will take place in Contracting State B in accordance with its law and to the extent provided by such law, taking into consideration the best interests of the child.³¹⁴

Example 10 (k)

A mother and child are habitually resident in Contracting State A; the father is habitually resident in Contracting State B. After the divorce of the parents, a court in Contracting State A grants the mother custody of the child and the father regular contact with the child. The contact with the father is to take place in Contracting State B. This decision will be recognised by operation of law in Contracting State B. However, following the first contact period in Contracting State B, the father retains the child in Contracting State B, contrary to the order of Contracting State A. The mother can request that the decision of Contracting State A be declared enforceable or registered for the purpose of enforcement in Contracting State B.³¹⁵ Once the order has been declared enforceable or registered for enforcement in Contracting State B, enforcement will take place there in accordance with the law of Contracting State B and to the extent provided by such law, taking into consideration the best interests of the child.³¹⁶

Example 10 (l)

A girl, aged 11, is habitually resident in Contracting State X. Her father disappeared when she was very young and recently her mother has passed away as a result of AIDs. The authorities of Contracting State X determine that the girl should live with her maternal aunt, who is willing to care for her. Two months later the girl goes missing after school. The maternal aunt immediately reports this to the authorities. The police suspect that she has been abducted by a well-known child trafficking ring and taken to Contracting State Z where girls are sold into child prostitution. Using the Central Authority to assist with locating the girl,³¹⁷ she is eventually found in Contracting State Z. The measure of protection of Contracting State X is recognised by operation of law in Contracting State Z. However, the girl refuses to co-operate with the authorities and claims that she is living with her father (a man whom the authorities in Contracting State Z are concerned is involved in the trafficking ring). The authorities in Contracting State Z consider the girl is in immediate danger and take measures under Article 11 to take the girl into temporary State care.

The maternal aunt applies for the custody order in her favour made in Contracting State X to be declared enforceable. The aunt's application comes before the authorities in

³¹³ Art. 26.

³¹⁴ Art. 28. It should be noted that in this case, if the father were to apply to the authorities of Contracting State B for a review of the contact order, the authorities of Contracting State B would have jurisdiction (as the Contracting State of the child's new habitual residence, under Art. 5) to determine this issue. However, in such circumstances, the authorities of Contracting State B should be slow to review the contact order – see paras **13.22-13.26**, *infra*.

³¹⁵ This example is particularly relevant if the 1980 Hague Child Abduction Convention does not apply to the case (e.g., because one State is not a Contracting State to the 1980 Convention) because it demonstrates the possible remedy provided by the 1996 Convention in this abduction situation. However, if both States were Contracting States to the 1980 Convention in this scenario (as well as to the 1996 Convention), it would be a matter for the mother (and her legal advisers) as to whether she instituted return proceedings under the 1980 Convention in Contracting State B, or enforcement proceedings under the 1996 Convention in that State in respect of the order of Contracting State A, or both. Considerations the mother may take into account when making this decision might be: the speed of both procedures in Contracting State B and the legal costs (and any legal aid) that may be available for each procedure. For further discussion on international child abduction see, *infra*, **Chapter 13**, paras **13.1-13.14**.

³¹⁶ Art. 28.

³¹⁷ Art. 31 c) and see, *infra*, **Chapter 11**.

Contracting State Z and the declaration is granted. The custody order is enforced in accordance with the law of Contracting State Z and the girl is returned to her maternal aunt's care in Contracting State X.

11. Central Authorities and co-operation

Articles 29-39

a. The role of a Central Authority under the 1996 Convention

11.1 Central Authorities will play a key role in the practical operation of the 1996 Convention. The co-operation provisions of the Convention, which are essential to the successful operation of the Convention (and therefore to realising the Convention's aim of improving the protection of children in international situations), rely on Central Authorities to put them into effective practice. Competent, co-operative and responsive Central Authorities are therefore at the very heart of this Convention.

11.2 However, for those familiar with Central Authorities designated under the 1980 Convention, it should be noted that the Central Authority functions under the 1996 Convention have a different emphasis. Under the 1996 Convention there are far fewer responsibilities to initiate or process applications compared with the obligations placed on the Central Authorities under the 1980 Convention.³¹⁸ Further, as will be discussed below, there are also more possibilities under the 1996 Convention for certain Central Authority functions to be performed through other bodies.³¹⁹ The role of the Central Authority could therefore be said to be more flexible under the 1996 Convention than under the 1980 Convention (which is explicable by the fact that the 1996 Convention has a far broader material scope than the 1980 Convention and therefore potentially concerns a far greater number of children³²⁰). However, despite the slight difference in emphasis in the roles of the Central Authorities under the two Conventions, careful consideration should still be given to whether it is appropriate, in States which are Parties to both Conventions, to designate the same body as Central Authority under both Conventions (the reasons for this are discussed, *infra*, at para. 11.5).

b. The designation and establishment of a Central Authority

11.3 Article 29 of the Convention obliges Contracting States to designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.

11.4 If the Contracting State is (1) a federal State, (2) a State with more than one system of law, or (3) a State having autonomous territorial units, the Contracting State is free to appoint more than one Central Authority. In this scenario, the Contracting State must designate one Central Authority to receive communications from abroad (for onward transmission to the appropriate Central Authority within that State).³²¹

11.5 If the Contracting State is also Party to the 1980 Hague Child Abduction Convention, consideration should be given to whether the Central Authority designated under the 1996 Convention should coincide with the Central Authority already designated

³¹⁸ See Arts 7 and 21 of the 1980 Convention.

³¹⁹ *E.g.*, see Art. 31 where the duties may be carried out directly by the Central Authority, or indirectly "through public authorities or other bodies".

³²⁰ See the Explanatory Report (*op. cit.* note 20), at para. 136, where it explains that: "The Commission [...] saw the benefit [...] [of] a Central Authority charged with this co-operation, but it also saw the danger of excessive bureaucracy, of which the double effect would be to paralyse the protection of the child and above all to discourage the States, which would have to bear the burden, from ratifying the future Convention. This latter danger was all the more serious in that the number of children whose protection would be insured by the future Convention was completely out of proportion with the number of children concerned with the Conventions on child abduction or on intercountry adoption."

³²¹ See Art. 29(2).

under the 1980 Convention. The experiences acquired by the Central Authority under the 1980 Convention may be of real benefit when operating the 1996 Convention. Furthermore, cases of international child abduction and / or international contact / access will often involve issues arising under *both* the 1996 and 1980 Conventions. As a result, the Central Authorities of both Conventions may often need to be involved in the same case.³²² If these two Central Authorities are to be separate bodies, at the very least they should work in close co-operation and be able to communicate quickly and effectively.

11.6 The details of the designated Central Authority (and, where a Contracting State has designated more than one Central Authority, the designation of the Central Authority that will receive communications from abroad) must be communicated to the Permanent Bureau of the Hague Conference on Private International Law.³²³ This information will be made available on the Hague Conference website (< www.hcch.net >, under "Convention 34" then "Authorities").

11.7 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*³²⁴ contains many principles and practices which are also relevant under the 1996 Convention. In particular, the 'key operating principles' will also apply to Central Authorities designated under the 1996 Convention:

❖ Resources and powers

Central Authorities must be given sufficient powers, qualified personnel and adequate material resources, including modern means of communication, to carry out their functions effectively.

❖ Co-operation

Central Authorities should co-operate effectively with each other and also with other authorities within their own Contracting States.

❖ Communication

Central Authorities should ensure that they can be easily contacted, by ensuring that their contact details are up-to-date, that communication is clear and effective, that communications from other Central Authorities or other bodies are responded to promptly and that rapid means of communication are used when available.

❖ Consistency

Central Authorities should apply a consistent approach when dealing with requests and / or applications.

❖ Expeditious procedures

Although expeditious action is of particular importance under the 1980 Hague Child Abduction Convention, wherever the protection of children is concerned Central Authorities should always seek to respond to, and act on, applications in a timely manner.³²⁵

❖ Transparency

³²² Further, as a result of the overlap, if there are two separate Central Authorities, they will both need to be knowledgeable about *both* Conventions.

³²³ Art. 45(1).

³²⁴ Useful information on the establishment and operation of Central Authorities can be found in the *Guide to Good Practice on Central Authority Practice* (Jordan Publishing, 2003). Available at < www.hcch.net >, under "Child Abduction Section", then "Guides to Good Practice".

³²⁵ See the *Guide to Good Practice on Transfrontier Contact* (*op. cit.* note 200), at para. 5.2, which recognises the distinction between a return and contact application in this regard, but which also confirms the importance of speed in contact cases, particularly where a parent-child relationship is disrupted and especially in an international case where the international character may justify treating it even more expeditiously: "Because of the additional distances and costs that may be involved in exercising contact across frontiers, the absence of speedy recourse to a tribunal may sometimes result in serious injustice and cost to the contact parent."

Throughout the process there should be transparency in both legal process and administrative procedure. Information should be provided about these processes and procedures.

❖ Progressive implementation

Central Authorities should review and revise their procedures to improve the operation of the Convention as they gain more practical experience with the Convention and more information about practices in other countries.

11.8 It should be noted that Contracting States may enter into agreements with one or more other Contracting States with a view to improving the application of the co-operation provisions of the Convention (Chapter V) between themselves. The Contracting States which have concluded such an agreement must transmit a copy to the depositary of the Convention.³²⁶

c. What assistance must a Central Authority provide?

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

<ul style="list-style-type: none"> To co-operate with each other and promote co-operation amongst the competent authorities³²⁷ in their States to achieve the purposes of the Convention;³²⁸ <p>AND</p>
<ul style="list-style-type: none"> In connection with the application of the Convention, to provide information as to the laws of, and services available in, their States relating to the protection of children.³²⁹

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

<ul style="list-style-type: none"> Facilitate the communications and offer the assistance provided for: <ul style="list-style-type: none"> in Articles 8 and 9 of the Convention (transfer of jurisdiction provisions³³⁰); and in Chapter V (the co-operation provisions).³³¹
<ul style="list-style-type: none"> Facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies.³³²
<ul style="list-style-type: none"> Provide assistance, on the request of a competent authority of another Contracting State, in discovering the whereabouts of a child where it

³²⁶ Art. 39.

³²⁷ No definition is provided in the Convention as to what constitutes a "competent authority". However, it is clear that it is the authority which, under the law of the particular Contracting State, has competence to take the action required by the Convention.

³²⁸ Art. 30(1). This general and all-encompassing provision provides Central Authorities with a basis for co-operation whenever the co-operation will "achieve the purposes of the Convention". It can therefore be relied upon when no specific co-operation provision of the Convention applies in a case.

³²⁹ Art. 30(2). See also the Explanatory Report (*op. cit.* note 20), at para. 139.

³³⁰ See **Chapter 5**, *supra*.

³³¹ Art. 31 a).

³³² Art. 31 b).

appears that the child may be present and in need of protection within the territory of the requested State.³³³

These particular tasks may be performed directly by the Central Authority, or indirectly, "through public authorities or other bodies".³³⁴ The text of the Convention intentionally contains no qualifying language as to the identity of the public authorities or other bodies which may carry out these tasks.³³⁵ This is because the drafters considered that in a field as broad as international child protection it was unwise to unduly limit the scope of the bodies that may be able to provide assistance. However, as the Explanatory Report points out, rejection of a qualifying criterion (e.g., accreditation) does not exclude the possibility that Central Authorities will have recourse to bodies of uncontested competence in the field, such as the International Social Service.³³⁶

Example 11 (a)

The children live in Contracting State A with their mother. Their father, residing in Contracting State B, wishes to have contact with the children. The mother will not permit contact to take place since she is concerned that if the children have contact with their father, he will not adhere to any agreement and may not return them to her at the conclusion of contact. The father, whilst he does not agree that the mother has any rational basis for her fears, would like to find an agreed solution. He therefore contacts the Central Authority in Contracting State B³³⁷ to obtain information on the law regarding contact in Contracting State A and, in particular, the measures which may be put in place in either Contracting State to allay the mother's fears. The Central Authority in Contracting State B contacts the Central Authority in Contracting State A to ascertain information regarding the law of that State. The Central Authorities each provide helpful general information on these matters which the Central Authority of Contracting State B communicates to the father.³³⁸ The Central Authority in Contracting State A also suggests mediation as a possible way forward for the family and states that they are able to facilitate this in Contracting State A.

Example 11 (b)

A child, aged 14, runs away from his home in Contracting State A after suffering a particularly acute episode of bullying at school. The mother contacts the Central Authority in Contracting State A extremely concerned for his well-being. She states that she thinks he may be attempting to travel to a friend in Contracting State B but the friend has reported that he has not arrived and he does not know where he is. The Central Authority in Contracting State A, as well as carrying out its own enquiries to determine whether the child is still in its State, should contact the Central Authority in Contracting State B who will then come under an obligation to provide assistance (either directly or through public authorities or other bodies) in discovering the whereabouts of the child.³³⁹ Once the child is located, the Central Authorities (and other authorities

³³³ Art. 31 c). This provision ought to facilitate the localisation of abducted children, runaways or, more generally, children in difficulty (see the Explanatory Report, *op. cit.* note 20, at para. 141). See also paras **13.56-13.59**, *infra*.

³³⁴ Compare the stricter wording of Art. 7 of the 1980 Hague Child Abduction Convention.

³³⁵ *I.e.*, there is no requirement for the Central Authorities to delegate tasks only to "bodies duly accredited", as under the 1993 Hague Intercountry Adoption Convention (Art. 9 of the 1993 Convention).

³³⁶ See the Explanatory Report (*op. cit.* note 20), at para. 140.

³³⁷ There is no requirement for the father to approach the Central Authority in the Contracting State where he resides and he is free to contact the Central Authority in Contracting State A directly for information if he so wishes.

³³⁸ In relation to preventive measures which might be put in place in this case to allay the mother's concerns and prevent a wrongful removal / retention occurring, see the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003), available at < www.hcch.net >, under "Child Abduction Section", then "Guides to Good Practice".

³³⁹ Art. 31 c).

involved) should communicate to discuss the appropriate way forward in the child's best interests (e.g., whether it is necessary for Contracting State B to take necessary measures under Article. 11 or whether Contracting State A can take the necessary measures promptly to return the child to his mother's care and also begin to investigate his school situation and take necessary measures in that regard).

d. Situations where it is obligatory for authorities³⁴⁰ to co-operate / communicate

11.11 In two specific situations set out in the Convention, an *obligation* to co-operate / communicate is placed on the authorities of Contracting States. It should be noted that these obligations are not placed specifically on Central Authorities, but on the particular authorities which wish to take, or which have taken (in the case of Art. 36), a certain measure of protection under the Convention.³⁴¹ However, it is anticipated that the communication and co-operation required by these provisions will often take place through, or with the assistance of, the relevant Central Authority(ies).³⁴²

(1) When an authority is contemplating the placement of a child abroad (Art. 33)³⁴³

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

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

- (a) a report on the child, together with
- (b) the reasons for the proposed placement or provision of care.³⁴⁴

11.14 Each Contracting State may³⁴⁵ designate the authority to which requests under Article 33 should be addressed.³⁴⁶ If any such designation is made, it must be communicated to the Permanent Bureau of the Hague Conference on Private International Law. The Permanent Bureau will make this information available in the relevant section of its website (< www.hcch.net >, under "Convention 34" then "Authorities"). If no such designation is made, communications may be sent to the Central Authority of the relevant Contracting State.

11.15 The decision to place the child in the other Contracting State must not be made unless the Central Authority or other competent authority from the other Contracting State has consented to the placement or provision of care, taking into account the child's best interests.³⁴⁷

³⁴⁰ This title intentionally does not refer to Central Authorities – see para. **11.11**, *infra*.

³⁴¹ In Art. 33 the Convention refers to the "authority having jurisdiction under Articles 5 to 10" and in Art. 36 it refers to the "competent authorities" of the relevant Contracting State. In both instances, therefore, the reference is to the authority considering whether to take (or the authority which has already taken, in the case of Art. 36) a measure of protection in respect of the child.

³⁴² In particular, Art. 33 specifically mentions that consultation shall be with the "Central Authority or other competent authority" of the requested Contracting State.

³⁴³ See also paras **13.30-13.37**, *infra*.

³⁴⁴ Art. 33(1).

³⁴⁵ It is not obligatory. However, to facilitate efficient communication it may be thought of as good practice.

³⁴⁶ Art. 44.

³⁴⁷ Art. 33(2).

11.16 If this procedure is not followed, the measure can be refused recognition under the Convention.³⁴⁸

(2) Provision of information where a child is in serious danger and changes residence / presence (Art. 36)

11.17 In any case where the child is exposed to a serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration.³⁴⁹

11.18 It should be noted that this obligation extends to a case where the child has become resident or present in a *non*-Contracting State.

11.19 It will be a matter for the relevant authorities to determine whether, in the particular case, the child concerned is "exposed to a serious danger". The Explanatory Report lists the following possible examples: where the child has an illness requiring constant treatment or where the child is exposed to drugs or an unhealthy influence such as a sect.³⁵⁰ Other examples might be: where the child's carer was under the supervision of the authorities in the first Contracting State due to allegations of neglect or abuse, or where the child is an unaccompanied minor.³⁵¹

11.20 Where the relevant authorities are not certain of the child's whereabouts but *suspect* the child has become resident or present in another *Contracting* State, Article 31 c) may be used³⁵² to ascertain the whereabouts of the child so that the information can then be provided to the relevant State in accordance with Article 36.

11.21 However, it must be noted that if the transmission of such information would be likely, in the opinion of the authority involved, to place the child's person or property in danger or constitute a serious threat to the liberty or life of a member of the child's family, the authority must not transmit such information.³⁵³

Example 11 (c)

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

Example 11 (d)

A child is born to a young unmarried mother habitually resident in Contracting State A (but a national of Contracting State B). The father does not want anything to do with the

³⁴⁸ Art. 23(2) *f*) and see **Chapter 9**, *supra*, on recognition and enforcement of measures of protection.

³⁴⁹ Art. 36.

³⁵⁰ Explanatory Report (*op. cit.* note 20), at para. 150.

³⁵¹ See also paras **13.56-13.59**, *infra*.

³⁵² See para. **11.10**, *supra*.

³⁵³ Art. 37.

child. The mother feels that she is too young to be able to raise the child. She has an older sister in Contracting State B who is married and who is willing to care for the child with her husband by way of kafala. In accordance with Article 33, Contracting State A consults with the Central Authority or other competent authority in Contracting State B and submits a report on the child together with the reasons for the proposed provision of care. Contracting State B considers the report, investigates the situation of the sister and her husband and consents to the proposed plan, taking into consideration the best interests of the child. The authorities in Contracting State A are therefore able to proceed to make the order providing that the child be placed with the older sister and her husband under kafala. This order will be recognised by operation of law in Contracting State B.

Example 11 (e)

A family lives in Contracting State A. The public authorities are informed by the school which the children attend that the children often arrive at school unclean, extremely tired and with bruises on their arms and legs. The parents claim that the children are naughty, will not wash or go to bed and that the bruises are from 'play-fighting'. The authorities undertake a preliminary investigation into the family and determine that no urgent measures of protection need to be taken. However, they wish to continue to closely monitor the family and do not discount the possibility of further intervention in the future, if necessary. The parents become very concerned that the children are going to be taken from their care. The parents therefore decide to flee to neighbouring Contracting State B, where they have relatives. The public authorities of Contracting State A discover that the family has fled and that the parents may well have decided to go to relatives in Contracting State B. The Central Authority of Contracting State A therefore contacts the Central Authority in Contracting State B and requests assistance in discovering the whereabouts of the children.³⁵⁴ With the help of the Central Authority of Contracting State B, the family is located in this State. The Central Authority of Contracting State A is informed by the competent authorities in its State that they consider that the children may be exposed to serious danger as a result of the concerns regarding the parent's care and the fact the children are now in an unmonitored situation. As a result, the Central Authority of Contracting State A considers itself under an obligation to inform the Central Authority of Contracting State B about the case,³⁵⁵ the danger involved to the children, and the measures which were under consideration in Contracting State A.³⁵⁶ As a result of this information, the relevant authorities in Contracting State B decide, under Article 11, to continue the close monitoring which the authorities in Contracting State A had in process in order to assess if any necessary measures of protection need to be taken in respect of the children.

Example 11 (f)

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

³⁵⁴ Art. 31 c).

³⁵⁵ Art. 36.

³⁵⁶ The Central Authority, prior to transmitting the information, will need to ensure that Art. 37 is not applicable in the case and that transmitting the information is not likely to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family.

have been taken regarding the children.³⁵⁷ The authorities in Contracting State B can then act on this information and ensure the immediate safety of the children.³⁵⁸

Since the order made in Contracting State A will be recognised by operation of law and enforceable in Contracting State B,³⁵⁹ the authorities in Contracting State A will then need to consider whether they wish to seek enforcement of the measure to ensure the children are returned to the foster carer in Contracting State A. However, it should also be noted that if the order placing the children in foster care gave the public authorities rights of custody in respect of the children under the law of Contracting State A and both Contracting States A and B are also Parties to the 1980 Convention, in this case Contracting State A may be able to rely on the 1980 Convention to seek the return of the children to that State. Which procedure is used in this situation will be a matter for Contracting State A. (Contracting State A may consider ascertaining information from the Central Authority of Contracting State B³⁶⁰ as regards which procedure will be more speedy and cost-effective and therefore promote the best interests of the children.)

e. Specific instances of co-operation

11.22 In addition to the obligations set out in **sections c** and **d** above, specific instances are provided for in the Convention where co-operation between authorities³⁶¹ is envisaged (and may be thought of as good practice), but is not mandatory. The fact that these specific instances are provided for in the Convention does not prevent co-operation in other circumstances.³⁶²

(1) **Requesting another Contracting State to provide a report on the situation of a child, or to take measures of protection in respect of a child (Art. 32)**

<p><u>Article 32</u></p> <p><i>On a request made with supporting reasons by a Central Authority or other competent authority of a Contracting State with which a child has a substantial connection, the Central Authority in which the child is habitually resident and present may, either directly or through public authorities or other bodies, perform the following tasks:</i></p> <ul style="list-style-type: none"> – <i>Provide a report on the situation of the child.</i>³⁶³ – <i>Request the competent authority of its State to consider the need to take measures for the protection of the person or property of the child.</i>³⁶⁴ 	<p><u>Points to note:</u></p> <ul style="list-style-type: none"> • The request must be made by a Central Authority or other competent authority which has a “substantial connection” with the child concerned. See Chapter 13 for commentary regarding the term “substantial connection”. • The request must be made with supporting reasons (<i>i.e.</i>, the request should detail the reasons why it is being made and why it is felt necessary for the protection of the child concerned). • The request has to be made to the Central Authority in the Contracting State in which the child is habitually resident and present.
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³⁵⁷ It should be noted that, under Art. 37, the authorities must abstain from transmitting any information if this information is likely to place the child’s person or property in danger, or constitute a serious threat to the liberty or life of a member of the child’s family.

³⁵⁸ Through the use of Art. 11.

³⁵⁹ See **Chapter 10, supra**, on the recognition and enforcement of measures and also **Chapter 8, supra**, on the continuation of measures.

³⁶⁰ Art. 30(2).

³⁶¹ As in **section c** above, these instances of co-operation are not limited to Central Authority action. However, it is envisaged that such co-operation will often taken place through, or with the assistance of, Central Authorities. Indeed, Art. 34(2) permits a Contracting State to declare that requests under Art. 34(1) shall be communicated to its authorities *only through its Central Authority* (see, further, **section e, number (2), infra**).

³⁶² See the general duty to co-operate placed upon Central Authorities – Art. 30, discussed at **section a, supra**.

³⁶³ Art. 32 a).

³⁶⁴ Art. 32 b). The competent authorities of the State of the child’s habitual residence may also consider as appropriate a transfer of jurisdiction under Art. 8 of the Convention especially if the child is not present in the

–	<ul style="list-style-type: none"> • The Central Authority may carry out the task requested or may delegate this to a public authority or other body. • Whilst this provision <i>authorises</i> the requested Central Authority to reply to such a request, either directly or through public authorities or other bodies, it does not <i>oblige</i> it to do so.³⁶⁵
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(2) **Requesting information relevant to the protection of a child when contemplating taking a measure of protection (Art. 34)**

<p><u>Article 34</u></p> <p><i>If a competent authority is contemplating taking a measure of protection and it considers that the situation of the child so requires, it may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.</i></p> <p><i>A Contracting State may declare that such requests shall be communicated to its authorities only through its Central Authority.</i></p>	<p><u>Points to note:</u></p> <ul style="list-style-type: none"> • This request for information can only be made if the competent authority is: (1) contemplating taking a measure of protection in respect of the child; and (2) considers that the situation of the child requires the request to be made. It will be for the requesting authority to consider the latter condition and, in its grounds in support of the request, show that this condition is fulfilled. • The competent authority may make the request to any other Contracting State which has information relevant to the protection of the child. • The request may be made to any authority of that Contracting State. The authorities envisaged here are “public authorities”.³⁶⁶ However, this is subject to Article 34(2) which states that a Contracting State may declare that such requests shall be communicated to its authorities <i>only through its Central Authority</i>. Such a declaration should be made to the depositary of the Convention.³⁶⁷ The depositary will notify States of such a declaration.³⁶⁸ The Permanent Bureau of the Hague Conference on Private International Law will ensure such information is placed on its website (< www.hcch.net >, under “Convention 34” then “Authorities”).
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territory of the other State concerned. See, *supra*, **Chapter 5**.

³⁶⁵ See the Explanatory Report (*op. cit.* note 20), at para. 142.

³⁶⁶ *Ibid.*, at para. 144.

³⁶⁷ Art. 45(2). The depositary of the Convention is the Ministry of Foreign Affairs of the Netherlands.

³⁶⁸ Art. 63 d).

	<ul style="list-style-type: none"> • The best interests of the child should serve as a guide in relation to this provision both for the requesting authority (who, in any event, can only make the request if the situation of the child requires it), and for the requested authority.³⁶⁹ • The requested authority is never bound to furnish the information requested, even if the conditions for making the request are fulfilled. It has its own power of discretion.³⁷⁰ • If the transmission of information would be likely, in the opinion of the authority involved, to place the child's person or property in danger, or constitute a serious threat to the liberty or life of a member of the child's family, the authority must not request or transmit such information.³⁷¹ • In addition, the authorities concerned must respect the general rules applicable to information gathered or transmitted provided for by Articles 41 and 42 of the Convention.³⁷²
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(3) Requesting assistance to implement measures of protection abroad (Art. 35)

<p><u>Article 35(1)</u></p> <p><i>When measures of protection have been taken under the Convention, the authorities of one Contracting State can request the authorities of another Contracting State to assist in the implementation of the measures.</i></p> <p><i>This especially applies to securing the effective exercise of rights of access, as well as the right to maintain direct contacts on a regular basis.</i></p>	<p><u>Points to note:</u></p> <ul style="list-style-type: none"> • This paragraph provides for mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. It therefore provides a general basis for co-operation between authorities in implementation. • The provision explicitly applies "especially" to securing the effective exercise of rights of access, as well as the right to maintain direct contacts on a regular basis. It therefore completes and reinforces the co-operation provided for between Central Authorities of Contracting States to the 1980 Convention (see Art. 21 of the 1980 Convention).
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³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Art. 37.

³⁷² See further, *infra*, at paras **11.23-11.24**.

- The maintenance of regular and direct contacts is provided for in Article 10 of the UNCRC.³⁷³

(4) Seeking / providing assistance in international contact / access cases (Art. 35)

<p><u>Article 35</u></p> <p><i>When a parent residing in a Contracting State is seeking to obtain or maintain access to a child habitually resident in another Contracting State, he / she can request the authorities where he / she resides to gather information or evidence and make a finding on the suitability of him / her to exercise access and on the conditions under which access is to be exercised.</i></p> <p><i>This information, evidence and finding must³⁷⁴ be considered by the authority which has jurisdiction to determine an application concerning access to the child before reaching its decision.</i></p>	<p><u>Points to note:</u></p> <ul style="list-style-type: none"> • The authority having jurisdiction to hear the access application may³⁷⁵ adjourn the proceedings pending the outcome of such a request, in particular when considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.³⁷⁶ • However, this does not prevent an authority having jurisdiction from taking provisional measures pending the outcome of the request.³⁷⁷
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(5) Providing documentation stating the powers of a person having parental responsibility or responsible for the protection of the child (Art. 40)³⁷⁸

<p><u>Article 40</u></p> <p><i>The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her</i></p>	<p><u>Points to note:</u></p> <ul style="list-style-type: none"> • There is no requirement upon Contracting States to provide such certificates. It is therefore a matter for each Contracting State whether to do so. • Should it decide to do so, the Contracting State in question must designate the authorities which are competent to draw up these certificates.³⁷⁹ These designations
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³⁷³ See the Explanatory Report (*op. cit.* note 20), at para. 146.

³⁷⁴ Once the information / evidence / finding(s) has been gathered in the Contracting State where the parent resides, it is *mandatory* for the Contracting State hearing the case to consider the information / evidence / finding(s).

³⁷⁵ The authority is not obliged to adjourn the proceedings – see the Explanatory Report (*ibid.*), at para. 148.

³⁷⁶ Art. 35(3).

³⁷⁷ Art. 35(4).

³⁷⁸ Art. 40 is not in Chapter V as a co-operation provision but is in Chapter VI of the Convention, "General Provisions".

³⁷⁹ Art. 40(3).

request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.

can be found on the Hague Conference website (< www.hcch.net >, under "Convention 34", then "Authorities".)

- The Contracting State competent to deliver a certificate is the Contracting State of the child's habitual residence, or the Contracting State of origin of the measure of protection.
- The certificate should usually indicate:
 - Who is the holder of parental responsibility;
 - Whether this results by operation of law (from the law which is applicable under Art. 16) or from a measure of protection taken by a competent authority according to Chapter II of the Convention;
 - The powers of the person having the parental responsibility;
 - In a suitable case, it may indicate in the negative the powers which the person does not have.³⁸⁰
- The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.³⁸¹ It will therefore be possible for any interested person to contest the correctness of the indications appearing on the certificate but, in the absence of a contest, a third party may in all security deal with the person indicated by the certificate, within the limits of the powers which are mentioned there.³⁸²

Example 11 (g)

A mother and child, aged 7, are habitually resident in Contracting State A. The father is habitually resident in Contracting State B. The mother and child relocated to Contracting State A with the agreement of the father six months ago. The child visits the father in Contracting State B for contact once a month. The father is concerned since, during the last two visits, the child has complained to his father that he is often left alone in the house at night whilst his mother goes out and that when he comes home from school there are always different men in the house. The father contacts the Central Authority in Contracting State B regarding the child's comments. He is not sure what to do since the child does have a history of making up fantastical stories for attention. The Central Authority in Contracting State B contacts the Central Authority in Contracting State A and requests that they investigate the matter and provide a report on the situation of the

³⁸⁰ See the Explanatory Report (*op. cit.* note 20), at para. 154.

³⁸¹ Art. 40(2).

³⁸² See the Explanatory Report (*op. cit.* note 20), at para. 155.

child.³⁸³ The Central Authority in Contracting State A, having been provided with the child's comments, is concerned for the welfare of the child and agrees to investigate the matter and provide such a report.³⁸⁴

Example 11 (h)

A family are habitually resident in Contracting State A, having relocated a year ago from Contracting State B. The maternal grandparents live in Contracting State B. The children (one boy, aged 8 and one girl, aged 10) visit their maternal grandparents regularly. The grandparents have become concerned about the children due to the fact that during the last visit the children's behaviour had changed. They were displaying sexualised behaviour and making inappropriate sexual remarks. When the grandparents challenged the children about this, the children made allegations that their father had touched them inappropriately on a number of occasions. The grandparents are afraid to challenge the parents about this behaviour since they are concerned that their contact will be stopped. Unsure what to do, the grandparents contact the Central Authority in Contracting State A. The Central Authority is concerned for the children's welfare and contacts the Central Authority in Contracting State B and requests that it (or its public authorities or other bodies) consider the need to take measures to protect the children.³⁸⁵ The Central Authority of Contracting State B, through its relevant public authorities, immediately takes steps to investigate the situation of the children. The children are interviewed by a child psychologist and repeat the allegations regarding the father. The competent authorities of Contracting State B, having interviewed the father and mother, immediately take measures to remove the father from the home whilst the matter is investigated further and pending the initiation of any proceedings which may be necessary regarding the children.

Example 11 (i)

A child is wrongfully removed from Contracting State A to Contracting State B. Both Contracting States are also Parties to the 1980 Hague Child Abduction Convention. An application for the return of the child is made to the authorities of Contracting State B. The application is refused on the basis of a grave risk of harm to the child. The authorities of Contracting State A still have jurisdiction to make a custody order provided that the conditions for a change of jurisdiction under Article 7 have not been met.³⁸⁶ However, before they make any order, they need to know the reasons for the refusal of the return application. This is because this information will be crucial to any decision on the merits of the custody issues relating to the child. Further, any decision which did not take into account such matters may be subsequently refused recognition and enforcement in Contracting State B.³⁸⁷ Under Article 34(1), the authorities of Contracting State A may, and as a matter of good practice for the reasons set out above should, request this information from the authorities of State B.³⁸⁸

Example 11 (j)

A child is habitually resident in Contracting State A. The mother wishes to relocate with the child to Contracting State B. The father objects but this objection is overridden by a court order. The court order sets out a specific arrangement for contact between the father and child. It envisages that contact handovers will take place at a neutral venue and in a manner such that the parents will not have to meet (due to the high levels of tension between the parents and the impact of this on the child). With the assistance of the Central Authorities in both States, the authorities in Contracting State A contact the

³⁸³ Art. 32 a).

³⁸⁴ In this case, the authorities in Contracting State B may also request that the authorities in Contracting State A request the competent authorities in Contracting State A to consider the need to take measures of protection in respect of the child (Art. 32 b)).

³⁸⁵ Art. 32 b).

³⁸⁶ See **Chapter 4**, *supra*, paras **4.20-4.25**.

³⁸⁷ Art. 23(2) d).

³⁸⁸ Compare Art. 11(6) of the Brussels II a Regulation, discussed further at para. **13.10**, *infra*.

relevant authorities in Contracting State B for assistance with the implementation of the contact arrangement.³⁸⁹ The authorities in Contracting State B make supervised exchange services available to the family, so that the child can be dropped off and collected at a neutral location with a third party present so that the parents do not have to meet.

Example 11 (k)

Two children are habitually resident in Contracting State A with their father. Their mother resides in Contracting State B. Since the children and father moved to Contracting State A one year ago, the mother has struggled to have any contact with the children. The mother issues an application for contact before the authorities of Contracting State A.³⁹⁰ The father resists this application alleging that it is not in the best interests of the children for them to have any contact with the mother due to her unstable mental health condition. The mother wishes to contest this claim and for the children to have contact with her at her home in Contracting State B each school holiday. She asks the authorities of Contracting State B, under Article 35(2), to gather information and evidence and make a finding showing (1) her suitability to exercise contact with her children, and (2) that such contact could take place at her home in Contracting State B. The authorities in Contracting State A, who are making the determination regarding contact, agree to adjourn proceedings until they receive a report of the findings from the authorities of Contracting State B.³⁹¹ The authorities in Contracting State B write a report stating, amongst other things, that, (1) according to the mother's medical records, she does not have, and has never had, any known mental health condition; (2) as a result of a number of interviews with her they cannot determine any reason as to why she would not be fit to exercise contact with her children; and, (3) having visited her home on more than one occasion, it is a suitable environment for children and indeed the children have their own bedroom at her home. The report and supporting documentation is admitted into evidence and considered in the proceedings before Contracting State B.³⁹²

Example 11 (l)

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

f. The transmission of personal data and information by authorities

11.23 It should be noted that personal data gathered or transmitted under the Convention is to be used only for the purposes for which it was gathered or transmitted.³⁹³

11.24 Further, authorities to whom information is transmitted are to ensure its confidentiality in accordance with the law of their State.³⁹⁴

³⁸⁹ Art. 35(1).

³⁹⁰ Which have jurisdiction on the basis of Art. 5 – see **Chapter 4**, *supra*.

³⁹¹ Art. 35(3).

³⁹² Art. 35(2).

³⁹³ Art. 41.

³⁹⁴ Art. 42.

g. Central Authority / public authority costs

11.25 Generally, Central Authorities and other public authorities are to bear their own costs in carrying out their tasks under the Convention.³⁹⁵ Such costs may include: the fixed costs of the functioning of the authorities, the costs of correspondence and transmissions, the costs of seeking out information regarding a child, the costs of assisting with discovering the whereabouts of a child, the costs of the organisation of mediation or settlement agreements, as well as the costs of implementation of the measures taken in another Contracting State, in particular, placement measures.³⁹⁶

11.26 However, Article 38 recognises that the authorities of Contracting States retain the “possibility of imposing reasonable charges for the provision of services”. If such a Contracting State does impose such charges, whether the imposition is seeking reimbursement for costs already incurred or requesting the provision of funds before the service is furnished, the charge should be formulated with a certain amount of moderation.³⁹⁷

11.27 The expression “public authorities” in Article 38 refers to the administrative authorities of Contracting States, and not to the courts. Court costs and, more generally, the costs of proceedings and lawyers are not included within Article 38.

11.28 Any Contracting State may also conclude an agreement with one or more other Contracting State(s) concerning the allocation of charges when applying the Convention.³⁹⁸ This provision may be useful, for example, in cases involving cross-border placements of children.

³⁹⁵ Art. 38(1).

³⁹⁶ See the Explanatory Report (*op. cit.* note 20), at para. 152.

³⁹⁷ *Ibid.*

³⁹⁸ Art. 38(2).

12. Relationship between the Convention and other instruments

How does this Convention affect the operation of the Hague Convention of 12 June 1902 governing the guardianship of minors?³⁹⁹

Article 51

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

How does this Convention affect the operation of the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors?⁴⁰⁰

Article 51

12.2 In relations between Contracting States to the 1996 Convention, the 1996 Convention replaces the 1961 Convention. However, this replacement is without prejudice to the recognition of measures previously taken in application of the 1961 Convention.

12.3 This means that if a measure was taken by a Contracting State to the 1961 Convention in accordance with Article 4 of that Convention (which gave jurisdiction to the authorities of the Contracting State of the child's nationality), this measure will have to be recognised under the 1961 Convention (Art. 7 of the 1961 Convention) by any other State which was a Party to the 1961 Convention at the time the measure was taken. This is the case even if, in the meantime, the two States concerned have become Parties to the 1996 Convention.

Example 12 (a)

State A and State B are Contracting States to the 1961 Hague Convention on the Protection of Minors. In 2007, the 1996 Convention comes into force in State B. In 2008, the authorities of State A make an order regarding a child who is habitually resident in State C based on the child having the nationality of State A. This order fulfils the criteria for recognition under the 1961 Convention. In 2009, the 1996 Convention comes into force in State A. In 2010, recognition of the measure is sought in State B. Although not entitled to recognition under Article 23 of the 1996 Convention,⁴⁰¹ the order should be recognised in State B under the 1961 Convention, by virtue of Article 51 of the 1996 Convention.

³⁹⁹ As at April 2011, the Contracting States are Austria, Belgium, Italy, Luxembourg, Portugal, Romania and Spain. In relations between Contracting States to the 1961 Hague Convention on the Protection of Minors, the 1961 Convention replaced the 1902 Convention. It should be noted that all the remaining Contracting States to the 1902 Convention are EU Member States who are therefore bound by the Brussels II a Regulation, which prevails pursuant to Art. 59(1) of the Regulation.

⁴⁰⁰ As at April 2011, the Contracting States are Austria, China (the Convention applies only to the Special Administrative Region of Macao), France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland and Turkey.

⁴⁰¹ Art. 53(2) – see **Chapter 2**, *supra*. Even if temporal scope were not a difficulty, recognition may also be refused on the basis of Art. 23(2) a) of the Convention – see **Chapter 9**, *supra*.

How does this Convention affect the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*?**Article 50**

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

How does this Convention affect the operation of other instruments?**Article 52**

12.5 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the Contracting States to such instruments.⁴⁰²

12.6 This Convention also does not affect the possibility of one or more Contracting States concluding agreements which contain, in respect of children habitually resident in any of the Contracting States to such agreements, provisions on matters governed by this Convention.⁴⁰³ Any agreements concluded by Contracting States on matters falling within the scope of this Convention will not affect the application of this Convention between those Contracting States and other Contracting States who are not party to this agreement.⁴⁰⁴

12.7 Currently the main instrument that fits into this category is the Brussels II a Regulation⁴⁰⁵ which operates between the Member States of the European Union, excluding Denmark. The material scope of the Regulation and the 1996 Convention is very similar, although the Regulation does not include rules on applicable law.⁴⁰⁶ As concerns the relationship with the 1996 Convention, for Member States of the European Union (excluding Denmark), the Regulation will prevail where a child has his or her habitual residence in a Member State of the European Union (excluding Denmark), or where the recognition or enforcement of a decision issued by the competent authorities of a Member State (excluding Denmark) is sought in another Member State (excluding Denmark), irrespective of where the habitual residence of the child is.⁴⁰⁷

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

⁴⁰² Art. 52(1).

⁴⁰³ Art. 52(2).

⁴⁰⁴ Art. 52(3).

⁴⁰⁵ See *supra*, note 8.

⁴⁰⁶ It should be noted that the rules on applicable law contained within the 1996 Convention apply to children habitually resident in an EU Member State. In particular, Art. 15 of the 1996 Convention will apply if the court of an EU Member State bound by the Regulation exercises jurisdiction under the rules of the Regulation (where the ground of jurisdiction is one which exists in Chapter II of the 1996 Convention) – see **Chapter 9**, *supra*, para. **9.1**.

⁴⁰⁷ Art. 61 of the Regulation. See also the Explanatory Report (*op. cit.* note 20), at para. 172.

13. Special topics

International child abduction

13.1 The 1996 Convention does not amend or substitute the mechanism established by the 1980 Convention for dealing with situations of international child abduction.⁴⁰⁸ Instead, the 1996 Convention supplements and strengthens the 1980 Convention in certain respects. This means that a number of its provisions can be useful as a complement to the mechanism of the 1980 Convention when the 1980 Convention does apply to a case. However, in States or situations where the 1980 Convention does *not* apply, the provisions of the 1996 Convention may still be a useful stand-alone source of remedies in international child abduction cases. These two different situations are discussed below.

13.2 As a general point in relation to the 1996 Convention and international child abduction, and whether the 1980 Convention applies to a case or not, it should be noted that the jurisdictional rules set out in Chapter II of the 1996 Convention create a common approach to jurisdiction which provides certainty to parties and thereby may discourage attempts at forum shopping through international child abduction. The rule in Article 5 which designates the child's habitual residence as the primary basis for the allocation of jurisdiction encourages parents to litigate (or to reach an agreement on) custody, access and relocation issues in the Contracting State where the child currently lives, rather than removing the child to a second jurisdiction before determining such issues.

13.3 Further, as discussed in **Chapter 4** above, Article 7 of the 1996 Convention sets out a special jurisdictional rule for cases of international child abduction.⁴⁰⁹ The authorities of the Contracting State of the habitual residence of the child immediately before the wrongful removal or retention retain jurisdiction for measures aimed at the protection of the person and the property of the child until a number of conditions have been met. This rule seeks to balance two ideas. The first is that a person who wrongfully removes or retains a child should not be able to take advantage of this act by securing a change in the authorities having jurisdiction to take measures relating to custody or contact. The second is that the change in residence of the child, if it persists, is a fact that cannot, for the most part, be ignored to such a point as to deny the jurisdiction of the authorities of the new State indefinitely. While jurisdiction remains with the authorities of the Contracting State from which the child has been wrongfully removed or retained, the authorities of the Contracting State to which the child has been wrongfully removed or in which he or she has been wrongfully retained can only take necessary measures of protection under Article 11 (where the case is considered urgent⁴¹⁰) and may not take provisional measures under Article 12 of the Convention.⁴¹¹

13.4 The definition of wrongful removal or retention used in the 1996 Convention is the same as that found in the 1980 Convention, indicating the complementary nature of the two Conventions.⁴¹² The interpretation and the application of the 1980 Convention provisions relating to wrongful removal and retention may therefore offer assistance in the determination of jurisdiction under the 1996 Convention.⁴¹³

⁴⁰⁸ This is seen clearly in Art. 50 of the 1996 Convention, referred to, *supra*, in para. **12.4**.

⁴⁰⁹ This is discussed, *supra*, in paras **4.20-4.28**.

⁴¹⁰ Discussed more fully, *supra*, **Chapter 6**.

⁴¹¹ See Art. 7(3) of the Convention and the Explanatory Report (*op. cit.* note 20), at para. 51.

⁴¹² Art. 7(2) of the 1996 Convention and Art. 3 of the 1980 Convention. See, *supra*, para. **4.21**.

⁴¹³ See, *supra*, para. **4.21**. For decisions on the interpretation of wrongful removal or retention, see the case law and commentary in the International Child Abduction Database (INCADAT, < www.incadat.com >).

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

13.5 The 1980 Convention will continue to apply between Contracting States to the 1996 Convention that are also Parties to the 1980 Convention.⁴¹⁴

13.6 The 1996 Convention supplements and reinforces the 1980 Convention by providing an explicit framework for jurisdiction, including in exceptional cases where the return of the child is refused or return is not requested. The Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the Contracting State of the child's habitual residence in deciding upon any measures which may be needed to protect the child in the long term.⁴¹⁵ It does this by ensuring that the Contracting State of the child's habitual residence retains jurisdiction until certain conditions have been fulfilled.⁴¹⁶

13.7 The 1996 Convention also contains provisions which may assist when a judicial or administrative authority wishes to order the return of a child under the 1980 Convention, but *only on the basis that* certain interim measures are put in place to ensure the safe return of the child and to ensure the child's continued protection in the requesting Contracting State (until the authorities in that Contracting State can act to protect the child). In this regard, the 1996 Convention contains a specific ground of jurisdiction which, where the case is one of urgency, enables the requested Contracting State to take necessary measures of protection regarding the child.⁴¹⁷ The 1996 Convention adds to the efficacy of any such interim measures of protection ordered by ensuring that such orders are recognised by operation of law in the Contracting State to which the child is to be returned and are enforceable in that Contracting State upon the request of any interested party (until such time as the authorities in the requesting Contracting State are able to put in place any necessary protective measures).⁴¹⁸

13.8 The 1996 Convention may also assist with questions of interim access in abduction cases where return proceedings under the 1980 Convention are pending.⁴¹⁹ Where the Contracting State of the child's habitual residence is not in a position to deal with interim access, Article 11 of the Convention may provide a basis for the authorities of the Contracting State hearing the return proceedings to make such an order.⁴²⁰ This order will lapse once the authorities of the Contracting State of the child's habitual residence have taken the necessary measures of protection in this regard.⁴²¹

13.9 The provisions regarding co-operation in the 1996 Convention may also be used to support the co-operation requirements found in the 1980 Convention. Under the 1980 Convention, the Central Authority has to provide "information of a general character as to the law of their State in connection with the application of the Convention",⁴²² whilst under the 1996 Convention, the Central Authority has to take steps to provide, in

⁴¹⁴ Art. 50. See, *supra*, para. 12.4.

⁴¹⁵ In relation to the 1980 Convention, see Arts 16 and 19 of that Convention, as well as paras 16 and 19 of the Explanatory Report on the 1980 Hague Child Abduction Convention, by Elisa Pérez-Vera (1982), in *Actes et documents de la Quatorzième Session (1980)*, tome III, *Child abduction*. The Explanatory Report states that the 1980 Convention rests implicitly on the principle that any debate on the merits of custody rights should take place before the competent authorities in the Contracting State where the child had his / her habitual residence prior to his / her wrongful removal / retention (*ibid.*, at para. 19).

⁴¹⁶ Art. 7 – see paras 4.20-4.25, *supra*.

⁴¹⁷ Art. 11 – see **Chapter 6**, *supra* (and particularly, **Example 6 (g)**).

⁴¹⁸ See para. 6.11 regarding the recognition and enforcement of measures of protection taken on the basis of Art. 11 and, more generally, the discussion at **Chapter 10**, *supra*.

⁴¹⁹ See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 200), at para. 4.6.2, where, in the context of Art. 21 of the 1980 Convention, it is stated: "in some countries the view has been taken that Article 21 does not cover interim contact applications made pending a decision on return. Again this is inconsistent with the underlying principle that contact should be maintained in all circumstances where the child is not at risk. Moreover, a failure to restore contact to a left-behind parent during the course of what may sometimes be protracted return proceedings carries the risk of further harm to the child and alienation from the left-behind parent."

⁴²⁰ See, *supra*, paras 6.2-6.4 on when a case may be considered "urgent" for the purposes of Art. 11.

⁴²¹ Art. 11(2) – see paras 6.7-6.8, *supra*.

⁴²² Art. 7(2) e).

connection with the application of the Convention, "information as to the laws of, and services available in, their States relating to the protection of children".⁴²³ This will enable another Central Authority or a parent to obtain a wider range of information about the laws of the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained.

13.10 Article 34 of the 1996 Convention, which permits competent authorities contemplating a measure of protection, if the situation of the child so requires, to request an authority of another Contracting State which has information relevant to the protection of the child to communicate such information,⁴²⁴ may be especially useful where a return order is refused under the 1980 Convention.⁴²⁵ In this situation, where an authority in the Contracting State of the child's habitual residence is seized with the custody dispute and does not already have before it the information upon which the refusal to return was based, Article 34 enables this authority to request such information from the authority which refused the return. This may prevent a situation arising where the authorities of the Contracting State of the child's habitual residence hearing the custody dispute do not have available to them the information that was considered by the authorities hearing the return application. It should be noted that there is a distinction here between the operation of the 1996 Convention and the operation of the Brussels II a Regulation.⁴²⁶ Article 11(6) of the Brussels II a Regulation places an *obligation* on a court that has refused a return under Article 13 of the 1980 Convention to transmit all documents relating to the hearing to the authorities of the State of the child's habitual residence prior to the wrongful removal or retention. The 1996 Convention contains no such obligation. However, as discussed in **Chapter 11, supra**, it does provide for such co-operation and communication between authorities.⁴²⁷ It should therefore be thought of as good practice to use Article 34 of the 1996 Convention, where necessary, in such cases.

13.11 Article 34 of the 1996 Convention may also be of use to a *requested* Contracting State hearing return proceedings under the 1980 Convention. If information from the Contracting State of the child's habitual residence is relevant to the decision of whether to return a child or not,⁴²⁸ or to any other interim measures of protection the judicial or administrative authority in the requested Contracting State is contemplating taking (*e.g.*, interim measures of protection relating to the safe return of the child), the authority may use the mechanism in Article 34 to obtain such relevant information from the Contracting State of the child's habitual residence.

13.12 Lastly, it should be noted that neither the 1996 Convention nor the 1980 Convention states the procedure to be followed where proceedings for the return of a child are brought at the same time in the Contracting State of the child's habitual residence (under Arts 5 and 7 of the 1996 Convention) and in the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained (under Art. 12 of the 1980 Convention). Article 13 of the 1996 Convention does not solve this issue since the jurisdiction to act under the 1980 Convention is not founded upon Articles 5 to 10 of the 1996 Convention (see Art. 13 of the 1996 Convention). In such circumstances, it will be for the Contracting States concerned to communicate and co-operate (either via Central Authorities and / or using direct judicial communications) as to the most appropriate way forward, taking into account the child's best interests.⁴²⁹

⁴²³ Art. 30(2).

⁴²⁴ Art. 34. See, further, para. **11.22, point (2)**, *supra*.

⁴²⁵ Particularly if return is refused on the basis that there is a grave risk that the child's return would expose him / her to physical or psychological harm or otherwise place the child in an intolerable situation – Art. 13(1) *b*) of the 1980 Convention.

⁴²⁶ See *supra*, note 8.

⁴²⁷ Art. 34. See, further, para. **11.22, point (2)**, *supra*. See also **Example 11 (i)**.

⁴²⁸ *E.g.*, to a defence raised under Art. 13 of the 1980 Convention. However, in relation to whether the removal or retention of a child was "wrongful" in accordance with the meaning of Art. 3 of the 1980 Convention, see the specific mechanism provided for in Art. 15 of the 1980 Convention.

⁴²⁹ One relevant factor in determining this issue may be the expeditious nature of the return proceedings under the 1980 Convention (see Arts 2 and 11 of the 1980 Convention).

Example 13 (a)

In this example, States A and B are Contracting States to both the 1996 and the 1980 Conventions.

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

- The father initiates return proceedings under the 1980 Convention. The mother makes allegations to the effect that the father has sexually abused the child and the courts in State B refuse the application for return on the basis that there is a grave risk that returning the child would expose him to physical or psychological harm.⁴³⁰

- The father therefore makes an application to the authorities in State A for the return of the child (since the authorities in State A retain jurisdiction under Art. 7 of the 1996 Convention, the refusal to return under the 1980 Convention not leading, in itself, to a change in jurisdiction⁴³¹). Under Article 34(1), the courts of State A can, and should if necessary, request information from the authorities of State B as to the reasons for the refusal of the return application and the information / evidence upon which the decision was based.

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

- State A's order must be recognised by operation of law in State B if there are no grounds for refusal under Article 23(2). The fact that a decision of non-return based on Article 13 of the 1980 Convention has been given in State B is not, of itself, a ground for refusal of recognition under Article 23. If the mother is not prepared to voluntarily comply with State A's order, the order may be enforced in accordance with Articles 26 and 28 of the 1996 Convention.⁴³²

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

⁴³⁰ Art. 13(1) b) of the 1980 Convention.

⁴³¹ See paras **4.20-4.25**, *supra*.

⁴³² See paras **10.12-10.17**, *supra*.

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

13.13 There are a number of instances where the 1980 Convention might not apply to a case although the 1996 Convention does. For example, the 1980 Convention does not apply to children over 16 years old, while the 1996 Convention applies to a child up to the age of 18 years.⁴³³ More importantly, the 1980 Convention will only apply to cases involving two States that are Contracting States to that Convention and between whom the Convention has entered into force. For example, if a State has acceded to the 1980 Convention, the 1980 Convention will apply only between it and another Contracting State that has *accepted* its accession.⁴³⁴ Two States involved in an international child abduction case may therefore both be Contracting States to the 1996 Convention, but the 1980 Convention may not be in force as between them.

13.14 Many of the ways in which the 1996 Convention can assist in cases of wrongful removal / retention where the 1980 Convention does *not* apply are mentioned in the previous Chapters of this Handbook. For example:

- (a) The jurisdiction provisions, which ensure that jurisdiction remains with the Contracting State of the child's habitual residence until strict conditions have been fulfilled,⁴³⁵ were discussed at paragraphs **4.20** to **4.25** and also at paragraphs **13.2** to **13.4**, *supra*;
- (b) The co-operation provisions, which ensure that a wide range of services that may assist in cases of international child abduction are provided to parents in Contracting States to the 1996 Convention, were discussed in **Chapter 11**, *supra*. The main provisions that may be helpful when a child has been wrongfully removed / retained are the duties of the Central Authorities to provide assistance in discovering the whereabouts of the child and to facilitate agreed solutions for the protection of the person of the child.⁴³⁶
- (c) The provisions on recognition and enforcement, discussed at **Chapter 10**, *supra*, when combined with the jurisdictional rules, can also be used in some circumstances to ensure a child is actually returned to the Contracting State of his / her habitual residence. For example, the parent in the Contracting State of the child's habitual residence might already have an enforceable order for custody or delivery of the child or might be able to obtain one quickly in this Contracting State. This order could then be sent for recognition and enforcement under the Convention to the Contracting State to which the child has been wrongfully removed or in which the child has been wrongfully retained. Once declared enforceable or registered for enforcement, the order has to be enforced in the latter Contracting State as if it had been made by the authorities of that State, unless one of the grounds for refusal of recognition is established.⁴³⁷

Example 13 (b)

In this example both States A and B are Contracting States to the 1996 Convention. However, State B is not a Contracting State to the 1980 Convention.⁴³⁸

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

⁴³³ Art. 2 of the 1996 Convention; Art. 4 of the 1980 Convention.

⁴³⁴ See Art. 38 of the 1980 Convention.

⁴³⁵ Art. 7 of the 1996 Convention.

⁴³⁶ Art. 31 *b*) and Art. 31 *c*) – which may be performed directly by the Central Authority or indirectly, through public authorities or other bodies. See, *supra*, para. **11.10**.

⁴³⁷ On the issue of enforcement, see, *supra*, paras **10.12-10.17**.

⁴³⁸ The 1980 Convention is therefore not in force as between the two States and cannot apply in the case.

- Under the 1996 Convention, the father can ask the Central Authority in State A to request the Central Authority in State B to provide assistance in discovering the whereabouts of the child in that State.⁴³⁹
- He can also ask the Central Authority in State A to obtain information from the Central Authority in State B regarding the laws of, and services available in, State B relating to the protection of children.⁴⁴⁰
- Jurisdiction to take measures of protection in relation to the child remains with the authorities in State A.⁴⁴¹ On application by the father, these authorities may therefore be able to order that the child be returned to the jurisdiction of State B forthwith (either in the mother's care or, if the mother is not willing to return to State B, that the child be delivered into the father's care). This order will have to be enforced in State B upon the request of the father or any interested person.⁴⁴² However, depending upon the facts of the case, the courts in State A may alternatively order that the child should remain in the care of the mother in State B pending a full hearing of the custody issues relating to the child (which will take place in State A), but that the child is to have interim contact with the father whilst these proceedings are ongoing.

Access / contact⁴⁴³

What are "rights of access"?

13.15 Article 3 *b*) states that "measures directed to the protection of the person or the property of the child" may deal, in particular, with "rights of access". Whilst no complete definition of the term "rights of access" is given in the Convention, these rights are expressly stated to include "the right to take a child for a limited period of time to a place other than the child's habitual residence".⁴⁴⁴ This formulation is a reproduction of the definition of "rights of access" found in Article 5 *b*) of the 1980 Convention.⁴⁴⁵ This consistency in language in the two Conventions is intentional and the terms should be interpreted in the same autonomous⁴⁴⁶ manner in both Conventions to ensure the complementarity of the Conventions.⁴⁴⁷ It should be noted that the Explanatory Report to the 1996 Convention makes it clear that such "rights of access" encompass "the contacts at a distance which a parent is authorised to maintain with his or her child by correspondence, telephone or telefax".⁴⁴⁸

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

⁴³⁹ Art. 31 *c*). See, *supra*, para. **11.10**.

⁴⁴⁰ Art. 30(2): the father may ask the Central Authority in Contracting State B, his Contracting State of habitual residence, to make the request for information, or he may approach the Central Authority in Contracting State A directly. See, *supra*, para. **11.9**.

⁴⁴¹ Art. 7 of the 1996 Convention, discussed at paras **4.20-4.25**, *supra*.

⁴⁴² Unless a ground for non-recognition under the Convention is established – see Art.26(3), discussed, *supra*, at para. **10.14**.

⁴⁴³ Further information on transfrontier contact can be found in the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 200).

⁴⁴⁴ Art. 3 *b*). See also, paras **3.22-3.24**, *supra*, on the meaning of Art. 3 *b*).

⁴⁴⁵ The formulation of "rights of custody" found in Art. 3 *b*) of the 1996 Convention is also a reproduction of Art. 5 *b*) of the 1980 Convention.

⁴⁴⁶ This means that the terms should be given an independent interpretation, free of domestic law constraints.

⁴⁴⁷ See *supra*, note 72.

⁴⁴⁸ See the Explanatory Report (*op. cit.* note 20), at para. 20. Today, this indirect contact would presumably also include contact via e-mail and internet communications, including video-conferencing facilities.

Inter-State administrative co-operation⁴⁴⁹ in international access / contact cases

13.17 In addition to the general duties of Central Authorities, some of which, such as to provide assistance in locating the child and in facilitating agreed solutions, will also be useful in ensuring the exercise of access or contact, Article 35 of the 1996 Convention is dedicated specifically to co-operation in international access / contact cases. Article 35 provides that the competent authorities of one Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis.⁴⁵⁰

13.18 Article 35 also provides a mechanism for a parent who lives in a different Contracting State than the child to apply to the authorities in his or her own State for them to gather information and evidence and make a finding on the suitability of that parent to exercise access and the conditions under which such access is to be exercised.⁴⁵¹ This information, evidence or finding has to be considered by the authorities who have jurisdiction when making a decision concerning the child. The article also gives a discretion to the authorities who have jurisdiction to adjourn the access / contact proceedings pending the outcome of such a request.⁴⁵² It is emphasised in the Convention that this adjournment to wait for the receipt of such information may be particularly appropriate when the proceedings are considering the restriction or termination of access rights granted in the State of the child's former habitual residence.⁴⁵³

Example 13 (c)

The mother and child moved to Contracting State A from Contracting State B several years ago and the father remained in Contracting State B. Access arrangements were in place and the child and father had regular contact. The mother now wishes to reduce or terminate the access arrangements between the child and the father and initiates proceedings before the authorities of Contracting State A to this end. The father requests that the authorities of Contracting State B gather information / evidence and make a finding on his suitability to exercise access and on the conditions under which access should be exercised.⁴⁵⁴ He also requests that the authorities hearing the case in Contracting State A adjourn the proceedings pending receipt of Contracting State B's findings.⁴⁵⁵ The authorities accede to this request and the proceedings in Contracting State A are adjourned. The authorities in Contracting State B investigate the situation and produce a report which demonstrates the suitability of the father to exercise access. This report and accompanying information is admitted as evidence and considered by the authorities in Contracting State A when they are making their decision on access / contact.⁴⁵⁶

Advance recognition⁴⁵⁷

13.19 Under the 1996 Convention a contact order made in one Contracting State will generally be recognised by operation of law in all other Contracting States.⁴⁵⁸ The grounds on which a refusal of recognition may be based are limited and exhaustively enumerated in Article 23(2) of the Convention.⁴⁵⁹

⁴⁴⁹ For a detailed discussion regarding the co-operation provisions, see **Chapter 11**, *supra*.

⁴⁵⁰ Art. 35(1). See, *supra*, para. **11.22, points (3) and (4)**.

⁴⁵¹ Art. 35(2).

⁴⁵² Art. 35(3).

⁴⁵³ *Id.*

⁴⁵⁴ Art. 35(2).

⁴⁵⁵ Art. 35(3).

⁴⁵⁶ Art. 35(2).

⁴⁵⁷ This is discussed further, *supra*, **Chapter 10**, paras **10.7-10.11**.

⁴⁵⁸ Art. 23(1).

⁴⁵⁹ See, *supra*, paras **10.4-10.6**.

13.20 However, the possibility for 'advance recognition', provided for by Article 24 of the Convention, is a particularly useful tool in facilitating international access / contact. This is because it may allay parental concerns that contact orders will not be respected by parties in other Contracting States. Two situations involving international contact / access illustrate this use:⁴⁶⁰

(1) Where a child is to travel to another State for a period of contact / access, the primary carer(s) of a child may be concerned that the contact order will not be adhered to by the person exercising contact and that the child may not be returned to their care at the conclusion of contact. Advance recognition of both the custody and contact orders of the Contracting State of the child's habitual residence will ensure that, if the contact order is not respected in the Contracting State where contact is exercised, the return of the child to the primary carer can be enforced (in accordance with Arts 26 and 28 of the 1996 Convention). This legal certainty may encourage the primary carer to permit contact to take place,⁴⁶¹ and

(2) Where a parent wishes to relocate internationally with a child, the 'left-behind' parent may be concerned that any contact which may be ordered will not be adhered to by the relocating parent once the relocation has taken place. Advance recognition will reassure this parent that, if the contact order is not respected by the relocating parent, it will be enforced in the Contracting State to which the parent and child have moved as if it had been ordered there.⁴⁶²

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

International relocation⁴⁶³

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

13.23 It is important that the terms and conditions of a contact order made in the context of an international relocation are given maximum respect in the State to which relocation occurs. Two reasons for this are: (1) the authorities deciding upon relocation

⁴⁶⁰ Where the 1996 Convention is *not* in force as between the relevant States, so-called 'mirror orders' are often used as a means of ensuring that an order made in one State is able to be enforced in another State. A 'mirror order' is an order made by the courts in the State, for example, where contact is to be exercised (in example (1) at para. **13.20**) or to where the child is to relocate (in example (2) at para. **13.20**), that is identical or similar to an order made in the other State. As such, the order made in the latter State becomes fully enforceable and effective in *both* States. However, in some States and situations parties have encountered difficulties in obtaining mirror orders. This has often been as a result of the fact that the State in question has not considered itself to have jurisdiction to make the mirror order sought because the child is not habitually resident in that State (*e.g.*, if the child will be simply visiting that State to exercise contact). The 1996 Convention therefore avoids this difficulty and provides a far simpler and quicker method by which the order of one Contracting State will be recognised and enforceable in the other Contracting State.

⁴⁶¹ If the 1980 Convention is in force as between the relevant States, the return remedy would also provide considerable reassurance to a primary carer in this situation. This is because the primary carer would know that an expedient remedy exists if the child is wrongfully retained in breach of the court order. In this way, the 1980 Convention also facilitates international contact / access.

⁴⁶² However, see paras **13.22-13.26**, *infra*, in relation to international relocation and the fact that the Contracting State to which the child has moved, once the child has obtained a habitual residence there, will become the Contracting State with general jurisdiction in relation to the child (Art. 5(2); see paras **4.8-4.11**, *supra*).

⁴⁶³ International relocation and contact are discussed more fully in Chapter 8 of the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 200).

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 (2) if contact orders in such situations are not respected in a particular State, this may have a negative impact on judges considering whether to permit relocation to that State in the future (*i.e.*, permission to relocate may be refused because contact cannot be adequately guaranteed).

13.24 When a contact order is made in the context of international relocation (by the authorities in the Contracting State where the child is habitually resident), that order is entitled, under Article 23(1) of the Convention, to be recognised by operation of law in the Contracting State to which relocation is to occur. It is entitled to be enforced in that Contracting State, according to Articles 26 and 28, as if it had been made in that Contracting State. If there is any concern that the order might not be recognised following the relocation, an application for advance recognition under Article 24 should be made.⁴⁶⁴

13.25 However, a concern in international relocation cases may be that, under the 1996 Convention, as soon as the child becomes habitually resident in the Contracting State to which he / she has lawfully⁴⁶⁵ relocated, primary jurisdiction to take measures of protection in respect of the child will move to the competent authorities in that Contracting State (see Art. 5(2) and paras **4.8-4.11**, *supra*). The concern is therefore that the relocating parent may take advantage of this change in jurisdiction and may subsequently apply to modify, restrict or even terminate the contact rights of the parent who remained in the Contracting State of origin. On this issue, see Chapter 8 of the Guide to Good Practice on Transfrontier Contact for detailed guidance.⁴⁶⁶

13.26 As mentioned above, one possible safeguard would be for this parent to apply for 'advance recognition'⁴⁶⁷ of the contact order in the new Contracting State with a view to securing his or her contact rights. Once recognised, the authorities of the Contracting State of relocation should regard the contact order as having the same status as an order made by the authorities of that Contracting State. However, even where the contact order has not been the subject of 'advance recognition', the Contracting State to which the child has relocated should not allow review and variation of the contact order unless, in the circumstances, it would permit a review or variation of a domestic contact order.⁴⁶⁸ Moreover, where the Contracting State to which the child has relocated is dealing with an application to review or vary a contact order which has been made *shortly after* a court-permitted relocation, the court dealing with the review application should be very slow to disturb the arrangements concerning contact made by the authorities which decided upon the relocation.⁴⁶⁹ In the event that it is felt necessary to take action to review or vary the contact order, consideration should be given to using the mechanisms provided for in the Convention in order to obtain the relevant information from the authorities in the Contracting State of the child's former habitual residence (*e.g.*, consideration of the use of Art. 9 of the Convention to transfer jurisdiction to that Contracting State, or use of the mechanism in Art. 35).⁴⁷⁰

⁴⁶⁴ Discussed, *supra*, paras **13.19-13.21**.

⁴⁶⁵ If the relocation was not lawful and was a wrongful removal or wrongful retention of the child, see Art. 7 and paras **4.20-4.25**, *supra*.

⁴⁶⁶ *Op. cit.* (note 200), at para 8.5.4.

⁴⁶⁷ Advance recognition is further discussed *supra*, paras **13.19-13.21**.

⁴⁶⁸ See *ibid.*, Chapter 8 and, particularly, para. 8.5.

⁴⁶⁹ *Ibid.*, at para. 8.5.3.

⁴⁷⁰ These mechanisms may also prove useful in situations where a contact order was not made in the context of a proposed relocation, but a lawful relocation occurred shortly after a contact order was made. *Ibid.*

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

13.27 It should be remembered that, in States and situations where the 1980 Convention is also applicable, Articles 7(2) *f*) and 21 of the 1980 Convention contain important obligations regarding access / contact.⁴⁷¹ This is not the place for a detailed discussion of these provisions but reference should be made to the Guide to Good Practice on Transfrontier Contact⁴⁷² (in particular, Chapter 4) and to the Guide to Good Practice on Central Authority Practice⁴⁷³ (in particular, Chapter 5).

13.28 Contracting States should bear in mind that the provisions of the 1980 and 1996 Conventions do have different emphases in relation to rights of access. Article 21 of the 1980 Convention specifically provides that a Central Authority, either directly or through intermediaries, “may initiate or assist in the institution of proceedings with a view to organising or protecting these [access] rights and securing respect for the conditions to which the exercise of these rights may be subject”. Where both Conventions apply, the provisions of the 1996 Convention relating to access are intended to complete and reinforce the co-operation in relation to access rights provided for in the 1980 Convention.⁴⁷⁴

13.29 Where an application for international access / contact is being made in circumstances where both Conventions apply, it is suggested that, as a matter of good practice and where relevant, both Conventions be mentioned in the application.⁴⁷⁵

Foster care, *kafala* and institutional placements across borders

13.30 Decisions regarding the placement⁴⁷⁶ of a child in a foster family or in institutional care, or the provision of care by means of *kafala* or an analogous institution come within the definition of measures directed to the protection of children and fall within the scope of the Convention.⁴⁷⁷ Jurisdiction to make such placements or decisions is therefore governed by the jurisdictional provisions in the Convention⁴⁷⁸ and placements or decisions made in one Contracting State will have to be recognised and enforced in other Contracting States, in the absence of a ground for non-recognition.⁴⁷⁹

13.31 Importantly, the Convention also provides for co-operation between States in relation to the growing number of cases in which children placed in alternative care move abroad, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *kafala*.⁴⁸⁰

⁴⁷¹ As stated at note 461 above, it should also be remembered that the return remedy in the 1980 Convention is a very important tool in facilitating international contact / access. By providing a carer with the strongest guarantee against the wrongful retention of a child, it provides a reassuring legal framework within which international contact / access can take place.

⁴⁷² *Op. cit.* note 200.

⁴⁷³ *Op. cit.* note 324.

⁴⁷⁴ See the Explanatory Report (*op. cit.* note 20), at para. 146.

⁴⁷⁵ See also paras **11.2** and **11.5**, *supra*, regarding giving due consideration to designating the same Central Authority under the 1980 and 1996 Conventions where a State is Party to both Conventions. This is an example of a situation in which the designation of the same body under both Conventions may be useful.

⁴⁷⁶ See, *supra*, para. **3.37** regarding the meaning of the term “placement” in this context.

⁴⁷⁷ Art. 3 *e*). See, *supra*, paras **3.25-3.27**.

⁴⁷⁸ Arts 5-10, see, *supra*, **Chapter 4**.

⁴⁷⁹ Art. 23(2). See, *supra*, paras **10.4-10.6**.

⁴⁸⁰ As stated earlier in this Handbook, *kafala* arrangements fall outside the scope of the 1993 Hague Intercountry Adoption Convention: see paras **3.25-3.27**, *supra*.

Example 13 (d)

*The child is habitually resident in Contracting State A. The authorities of Contracting State A take a decision that the child should be cared for by her uncle and his wife through kafala. The couple and child later move to Contracting State B. As the decision taken by the authorities of Contracting State A fulfils all the requirements for recognition, the authorities of Contracting State B will recognise the kafala arrangement by operation of law.*⁴⁸¹

13.32 If an authority is contemplating the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution, *and such care is to take place in another Contracting State*, the Convention sets down strict rules which must be complied with before this placement can be put into effect. These rules involve co-operation between the authorities of both Contracting States and ensure that the best interests of the child are secured. If these rules are not respected, the placement may not be recognised abroad under the Convention.⁴⁸²

13.33 The rules are set out in Article 33 of the Convention.⁴⁸³ This article applies if:

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

13.34 The authority wishing to make the placement must transmit a report to the authority in the other Contracting State with details of the child and the reasons for the proposed placement or provision of care.⁴⁸⁴ The decision to place the child abroad by the authority having jurisdiction under Articles 5 to 10 may not be made unless the authority from the other Contracting State has consented to the placement or provision of care, taking into account the child's best interests.⁴⁸⁵ If this procedure is not followed, it means that the measure may be refused recognition under the Convention.⁴⁸⁶

Example 13 (e)

The child is habitually resident in Contracting State A with his parents who are killed in a car accident. The child's closest relatives, his mother's cousin and his wife, live in Contracting State B. The authorities of Contracting State A wish to place the child in the care of this couple.

As the authorities of Contracting State A have jurisdiction to take measures directed to the protection of the child and are considering the provision of care by kafala in Contracting State B, they must transmit a report to the authorities of Contracting State B with details of the child and the reasons for the proposed provision of care.⁴⁸⁷ The authorities in Contracting State B must then consider whether or not to consent to the proposed measure, taking into account the best interests of the child.⁴⁸⁸ If the authorities of Contracting State B consent to the proposed measure, the authorities of Contracting

⁴⁸¹ Art. 23. See, *supra*, paras **10.1-10.3**.

⁴⁸² Art. 23(2) *f*). See, *supra*, paras **10.4-10.6**.

⁴⁸³ See paras **11.12-11.16**, *supra*.

⁴⁸⁴ Art. 33(1).

⁴⁸⁵ Art. 33(2).

⁴⁸⁶ Art. 23(2) *f*).

⁴⁸⁷ Art. 33(1).

⁴⁸⁸ Art. 33(2).

State A can proceed to make the order. If the authorities of Contracting State B refuse the proposed measure or if the authorities in Contracting State A fail to use this procedure, any decision they take regarding the provision of care by the mother's cousin and his wife in Contracting State B may be refused recognition in Contracting State B (and all other Contracting States) under the Convention.⁴⁸⁹

13.35 It should be noted that the Convention itself does not provide the exact details of how this procedure is to operate in practice, but rather gives only basic rules. It is for the Contracting States themselves to establish a procedure to implement these basic rules. Whilst the 1996 Convention expressly excludes adoption from its material scope, the 1993 Hague Intercountry Adoption Convention provides a similar procedure in intercountry adoption cases that may assist with the understanding (and / or implementation) of Article 33 of the 1996 Convention. Although the legal effects and requirements differ as between adoption and other forms of care, the co-operation mechanisms and some of the general principles of the 1993 Convention may still prove useful in relation to the cross-border provision of care. The Guide to Good Practice on the 1993 Hague Intercountry Adoption Convention⁴⁹⁰ gives a clear explanation of these mechanisms and principles.

13.36 One example in which the procedure in the 1993 Hague Intercountry Adoption Convention provided some guidance in terms of establishing rules regarding the operation of Article 33 of the 1996 Convention is the implementing legislation of the Netherlands, which devotes a chapter to setting out the procedure involved in cases where a child from the Netherlands is to be placed in another Contracting State, or a child from another Contracting State is to be placed in the Netherlands.⁴⁹¹ Under these rules, the Central Authority of the Netherlands is the competent authority to make the decision to place a child habitually resident in the Netherlands in a foster family or in institutional care or otherwise provide the child with care in another Contracting State. Before this decision is made it must transmit a reasoned application, accompanied by a report on the child to the Central Authority, or other competent authority, of the Contracting State where the placement or provision of care should take place. The Central Authority must then enter into consultation with this other authority. Before making the decision, the Central Authority must receive:

- a) a written declaration of consent from the persons with whom, or the institution with which, the placement is to be made or by whom or which the care is to be provided;
- b) if desired, a report drawn up by the Central Authority or other competent authority in the country of placement showing the suitability of the foster parent to provide foster care for the child;
- c) the consent of the Central Authority or other competent authority in the other State;
- d) if applicable, documents showing that the child has or will receive permission to enter the other Contracting State and has been or will be granted residence rights in that Contracting State.

13.37 If the placement in the Netherlands is of a child from outside the Netherlands, it is for the Dutch Central Authority to give the consent required. Before giving this consent, the Central Authority has to have received a reasoned request, accompanied by a report on the child. It also has to have gathered the equivalent documents at a), b) and d) above and transmitted them to the competent authority of the country of origin of the child. The Dutch legislation also provides what is to happen if this procedure is not complied with. The public prosecutor or Central Authority may apply to the children's judge for provisional guardianship of the child to be awarded to a foundation as provided

⁴⁸⁹ Art. 23(2) f).

⁴⁹⁰ *Op. cit.* (note 2), in particular Chapter 7, p. 79.

⁴⁹¹ International Child Protection Implementation Act, 16 February 2006, Chapter 3.

in other legislation. In general, this provisional guardianship will last for six weeks while the Child Protection Board obtains a ruling on the custody of the child.

Adoption

13.38 As mentioned in **Chapter 3**, *supra*, decisions on adoption, measures preparatory to adoption, or the annulment or revocation of an adoption are all excluded from the scope of the 1996 Convention.⁴⁹² However, it should be noted that once an adoption has been *completed*, measures for the protection of the person and property of the child fall within the scope of the Convention in the same way as for any other child.

Example 13 (f)

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

13.39 Further, there are certain situations involving an *intercountry* adoption where the provisions of the 1996 Convention may prove useful.⁴⁹³ One example of a rather rare situation is where, a short time after the completion of the intercountry adoption, the adoption order is declared void or revoked in the receiving Contracting State. In this situation, measures need to be taken regarding the provision of care for the child. However, the Contracting State of origin of the child may still have a significant interest in the protection of the child. A possible mechanism to enable the involvement of the authorities of the Contracting State of origin would be the transfer mechanism under the 1996 Convention (Arts 8 and 9⁴⁹⁴). A transfer of jurisdiction could be effected upon the request of the authorities of the Contracting State of the habitual residence of the child (Art. 8), which will usually be the receiving Contracting State in these circumstances, or upon the request of the authorities of the Contracting State of origin (Art. 9). Of course, the requirements relating to a transfer of jurisdiction under the 1996 Convention would have to be satisfied (see **Chapter 5**, *supra*). This transfer of jurisdiction would mean that the authorities of the Contracting State of origin would have jurisdiction to take measures regarding the future care of the child and such measures would be recognised by operation of law in the receiving Contracting State.⁴⁹⁵

13.40 The co-operation provisions of the 1996 Convention may also, occasionally, prove of use following an intercountry adoption. For example, in the very rare situation where the authorities of the child's State of origin are gravely concerned that the child may be at risk with his / her new parents, Article 32 could be used to ask the receiving State (where the child is now habitually resident and present) to consider taking protective measures in relation to the child (see Art. 32 *b*). Another example might be where the receiving State is considering taking a measure of protection in relation to the child and the State of origin has information relevant to the protection of the child. If the situation of the child so requires, the receiving State could use Article 34 to request that the State of origin communicate such information.⁴⁹⁶

⁴⁹² Art. 4 *b*). See, also, paras **3.37-3.38**, *supra*.

⁴⁹³ Of course, where both States involved are Contracting States to the 1996 Convention, as well as to the 1993 Convention. References in this paragraph to "Contracting States" are referring to the 1996 Convention.

⁴⁹⁴ For a detailed explanation of the transfer provisions, see **Chapter 5**, *supra*.

⁴⁹⁵ Art. 23(1) – see further, **Chapter 5**, regarding the transfer of jurisdiction provisions.

⁴⁹⁶ See further para. **11.2, point (2)**, regarding the operation of Art. 34.

Mediation,⁴⁹⁷ conciliation and similar means of amicable dispute resolution

13.41 The 1996 Convention places an obligation on Central Authorities to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies.⁴⁹⁸

13.42 Mediation has become an increasingly used means of dispute resolution in family matters. It is seen as beneficial in situations where the parties need to have an ongoing relationship, which is often the case in family disputes involving children. It also enables parties to craft solutions tailored to their particular needs, places the responsibility for decision-making on the parties and may help to lay some foundation for future co-operation and reduce the level of conflict between the parties.

13.43 The use of mediation in *cross-border* family disputes is growing but it poses some particular challenges. Different languages, different cultures and geographical distance add new and difficult dimensions that need to be taken into account when considering the methodology of mediation. Additionally, the involvement of more than one State and more than one legal system means that consideration must be given to ensuring that the mediation and the resulting agreement satisfy the legal requirements of, and conditions for, enforceability in the relevant State or States.

13.44 Where the States concerned are Parties to the 1996 Convention, the Convention may be particularly helpful in this regard. Due to its provisions regarding the recognition and enforcement of measures of protection, it will generally be sufficient to transform a mediated agreement into a court order in one Contracting State,⁴⁹⁹ since the enforceability in the other Contracting State will be secured (in so far as the matters in the order fall within the material scope of the Convention – see para. **13.45** below). To dispel doubts about the existence of a ground for non-recognition, 'advance recognition' of a measure of protection may be sought.⁵⁰⁰

13.45 It is important to note that mediated agreements in family matters may also contain measures which do not relate to the protection of the person or property of the child and which therefore do not fall within the scope of the 1996 Convention.⁵⁰¹ These other measures may regulate, for example, arrangements between the parents relating to their relationship, such as an application for a divorce, financial provision post-divorce or agreements regarding maintenance. Where a mediated agreement contains such provisions and is turned into a court order, the provisions of the 1996 Convention will not apply to the parts of the court order which are not within the material scope of the Convention. However, any parts of the court order which do constitute a measure of

⁴⁹⁷ On mediation, see the Guide to Good Practice on Mediation under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter "the Guide to Good Practice on Mediation"), currently in preparation. The Guide will be available on the Hague Conference website when published (< www.hcch.net >, under "Child Abduction Section" then "Guides to Good Practice"). See also the other Hague Conference documentation regarding mediation: "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", drawn up by S. Vigers, former Legal Officer of the Permanent Bureau, Prel. Doc. No 5 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* (30 October – 9 November 2006), available at < www.hcch.net > under "Child Abduction Section", "Special Commission meetings" then "Special Commission of October-November 2006"; and "Feasibility Study on Cross-Border Mediation in Family Matters", drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, available at < www.hcch.net > under "Work in Progress" then "General Affairs". In the context of the Malta Process, reference may also be made to the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the accompanying Explanatory Report, available at < www.hcch.net >, under "Child Abduction Section", then "Cross-border family mediation".

⁴⁹⁸ Art. 31 b). This obligation must be carried out directly by the Central Authority or indirectly, through public authorities or other bodies – see, further, para. **11.10**, *supra*.

⁴⁹⁹ The Contracting State with jurisdiction under Chapter II of the Convention.

⁵⁰⁰ Under Art. 24, see paras **10.7-10.11**.

⁵⁰¹ See **Chapter 3, section c**, regarding the material scope of the Convention.

protection within the scope of the Convention must still be recognised and enforced according to the provisions of the Convention.

Example 13 (g)

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

Any agreement reached may be able to be turned into a court order in Contracting State B, where the children are habitually resident.⁵⁰² "Measures of protection" would then have been taken in respect of the children in Contracting State B which would be recognised by operation of law and enforceable in all Contracting States under the provisions of Chapter IV of the 1996 Convention.⁵⁰³

Mediation in cases of international child abduction

13.46 Mediation is fast developing as an important mechanism for dealing with applications under the 1980 Hague Child Abduction Convention. For a detailed discussion of good practices relating to mediation in international child abduction cases, reference should be made to the Guide to Good Practice on Mediation.⁵⁰⁴

13.47 A very important principle to be observed when mediation is used in these cases is that mediation should not impede or delay any return proceedings brought under the 1980 Convention.⁵⁰⁵

Example 13 (h)

In this example, States A and B are Contracting States to both the 1980 and 1996 Conventions.

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

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

⁵⁰² Art. 5. Whether this is possible will depend upon the domestic law of Contracting State B regarding rendering mediated agreements legally binding and enforceable.

⁵⁰³ See, *supra*, **Chapter 10**.

⁵⁰⁴ *Op. cit.* note 497.

⁵⁰⁵ See further, the Guide to Good Practice on Mediation, *ibid.*

13.48 In this example, the mother and father need to be sure that the agreement reached will be respected in both Contracting States A and B. One way to achieve this may be to have the agreement approved or otherwise formalised by a court or other competent authority.⁵⁰⁶ However, if such approval or formalisation is to be sought, it will be important for the parties to consider whether such an application should be made to the authorities of Contracting State A *or* Contracting State B.

13.49 The easiest solution might appear to be for the authorities in Contracting State B, with the consent of the parties, to deal with the agreement because the return proceedings and the mediation have been conducted in Contracting State B. However, under the 1996 Convention, whether Contracting State B has jurisdiction to turn the mediated agreement into a court order (thereby taking measures of protection within the scope of the 1996 Convention) will depend upon whether the requirements of Article 7 have been fulfilled.⁵⁰⁷ In circumstances such as these where a mediated agreement has been reached, careful consideration ought to be given to whether the conditions of Article 7(1) a) have been met. For example, if, (1) the child is found to have acquired a habitual residence in Contracting State B, and (2) the mediated agreement is considered to be evidence in Contracting State B of the fact that the parties, *strictly subject to the agreement being successfully formalised in a court order*, have acquiesced in the wrongful removal of the child (by agreeing to the child's relocation),⁵⁰⁸ jurisdiction will have moved to Contracting State B.⁵⁰⁹ This interpretation of Article 7 enables the authorities of Contracting State B, where the court is seized of the return proceedings and where the mediation has been undertaken, to have jurisdiction to turn the mediated agreement into a court order which will be recognised and enforceable in Contracting State A.

13.50 However, if it is determined that the requirements of Article 7 for a change in jurisdiction are *not* fulfilled in the particular case (*e.g.*, because the child cannot be said to have acquired a habitual residence in Contracting State B), the agreement may be submitted to the authorities of Contracting State A, who have general jurisdiction to take measures of protection in relation to the child (Art. 5(1)). A decision by these authorities to approve or otherwise formalise the mediated agreement will be entitled to be recognised and enforced in Contracting State B. However, the parties may wish to consider the possibility of using the transfer of jurisdiction provisions of the 1996 Convention. In this case, the authorities of Contracting State A may consider the possibility of transferring jurisdiction to the authorities of Contracting State B under Article 8 of the Convention, or the authorities of Contracting State B could request the transfer of jurisdiction under Article 9.⁵¹⁰ This would enable the mediated agreement to be submitted to the court in Contracting State B for approval.⁵¹¹ The Central Authorities designated under the Convention in Contracting States A and B should co-operate to help the parents make these arrangements *if* it is considered in the best interests of the particular child.⁵¹²

13.51 Despite the fact that the 1980 and 1996 Conventions do not regulate the modalities of how (and by whom) mediation, conciliation or similar means of amicable dispute

⁵⁰⁶ Domestic law provisions in each State will determine exactly how a mediated agreement may be rendered legally binding and enforceable in that State.

⁵⁰⁷ See paras 4.20-4.25, *supra*.

⁵⁰⁸ It will be very important in this case for any acquiescence by the left-behind parent to be wholly conditional upon a successful formalisation of the agreement in a court order (*i.e.*, the left-behind parent would only be acquiescing to the wrongful removal *on the basis that* the agreement is successfully rendered legally binding and enforceable in both jurisdictions concerned). This is because, if the formalisation process subsequently failed and the acquiescence had not been made conditional in this way, the abducting party could then rely on the agreement in any subsequent return proceedings as evidence of acquiescence. This may deter left-behind parents from entering into mediation.

⁵⁰⁹ Art. 7(1) a).

⁵¹⁰ Of course, the requirements for a transfer of jurisdiction would need to be fulfilled – see **Chapter 5**, *supra*.

⁵¹¹ On the requirements for a transfer of jurisdiction to take place, see **Chapter 5**, *supra*.

⁵¹² Such co-operation may be said to fall within Art. 31 b), *i.e.*, to facilitate agreed solutions for the protection of the child in situations to which the Convention applies. See para. 11.10, *supra*.

resolution should be conducted,⁵¹³ it is evident that these services need to be capable of facing the specific challenges posed by *cross-border* family disputes concerning children. It should be noted that the Guide to Good Practice on Mediation⁵¹⁴ elaborates in detail recommended safeguards and measures to meet these challenges. Although the Guide to Good Practice is drawn up with a focus on mediation and similar processes to bring about agreed solutions in international child abduction cases falling under the 1980 Hague Child Abduction Convention, much of its content is applicable to mediation in international family disputes concerning children in general. However, it must be remembered that not all cases are suitable for mediation and similar processes. An initial assessment of the suitability of the individual case for mediation before attempting mediation is crucial to identify such cases.⁵¹⁵

13.52 Lastly, the 1996 Convention places importance on hearing the child in proceedings concerning him / her by providing that not hearing the child may be a ground upon which to refuse recognition to a measure of protection taken in respect of that child.⁵¹⁶ While mediation procedures are not subject to the same formalities as court proceedings, consideration should be given to the involvement of children in the mediation process.⁵¹⁷

Special categories of children

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

13.53 For refugee children and children who, due to disturbances in their country, are internationally displaced, the Contracting State on whose territory the child is present will have jurisdiction to take measures directed to the person or property of the child.⁵¹⁸ This also applies to children whose habitual residence cannot be established.⁵¹⁹ It should be noted that Article 6 does not provide jurisdiction on an urgent or provisional basis: in this situation, the authorities of the Contracting State on whose territory the child is present have *general* jurisdiction to take measures of protection regarding the long-term care of the child.

13.54 The United Nations High Commissioner for Refugees (UNHCR) and other international bodies have noted that some countries, particularly when faced with large flows of internationally displaced persons, have tended to restrict the definition of "refugee" or used other methods to deny refugees the standards of treatment associated with recognition of refugee status.⁵²⁰ The application of Article 6 to children who, due to

⁵¹³ See Art. 7(2) of the 1980 Convention: "In particular, either directly or through any intermediary, they shall take all appropriate measures [...] c) [...] to bring about an amicable resolution of the issues"; see Art. 31 of the 1996 Convention, which states that mediation can be facilitated by "[t]he Central Authority of a Contracting State, either directly or through public authority or other bodies [...]". In fact the mediation schemes in the context of the 1980 Convention differ immensely from Contracting State to Contracting State: in Argentina, for example, the Central Authority directly engages in mediation; the French MAMIF programme was performed by a public authority established within the Ministry of Justice in France but has recently been absorbed into the French Central Authority; the English Reunite pilot project is conducted by a non-governmental organisation; the German Federal Ministry of Justice both proposes and backs mediation in Convention cases, but the mediation itself is performed by professional mediators from non-governmental organisations.

⁵¹⁴ *Op. cit.* note 497.

⁵¹⁵ *Ibid.*

⁵¹⁶ Where the measure is not taken in a case of urgency – see Art. 23(2) *b*) and paras **10.4-10.6**, *supra*.

⁵¹⁷ On hearing the child in the mediation process, see the Guide to Good Practice on Mediation (*op. cit.* note 497).

⁵¹⁸ For guidelines on making arrangements regarding intercountry adoption for internationally displaced children, see "Recommendation concerning the application to refugee children and other internationally displaced children of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption", Annex A to the Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Permanent Bureau, 1994). This document is available at < www.hcch.net >, under "Intercountry Adoption Section", "Special Commissions" then "Documents related to 1994 Special Commission". For further information on the operation of the 1993 Intercountry Adoption Convention, see Guide to Good Practice on the 1993 Hague Intercountry Adoption Convention (*op. cit.* note 2).

⁵¹⁹ Art. 6. See, *supra*, paras **4.13-4.18**.

⁵²⁰ See, for example, UN High Commissioner for Refugees, Note on international protection, 13 September 2001, A/AC.96/951, available at: < <http://www.unhcr.org/refworld/docid/3bb1c6cc4.html> > (last consulted

disturbances occurring in their country, are “internationally displaced” is intended to ensure a broad application of this Article.

13.55 In the case of children without a habitual residence (Art. 6(2)), if it is later established that the child *does* have a habitual residence somewhere, the jurisdiction of the Contracting State where the child is present will become limited, under the Convention, to the operation of Articles 11 and 12.⁵²¹

Example 13 (i)

Thousands of people are displaced following a natural disaster in Contracting State A. Among those who arrive in Contracting State B are a 10 year old boy and his 8 year old sister who have been orphaned. Article 6 allows Contracting State B to exercise jurisdiction to take long-term measures directed to the protection of these children. However, as a matter of good practice in this case and before long-term measures of protection are taken, the authorities in both Contracting States A and B should co-operate in an attempt to find out as much information as possible regarding the background of the children and to see if other family members can be located.⁵²² Whilst such enquiries are ongoing, Contracting State B may take any measures of protection it considers appropriate to ensure the protection of the children. When the enquiries have been concluded, depending upon their outcome, Contracting State B may, for example, give parental responsibility to a relative residing in a third State or place the children in long-term foster care. Under the Convention, the measures taken will have to be recognised and enforced in all other Contracting States.

Example 13 (j)

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

Example 13 (k)

A child arrives, unaccompanied, in Contracting State A and the State of the child’s habitual residence cannot be determined. Under Article 6(2), the authorities in Contracting State A take measures of protection providing for the child’s care. A month later, it is established that the child’s habitual residence is in non-Contracting State B and the child’s departure from that State did not result from an international displacement or refugee scenario. Despite this discovery, the measures of protection previously taken in respect of the child under Article 6 continue in force even though a change of circumstances has eliminated the basis upon which jurisdiction was founded.⁵²³ If the authorities of non-Contracting State B take a decision in respect of the child, the non-convention rules of Contracting State A concerning the recognition and enforcement of foreign decisions will apply to determine the effect of the foreign decision.

In the future, since the State of the child’s habitual residence has now been determined, the authorities of Contracting State A do not have jurisdiction to take further measures of protection in respect of the child on the basis of Article 6(2). Instead, under the

7 April 2011), para. 85 and “Report of the Working Group [of April 1994] to study the application to refugee children of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption”, 1994, para. 12, available at < www.hcch.net >, path indicated *supra*, note 518.

⁵²¹ See paras 4.16-4.19, *supra*, and the Explanatory Report (*op. cit.* note 20), at para. 45.

⁵²² Art. 30.

⁵²³ Art. 14.

Convention, they will only be able to take measures of protection based upon Articles 11 and 12 of the Convention.⁵²⁴ However, see paragraphs 3.11 to 3.13, *supra*, as regards the fact that, since the child has been established as being habitually resident in a non-Contracting State, Contracting State A may take measures of protection based upon its non-Convention rules of jurisdiction. However, if it does so, such measures will not be recognised and enforceable under the Convention.

Runaway, abandoned or trafficked children

13.56 It may be that a child's habitual residence can be established for the purposes of Article 5 of the Convention but it is still necessary for the Contracting State on whose territory the child is present to take measures in respect of the child under Articles 11 and 12. This may be the case, for example, where a child has run away, been abandoned or been trafficked across borders.⁵²⁵

13.57 Jurisdiction based on Articles 11 or 12 implies that the measures will be in force for a limited time and that the authorities of the State of the child's habitual residence are ultimately responsible for ensuring the care of the child.⁵²⁶ The authorities of the Contracting State where the child is present should work with the authorities of the State of the child's habitual residence to determine the most appropriate long-term arrangements for the child.

13.58 It should be noted that if the authorities in the State of the child's habitual residence are not in a position to take measures of protection relating to the child, a longer-term solution will have to be designed by the Contracting State on whose territory the child is present. Until measures of protection are taken by the State of the child's habitual residence, jurisdiction to protect these children rests, on an urgent or provisional basis,⁵²⁷ with the authorities of the Contracting State where the child is present. In addition, and depending on the situation, the authorities of the Contracting State where the child is present may consider the possibility of requesting a transfer of general jurisdiction according to Article 9 of the Convention. This, of course, will only be possible where the State of the child's habitual residence is another *Contracting State* and the other conditions for a transfer of jurisdiction are fulfilled.⁵²⁸

13.59 The Convention also provides for co-operation between authorities of Contracting States in locating children in need of protection.⁵²⁹

⁵²⁴ If measures of protection are taken by Contracting State A in future under Arts 11 or 12, they will be recognised by operation of law and enforceable in all other Contracting States. Whether they are recognised / enforceable in non-Contracting State B will, of course, depend on non-Contracting State B's own private international law rules.

⁵²⁵ See *supra*, note 3, regarding the complementary nature of the provisions of the 1996 Convention and the provisions of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (New York, 25 May 2000).

⁵²⁶ See **Chapters 6 and 7**, *supra*.

⁵²⁷ *I.e.*, under Arts 11 or 12 of the Convention.

⁵²⁸ See **Chapter 5** regarding the transfer of jurisdiction provisions – the provisions only operate between two *Contracting States*. See also the requirement in Art. 9(1) that the Contracting State requesting a transfer of jurisdiction must be one of the Contracting States listed in Art. 8(2).

⁵²⁹ Art. 31 c) and see **Chapter 11**, *supra*.

Example 13 (l)

A 14 year old girl from Contracting State B is found in Contracting State A having been trafficked into the country and forced to work. The authorities in Contracting State A have jurisdiction to take measures under Articles 11 and 12 in respect of the child, such as appointing a temporary guardian and arranging for her immediate care, but should make contact with, and co-operate with, the authorities in Contracting State B to determine what arrangements will be made for the long-term care of the child.⁵³⁰

Example 13 (m)

A 13 year old boy runs away from his family home in Contracting State A and arrives in Contracting State B. His father suspects that the child may be in Contracting State B as some family members in Contracting State B have reported seeing him. The parents approach the Central Authority of Contracting State B for assistance.⁵³¹ The Central Authority provides information on the laws and services in Contracting State B that may help the parents.⁵³² The Central Authority also provides assistance in discovering the whereabouts of the child.⁵³³

Once the child is located, Contracting State B takes a necessary measure of protection in relation to the child, placing the child in temporary State care.⁵³⁴ The parents wish to travel to Contracting State B to collect the child. Before this occurs, the authorities of Contracting States A and B should engage in close co-operation on this issue to ensure that this is a safe and appropriate option for the child. Indeed, depending on the circumstances of the case, it may be that the return of the child should only take place once the authorities of Contracting State A (the authorities with general jurisdiction in the case) have taken measures of protection to ensure that the child will be safe upon his return.⁵³⁵

Example 13 (n)

A 13 year old girl runs away from her home in Contracting State A accompanied by her 20 year old boyfriend. The girl and her boyfriend initially travel to Contracting State B to start a life together. However, in Contracting State B the boyfriend gets into trouble with the police and the couple flee to Contracting State C.

In the meantime, the girl's parents in Contracting State A have reported her missing. They are concerned for her well-being since they know that her boyfriend has a criminal record. The parents contact the Central Authority in Contracting State A for assistance in locating the girl.⁵³⁶ Due to the fact that the parents have very limited information as to where the girl may be, the enquiries initiated by the Central Authority in Contracting State A to locate the girl progress slowly.

⁵³⁰ Art. 30.

⁵³¹ In this example, the parents go directly to the Central Authority of Contracting State B where they think the child is. It would also be perfectly possible for the parents to approach the Central Authority in Contracting State A where they reside for assistance. This Central Authority would then transmit the requests to the Central Authority of Contracting State B.

⁵³² Art. 30(2).

⁵³³ Art. 31 c).

⁵³⁴ Art. 11.

⁵³⁵ In the case of a runaway child, hearing the child him- or herself and, in particular, ascertaining the reasons why he / she ran away, will often be particularly important when considering what measures of protection should be taken in relation to the child, whether on an urgent or long-term basis (see, in this regard, the requirements of Art. 12 of the UNCRC). Close co-operation between the authorities of both Contracting States will also be extremely important to discover, for example, whether previous child protection concerns have been raised in relation to the child or whether the public authorities in the Contracting State of the child's habitual residence have been previously involved with the family.

⁵³⁶ Art. 31 c).

After a month in Contracting State C, the boyfriend gets into trouble with the police there and the girl comes to the attention of the authorities. The authorities make enquiries and, considering the girl to be in a dangerous situation, they take necessary measures of protection on the basis of Article 11 and place her in temporary foster care. The authorities contact the Central Authority in Contracting State A and inform them of the girl's presence in their jurisdiction and of the measures of protection taken.

However, the girl manages to escape from her foster care and, with her boyfriend, quickly moves on to Contracting State D. In accordance with Article 36, the authorities of Contracting State C (having ascertained that the girl has travelled to Contracting State D), inform the authorities in Contracting State D of the danger the girl is in and of the measures they took in respect of her. These measures will be recognised by operation of law in Contracting State D and all other Contracting States. The authorities of Contracting State C also, as a matter of good practice, inform Contracting State A of the girl's departure from their State and of her presence in Contracting State D.

In this case, each Contracting State in which the girl becomes present has jurisdiction to take measures of protection in respect of her on an urgent or provisional basis (under Arts 11 and 12 of the Convention). However, whilst the girl's "habitual residence" remains in Contracting State A, that is the only Contracting State which may take long-term measures of protection in respect of the girl (Art. 5). In this example, the authorities in Contracting State D may therefore either recognise and enforce the measure of protection taken by Contracting State C or, if they consider it necessary, may take another measure of protection for the girl under Article 11.

In the case of a child 'on the run' for a considerable length of time, if, on the facts of the case, the situation develops so that the child is in a position where she can no longer be said to have a "habitual residence", the Contracting State where the child is present may decide that it has general jurisdiction to take long-term measures of protection for the child in accordance with Article 6(2) of the Convention. However, it should not be determined lightly that a child no longer has a habitual residence.⁵³⁷

Property of the child

13.60 Article 1 of the Convention states that measures directed to the protection of the *property* of the child are within the scope of the Convention. The aim of the Convention in this regard was to establish precise rules concerning the designation and the powers of the child's legal representative to administer the child's property located in a foreign State.⁵³⁸ It was thought that this may be particularly useful where it is necessary to take legal measures in respect of an estate which has passed to the child.⁵³⁹

13.61 Article 3 g) provides that the measures of protection directed to the protection of the child's property may, in particular, deal with "the administration, conservation or disposal of the child's property". This is a very broad formulation that encompasses all the operations concerned with the property of a child, including acquisitions, considered as investments or as assignments disposing of the property transferred in consideration of the acquisition.⁵⁴⁰ However, as has been stated at paragraphs 3.29 and 3.30, *supra*, it is important to note that the Convention does not encroach on systems of property law. It does not therefore cover the substantive law relating to the content of rights over property, for example, disputes in relation to ownership / title of property. In this

⁵³⁷ See, *supra*, paras 4.16-4.19 and, *infra*, 13.72-13.76.

⁵³⁸ See the Explanatory Report (*op. cit.* note 20), at para. 10.

⁵³⁹ *Ibid.* It should be noted that whilst the designation of the child's representative and the extent of the representative's powers would be matters falling within the scope of the Convention, the substantive matter of the settlement of the estate would not be within the scope of the Convention. The issue of succession is outside the scope of the Convention (Art. 4 f)). See, further, **Chapter 3, section c**, *supra*, regarding the material scope of the Convention.

⁵⁴⁰ See the Explanatory Report (*op. cit.* note 20), at para. 25.

context, the fact that any measure concerning trusts is expressly excluded from the scope of the Convention should also be noted.⁵⁴¹

13.62 Article 55 of the Convention allows Contracting States to make a twofold reservation in relation to the property of a child situated on its territory. First, under Article 55(1) a), a Contracting State may reserve the jurisdiction of its authorities to take measures directed to the protection of property of a child situated on its territory, *irrespective* of where the child is habitually resident. It should be noted that such a reservation will not prevent the authorities of another Contracting State from having jurisdiction under the Convention to take measures of protection regarding that property. However, secondly, according to Article 55(1) b), a Contracting State may also reserve the right not to recognise under the Convention any parental responsibility or measure of protection in so far as it is incompatible with any measure taken by its authorities in relation to that property.

13.63 These reservations may be limited to certain categories of property, the most likely being that of immovable property.

13.64 Any reservation under Article 55 must be made in accordance with the procedure set down in Article 60 and will be notified to the depositary of the Convention. The reservation will be noted on the "status table" of the 1996 Convention published on the Hague Conference website (< www.hcch.net >, under "Conventions", "Convention 34" then "Status Table").

Example 13 (o)

The child is habitually resident in Contracting State A and owns property in Contracting State B. A guardian is appointed in Contracting State A to deal with the child's property and is made responsible for managing some land in Contracting State B on behalf of the child. The order appointing the guardian is recognised by operation of law in all Contracting States. If Contracting State A delivers certificates of capacity to act (in accordance with Article 40 of the Convention), it may be useful in this situation for the guardian to obtain such a certificate.⁵⁴²

Example 13 (p)

The child, habitually resident in Contracting State A, travels to Contracting State B for a holiday. While she is in Contracting State B she is injured in a car accident. After her recovery she returns home to Contracting State A. Legal proceedings commence in Contracting State B and the child is awarded a significant amount of money in compensation for the injuries she sustained in the car accident. However, the competent authority cannot locate someone in Contracting State B to act as a guardian for the child to receive the money on her behalf. In this situation, the competent authority may exercise jurisdiction under Article 12 of the Convention and order that a guardian be appointed in Contracting State B to manage the money on behalf of the child on a provisional basis. This order would lapse once such a guardian has been appointed by the authorities in Contracting State A. Otherwise, the competent authority in Contracting State B may make a request under Article 9 that a competent authority in Contracting State A agree to the court in Contracting State B assuming jurisdiction in respect of the appointment of the child's guardian. If the competent authority in Contracting State B receives a favourable response, then it may make an order appointing a guardian to manage the money on behalf of the child.

⁵⁴¹ See Art. 4 f) discussed at para. 3.42, *supra*.

⁵⁴² See, *supra*, para. 11.22, point (5).

Representation of children

13.65 The representation of children is often required due to a child's legal incapacity. 'Representation' of a child generally involves acting on behalf of, or in the name of, a child vis-à-vis third parties. Situations in which this may occur include court proceedings involving the child, as well as property or financial transactions and consent to medical treatment.

13.66 Decisions regarding the representation of children are clearly within the scope of the Convention. Article 3 *d*) provides that measures of protection may, in particular, deal with the designation and functions of any person or body representing or assisting the child. In addition, the use of the term "powers" of the parents, guardians or other legal representatives in the definition of parental responsibility refers to the representation of children.⁵⁴³

13.67 This means that if the authorities of a Contracting State are taking a decision regarding the representation of a child, they must ensure that they have jurisdiction under the Convention to do so. However, where the authorities do not have jurisdiction under the Convention, if they consider that they are better placed in the particular case to assess the child's best interests in relation to this issue, they may consider whether to request a transfer of jurisdiction (where the requirements of Art. 9 are fulfilled).⁵⁴⁴ There may also be situations where it will be appropriate for a Contracting State *with* jurisdiction to consider the possibility of transferring jurisdiction to another Contracting State, *e.g.*, where a legal representative has to be appointed for a child in legal proceedings in that other Contracting State.⁵⁴⁵

13.68 Once taken, these measures of protection must be recognised and enforced in all other Contracting States, according to the rules of the Convention.

13.69 Where "parental responsibility"⁵⁴⁶ encompasses the representation of the child, the rules found in Articles 16 and 17 apply. Article 16 of the Convention sets out how to determine the *holders* of parental responsibility.⁵⁴⁷ Article 17 provides that the *exercise* of parental responsibility is governed by the law of the State of the child's habitual residence. This means that the rules of the State of the child's habitual residence which relate to the representation of the child by persons who have parental responsibility will determine the nature, powers and responsibilities of such representation.

Example 13 (q)

Under the law of State A, parents acting as legal representatives have the authority to act individually to initiate a civil suit on behalf of the child. Under the law of Contracting State B, both parents have to agree before an application for such proceedings can be made. The family lives in State A. The mother and the child travel to Contracting State B. The child is involved in an accident in Contracting State B and the mother wishes to initiate proceedings there. The mother can do so without the agreement of the father because the law of State A does not require his agreement and State A is the State of the child's habitual residence.

13.70 The different laws involved may lead to some uncertainty about the nature or extent of the capacity or powers of the person responsible for the care of the person or property of the child. Article 40 of the Convention therefore provides for the possibility of delivering a certificate to the holder of parental responsibility, or the person entrusted with the protection of the child, which would resolve this uncertainty. This certificate may

⁵⁴³ Art. 1(2). See, further, paras **3.18-3.24**, *supra*.

⁵⁴⁴ Art. 9. See, further, **Chapter 5**, *supra*.

⁵⁴⁵ Art. 8. See, further, **Chapter 5**, *supra*.

⁵⁴⁶ Art. 1(2).

⁵⁴⁷ Discussed, *supra*, **Chapter 9**.

be delivered by the authorities⁵⁴⁸ of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken. It should indicate the capacity in which the person is entitled to act and the powers conferred upon him or her. The capacity and powers indicated in the certificate are presumed to be vested in that person, in the absence of proof to the contrary.⁵⁴⁹

13.71 Article 19 of the Convention also provides some protection for third parties entering into transactions with a child's legal representative. This protection is designed for those third parties who cannot be expected to realise that the rules of the State where the transaction takes place determining who can act as a child's legal representative do not apply to a particular child as a result of the applicable law rules of the Convention. Therefore, if a transaction fulfils certain criteria, its validity cannot be contested, and the third party cannot be held liable on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the Convention. The criteria which must be fulfilled are:

- the transaction was entered into by a person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded;
- the third party did not know or could not have been expected to know that the parental responsibility was governed by the relevant law; and
- the transaction was entered into between persons present on the territory of the same State.⁵⁵⁰

Example 13 (r)

In Contracting State A, both parents can act as the child's legal representatives in all circumstances, unless there is a decision of a competent authority to the contrary. In Contracting State B, an unmarried father cannot act as a child's legal representative unless certain criteria are fulfilled.

The child is born in Contracting State B to unmarried parents. He resides there with his mother. The criteria allowing the father to act as the child's legal representative under the law of Contracting State B are not fulfilled. The child's father is a national of Contracting State A and resides there and the child visits him frequently.

The paternal grandfather dies, leaving the child his rare book collection. The father enters into a contract in Contracting State A with a third party, who is also resident in Contracting State A, to sell the collection.

Provided that there was no reason for the third party to know that the question of the parental responsibility of the child was governed by the law of Contracting State B, the validity of the contract to sell the collection cannot be questioned and the buyer cannot be held liable on the sole ground that the father, who acted as the child's legal representative, was not entitled to do so under the law designated by the Convention.

Connecting factors

Habitual residence

13.72 This is the main connecting factor and basis for jurisdiction used in the 1996 Convention.⁵⁵¹ The use of habitual residence is a factor common to all the modern Hague Children's Conventions.⁵⁵²

⁵⁴⁸ Art. 40(3) provides that Contracting States delivering such certificates must designate the authorities that are competent to draw up the certificate.

⁵⁴⁹ See the discussion of Art. 40, at para. **11.22, point (5)**, *supra*.

⁵⁵⁰ Art. 19(2).

⁵⁵¹ Art. 5, discussed, *supra*, paras **4.4 et seq.**

⁵⁵² The other Conventions are the 1980 Child Abduction Convention, the 1993 Intercountry Adoption Convention

13.73 The determination of habitual residence is of particular importance under the 1980 Hague Child Abduction Convention. However, it should be noted that the 1996 Convention uses the term habitual residence in a different context to the 1980 Convention. In the 1980 Convention, the determination that a child is habitually resident in the requesting State is necessary in order for the remedies of the 1980 Convention to apply, and is part of the larger enquiry as to whether there has been a wrongful removal or retention of a child. The role of habitual residence in the 1996 Convention is generally to assess which Contracting State's authorities have jurisdiction to take measures of protection and whether their decisions should be recognised and enforced in other Contracting States.

13.74 Habitual residence is a factual concept and determinations of habitual residence are largely case specific. The temporary absence of the child from the place of his or her habitual residence for reasons of vacation, of school attendance or of the exercise of access rights will not, in principle, change the habitual residence of the child.

13.75 A small number of trends can be noted in the international jurisprudence relating to the concept of "habitual residence". First, where there is clear evidence of an intention to commence a new life in another State, then an existing habitual residence will usually be lost and a new one acquired.⁵⁵³ Secondly, where a move is open-ended, or potentially open-ended, the habitual residence at the time of the move may also be lost and a new one acquired relatively quickly.⁵⁵⁴ However, where a move is time-limited, even if it is for an extended period of time, it has been accepted in a number of jurisdictions that an existing habitual residence can be maintained throughout.⁵⁵⁵ Assessments of other situations tend to follow one of two approaches. The "parental intention" approach looks at the shared intention of the parents regarding the nature of the move.⁵⁵⁶ The "child-centred" approach instead emphasises the factual reality of the child's life.⁵⁵⁷ This factual reality includes elements such as education, social interaction, family relationships and generally refers to the focus of the child's life. There have also been cases which mix both approaches, with reference to both the parental intentions and the child's life.⁵⁵⁸ In

and the 2007 Child Support Convention and its Protocol. For the full text of these Conventions see the Hague Conference website at < www.hcch.net >.

⁵⁵³ Usually the relevant intention here will be the *parental* intention. See, e.g., *DeHaan v. Gracia* [2004] *AJ* No 94 (QL), [2004] *ABQD* 4, [INCADAT cite: HC/E/CA 576]; *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 *AC* 562 [INCADAT cite: HC/E/UKe 2]; *Re F. (A Minor) (Child Abduction)* [1992] 1 *FLR* 548, [1992] *Fam Law* 195 [INCADAT cite: HC/E/UKe 40]. It should be noted that it is possible, in rare situations, for a habitual residence to be lost by a child and no new habitual residence to be acquired (in which case, under the 1996 Convention, Art. 6(2) would be applicable). However, such a determination should be avoided where possible – see paras 4.16-4.19, *supra*.

⁵⁵⁴ See *Al Habtoor v. Fotheringham* [2001] *EWCA Civ* 186, [INCADAT cite: HC/E/UKe 875]; *Callaghan v. Thomas* [2001] *NZFLR* 1105 [INCADAT cite: HC/E/NZ 413]; *Cameron v. Cameron* 1996 *SC* 17, 1996 *SLT* 306, 1996 *SCLR* 25 [INCADAT cite: HC/E/UKs 71]; *Moran v. Moran* 1997 *SLT* 541 [INCADAT cite: HC/E/UKs 74]; *Karkkainen v. Kovalchuk*, 445 *F.3d* 280 (3rd Cir. 2006), [INCADAT cite: HC/E/USf 879].

⁵⁵⁵ See *Denmark Ø.L.K.*, 5. April 2002, 16. *afdeling*, B-409-02 [INCADAT cite: HC/E/DK 520]; *Re H (Abduction: Habitual Residence: Consent)* [2000] 3 *FCR* 412 [INCADAT cite: HC/E/UKe 478]; *Morris v. Morris*, 55 *F. Supp* 2d 1156 (D. Colo., Aug. 30, 1999) [INCADAT cite: HC/E/USf 306]; *Mozes v. Mozes*, 239 *F.3d* 1067 (9th Cir. 2001) [INCADAT cite: HC/E/USf 301].

⁵⁵⁶ See *Re B (Minors Abduction)* [1993] 1 *FLR* 993 [INCADAT cite 204]; HC/E/UKe; *Mozes v. Mozes*, 239 *F.3d* 1067 (9th Cir. 2001) [INCADAT cite: HC/E/USf 301]; *Holder v. Holder*, 392 *F.3d* 1009, 1014 (9th Cir. 2004), [INCADAT cite: HC/E/USf 777]; *Ruiz v. Tenorio*, 392 *F.3d* 1247, 1253 (11th Cir. 2004), [INCADAT cite: HC/E/USf 780]; *Tsarbopoulos v. Tsarbopoulos*, 176 *F. Supp.2d* 1045 (E.D. Wash. 2001), [INCADAT cite: HC/E/USf 482]; *Gitter v. Gitter*, 396 *F.3d* 124, 129-30 (2d Cir. 2005), [INCADAT cite: HC/E/USf 776]; *Koch v. Koch* 450 *F.3d* 703 (7th Cir. 2006), [INCADAT cite: HC/E/USf 878]. It should be noted that within the *Mozes* approach the 9th Circuit did acknowledge that given enough time and positive experience a child's life could become so firmly embedded in the new country as to make it habitually resident there notwithstanding lingering parental intentions to the contrary.

⁵⁵⁷ *Friedrich v. Friedrich*, 983 *F.2d* 1396, (6th Cir. 1993), [INCADAT cite: HC/E/USf 142]; *Robert v. Tesson* (6th Cir. 2007), [INCADAT cite: HC/E/US 935]; *Re M (Abduction: Habitual Residence)* [1996] 1 *FLR* 887.

⁵⁵⁸ The key judgment is that of: *Feder v. Evans-Feder*, 63 *F.3d* 217, 222 (3d Cir. 1995), [INCADAT cite: HC/E/USf 83]. See also: *Karkkainen v. Kovalchuk*, 445 *F.3d* 280 (3rd Cir. 1995), [INCADAT cite: HC/E/USf 879]. In this case a distinction was drawn between the situation of young children, where it was held that heavy reliance would be placed on shared parental intention, and that of older children where parental intention would have a more limited role to play. *Silverman v. Silverman*, 338 *F.3d* 886 (8th Cir. 2003), [INCADAT cite: HC/E/USf 560].

deciding which approach to follow, the age of the child involved can be a deciding influence; the older the child is, the more likely the court will pay closer attention to the focus of his or her life.

13.76 The concept of habitual residence has been discussed by the Court of Justice of the European Union⁵⁵⁹ in the context of the Brussels II a Regulation.⁵⁶⁰ The CJEU has stated that the habitual residence of a child must be established taking into account all the circumstances specific to the individual case. In particular, the concept “must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory [...] and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.”⁵⁶¹

Presence

13.77 There are a number of instances where the presence of a child (or property of a child) is used as a connecting factor in the 1996 Convention.⁵⁶² The concept of “presence” denotes a physical presence in the territory of the Contracting State concerned. The concept does not require proof of residence of any sort: the mere physical presence of the child in the territory is sufficient.

Nationality

13.78 This connecting factor does not stand alone in the 1996 Convention, but is instead a factor in the transfer of jurisdiction mechanism found in Articles 8 and 9.⁵⁶³ The authorities of a Contracting State of which the child is a national can request that jurisdiction be transferred to them, and can also be requested to accept a transfer of jurisdiction. The nationality of the child alone is not sufficient, and the authorities of that Contracting State must also be felt to be the best placed to assess the best interests of the child involved. A number of children have more than one nationality. Any of the Contracting States of which the child has the nationality may come within the conditions set out in Articles 8 for a transfer of jurisdiction.

13.79 Article 47 deals with the situation of Contracting States which have a number of territorial units that apply different laws and explains that any reference to the State of which the child is a national shall be construed as referring to the territorial unit designated by the law of that State or, in the absence of relevant rules, to the territorial unit with which the child has the closest connection.

Substantial connection

13.80 Where there is a “substantial connection” between a child and a Contracting State, the authorities of that Contracting State can either request a transfer of jurisdiction (to be able to take measures directed to the protection of the person or property of a child – Art. 9), or can be requested to *receive* such a transfer of jurisdiction

⁵⁵⁹ Prior to 1 January 2011, the “Court of Justice of the European Communities”.

⁵⁶⁰ Case C-523/07, A, 2 April 2009. See also the more recent decision of the CJEU, *Barbara Mercredi v. Richard Chaffe* (C-497/10 PPU), 22 December 2010, which endorses this approach.

⁵⁶¹ Case C-523/07, A, 2 April 2009, paras 37-39. Of course, if the factors set out therein point to two or more different States as the possible State of the habitual residence of the child, it will ultimately be a matter for the judicial / administrative authority hearing the case to determine which factors are the most significant in the particular case at hand.

⁵⁶² See, e.g., Arts 6, 11 and 12, discussed, *supra*, in **Chapters 4, 6 and 7**.

⁵⁶³ Discussed, *supra*, paras **5.1-5.13**. However, in the 1961 Hague Convention on the Protection of Minors, nationality is used as a connecting factor. Art. 4 allows the State of which the child is a national to exercise jurisdiction to take measures for the protection of the person or the property of the child, if it considers that the interests of the child so require and after having informed the authorities of the State of the habitual residence of the child.

(Art. 8). This applies if it is felt that the authorities of that Contracting State are the best placed to assess the best interests of the child involved.⁵⁶⁴

13.81 The “substantial connection” test may also be used in the context of the 1996 Convention to apply a law that differs from that of the forum under Article 15(2).⁵⁶⁵ However, there is a slight difference in emphasis between Article 15 and Articles 8 and 9 in relation to the test to be applied. In Article 15, the Contracting State exercising jurisdiction may exceptionally apply or take into consideration the law of another State with which *the situation* has a substantial connection. In the transfer provisions, the substantial connection of the Contracting State receiving / making a request for transfer must be *with the child*.

13.82 Whether a child, or a situation, has a “substantial connection” with a State must be assessed on a case-by-case basis. Examples of States with whom a child may have a “substantial connection” are: the State of the former habitual residence of the child, the State in which members of the child’s family live who are willing to look after him or her, the State in which the access parent is living when the parents are separated, or the State in which the child has extended family members which he or she regularly visits.

Example 13 (s)

*The authorities in Contracting State A are seized of a divorce application. The criteria set out in Article 10 are fulfilled and the authorities have jurisdiction to take measures regarding the children of the divorcing parents. The children are habitually resident in Contracting State B and it is agreed that they should remain residing there. The fact of habitual residence is a “substantial connection” in this case and the authorities of Contracting State A may use this in order to apply the law of Contracting State B to the decision.*⁵⁶⁶

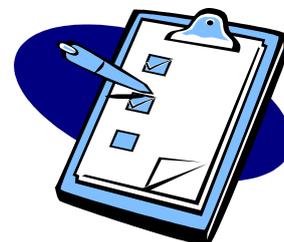
⁵⁶⁴ See **Chapter 5** for a detailed discussion regarding the transfer of jurisdiction provisions.

⁵⁶⁵ Discussed, *supra*, paras **9.1-9.3**.

⁵⁶⁶ Art. 15(2), discussed, *supra*, at paras **9.1-9.2**.

ANNEXE / ANNEX

IMPLEMENTATION CHECKLIST



Introduction

A "Checklist" of matters that may need to be examined in implementing the Convention

The purpose of this Checklist is to highlight issues which may need to be considered by States when implementing the Convention.

The Checklist does not seek to prescribe the method by which the Convention is implemented in Contracting States. Rather, it indicates some questions that may arise prior to, or upon implementation of the Convention. The list is not exhaustive and there undoubtedly will be other issues specific to States that will require consideration.

The Checklist includes "Preliminary matters" for consideration that relate to the Convention generally, while "Specific measures of implementation" and the annexes to the Checklist may also assist a State when considering particular aspects of the Convention. The annexes cover the following matters:

- | | |
|-----------|---|
| Annex I | A summary of provisions in the Convention that may require implementing measures, <i>e.g.</i> , changes to legislation, prior to the Convention entering into force. |
| Annex II | A summary of information to be communicated to the depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands), and the Permanent Bureau of the Hague Conference on Private International Law. |
| Annex III | A summary of the functions performed by Central Authorities, competent authorities and other authorities under the Convention. |

Preliminary matters

1. Contemplating becoming a State Party

- Consult with the Permanent Bureau of the Hague Conference on Private International Law and other Contracting States on the benefits of the Convention.
- Identify and consult with different stakeholders and experts in your State, for example, government and non-government agencies, judiciary, child protection services and the legal profession to:
 - determine the implications of becoming a State Party;
 - decide whether to become a State Party;
 - identify the best methods to implement the Convention; and,
 - develop a plan for the implementation and operation of the Convention.

2. Methods of implementation

- Consider the method by which the Convention will be implemented in your State:
 - In your legal system, is the Convention automatically incorporated into domestic law once the Convention enters into force?

OR

 - In your legal system, is incorporation or transformation of the Convention into domestic law necessary? If so, by what means will this be achieved?

Regardless of whether incorporation or transformation is required in your legal system, some implementing measures will be needed to assist the effective implementation and operation of the Convention within the context of your own legal and administrative systems.
- Conduct a comprehensive review of domestic laws, rules, regulations, orders, policies and practices to ensure that existing provisions are not contrary to the Convention.
- If there are any existing provisions that create obstacles or impediments to the effective implementation and operation of the Convention, what amendments are needed? (See below under "*Specific measures of implementation*" and Annex I.)
- Consider which matters will need, in your legal system, to be dealt with:
 - i. by administrative acts (*e.g.*, appointment of a Central Authority¹);
 - ii. in legislation (*e.g.*, rules of jurisdiction to take measures of protection, including provisions to transfer or assume jurisdiction²);
 - iii. in rules, regulations or orders (*e.g.*, rules of Court to admit and consider evidence from another Contracting State in proceedings related to access³).

¹ Art. 29.

² Arts 8 and 9.

³ Art. 35.

3. Becoming a State Party – signature and ratification or accession

Any State may become a State Party to the Convention. However, there are different ways in which a State may become a Party to the Convention. Consider which of the following is applicable:

- **Signature followed by ratification:** A State which was a Member of the Hague Conference on 19 October 1996 may *sign and ratify* the Convention.⁴ By *signing* the Convention, a State expresses, in principle, its intention to become a Party to the Convention. However, signature does not oblige a State to ratify the Convention.⁵ The State will then need to *ratify* the Convention for it to enter into force. The Convention enters into force three months after ratification.⁶
- **Accession:** Other States wishing to become a Party to the Convention may *accede*.⁷ For an acceding State the Convention will enter into force nine months after the date of accession.⁸ Within the first six months of that nine-month period, any other Contracting State may raise an objection to the accession. The Convention will not enter into force between the acceding State and the State which has raised the objection, until such time as the objection is withdrawn. Nevertheless, the Convention will enter into force between the acceding State and all other Contracting States which have not raised an objection.⁹

Ratification or accession to the Convention requires the deposit by a State of the appropriate instruments with the depositary.¹⁰ Annex II summarises other information that should be communicated to the depositary and / or the Permanent Bureau of the Hague Conference on Private International Law prior to, or on, ratification / accession.

4. Developing a timetable

Determine the date on which the Convention should come into force for your State. In developing a timetable for implementation, keep this date in mind and take steps to:

- Ensure that the necessary instruments and information are deposited with the depositary and communicated to the Permanent Bureau (see Annex II).
- Ensure that the appropriate implementing measures are put in place, or enacted and in force, by the time the Convention enters into force in your State.
- Make certain that all key stakeholders (*e.g.*, government departments, child welfare agencies, courts, police, legal profession) are informed of when the Convention will come into force, any changes to law and procedures and, where applicable, their respective roles under the Convention.
- Ensure that adequate training is provided to individuals involved in the application of the Convention (*e.g.*, government departments, child welfare agencies, courts, police).
- Disseminate information on the Convention to the public.

⁴ Art. 57(1): The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Eighteenth Session (19 October 1996).

⁵ Art. 18 of the *Vienna Convention on the Law of Treaties* obliges States, once an expression of consent to be bound by the treaty has been made, not to defeat the object and purpose of the treaty prior to its entry into force.

⁶ Art. 61(2) *a*): the Convention shall enter into force for each State *ratifying, accepting or approving* it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession.

⁷ Art. 58(1): any other State may accede to the Convention after it has entered into force.

⁸ Art. 61(2) *b*): the Convention shall enter into force for each State *acceding*, on the first day of the month following the expiration of three months after the expiration of the period of six months.

⁹ Art. 58(3). Note that an objection in respect of an earlier accession may be raised by States at the time they *ratify, accept or approve* the Convention.

¹⁰ Art. 57(2); Art. 58(2).

5. Designations, declarations and reservations

There are some obligatory designations to be made under the Convention as well as optional declarations and reservations that States may consider necessary.

A summary of the information to be communicated to the depositary and / or the Permanent Bureau is provided at Annex II, but in particular:

- Ensure that the designation of a Central Authority or Central Authorities is made at the time of ratification / accession (or at least before the Convention enters into force).¹¹
- Ensure that, as a matter of priority, the contact details of each Central Authority and the language(s) of communication are communicated to the Permanent Bureau and are kept updated.
- Contracting States may designate the authorities to which requests under Articles 8 and 9 (transfer of jurisdiction) and Article 33 (requests for placement of child in care) are to be addressed.¹² Ensure that, as a matter of priority, the designation and contact details of the authorities are promptly communicated to the Permanent Bureau (as well as language(s) of communication of the authorities).
- Consider whether a declaration is needed under Article 34, paragraph 2 (where a measure of protection is contemplated information relevant to the protection of a child is to be communicated to its authorities only through the Central Authority).¹³
- Consider whether reservations are necessary under Article 54 (language of communication) and Article 55 (property).¹⁴
- Consider whether a declaration under Article 59 is necessary (application of the Convention to territories).¹⁵

6. Ongoing processes of implementation

- Develop and implement mechanisms to monitor and evaluate the application and functioning of the Convention, for example, consultation with courts and other authorities responsible under the Convention. Regular evaluation will assist in identifying and responding to any implementation difficulties that may arise.
- Ensure that any future changes to contact details of Central Authorities and designated authorities are provided to the Permanent Bureau.
- Access the following resources for assistance:
 - Website of the Hague Conference on Private International Law < www.hcch.net >.
 - *The Judges' Newsletter on International Child Protection* – available at < www.hcch.net > under "Publications" then "Judges' Newsletter".
 - P. Lagarde, "Explanatory Report on the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children", *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, available at < www.hcch.net > under "Publications" then "Explanatory Reports".

¹¹ Art. 29; Art. 45. There is a risk that, if a Central Authority is not designated at the time of ratification / accession, this may lead other Contracting States to consider whether an objection to the accession should be raised.

¹² Art. 44; Art. 45.

¹³ Art. 45; Art. 60. See also Explanatory Report, para. 144.

¹⁴ Art. 60. See also Explanatory Report, para. 181.

¹⁵ Art. 60.

Specific measures of implementation

Chapter I – Scope

- Identify what measures of protection are already available in domestic law and how they relate to the Convention. The measures listed in Article 3 are not exhaustive and there may be other measures of protection available in your State.¹⁶
- Consider what rights and responsibilities under domestic law reflect the concept of “parental responsibility” (see Art. 1(2)).

Chapter II – Jurisdiction

- Consider whether changes to legislation are necessary for judicial or administrative authorities to have jurisdiction to take measures of protection based on a child’s “habitual residence” (Art. 5).
- Authorities must also be able to take certain measures of protection in respect of a child that is *present* in the State but not *habitually resident* (Arts 6, 11 and 12).
- Note that the Convention permits the authorities of a State to take measures of protection for a child habitually resident in another Contracting State in the context of an application for divorce, legal separation or annulment in respect of the parents’ marriage. However, this is in very limited circumstances, and only if permitted by the law of the State (Art. 10).
- Identify which judicial or administrative authorities will be competent to exercise jurisdiction under the Convention and ensure they are informed of any changes to legislation, policy or practice.

Transfer provisions (Arts 8 and 9)

- Consider what implementing measures may be necessary to facilitate the transfer of jurisdiction under Articles 8 and 9, for example:
 - changes to legislation or rules to enable competent authorities to transfer or assume jurisdiction. Authorities should be aware of the conditions under which the transfer may occur, in particular, that it must be in the best interests of the child and agreed to by both competent authorities (see Arts 8 and 9);
 - implementation of internal procedures, such as:
 - mechanisms for transferring or assuming jurisdiction. Authorities should have the ability to agree to requests to transfer or assume jurisdiction in appropriate cases. Consider:
 - how the application for measures of protection will come before an authority where jurisdiction has been assumed; and,
 - how to ensure that where jurisdiction has been transferred the case is no longer dealt with by the authorities of your State.

¹⁶ By contrast, the list in Art. 4 of matters for which the Convention does not apply *is* exhaustive. See Explanatory Report, paras 26 to 36.

Transfer provisions (Arts 8 and 9) continued

- procedures for the transmittal and receipt of requests for the transfer of jurisdiction and the role, if any, of the Central Authority. States should consider how their authorities will communicate with authorities in other Contracting States, for example, by a direct exchange between the competent authorities concerned with the proceedings or communication through the Central Authority. Consider whether a declaration under Article 44 is necessary (*i.e.*, designation of the authorities to which requests under Arts 8 and 9 are to be addressed);
- procedures for parties to a matter (other than Central Authorities or competent authorities) that are invited to request the transfer of jurisdiction. It should be borne in mind that one of the parties may be located in another Contracting State.

Chapter III – Applicable law

- Consider whether any changes to existing legislation are needed to enable:
 - the recognition of parental responsibility that has been attributed or extinguished under the laws of the child’s habitual residence, *i.e.*, the laws of another State (Art. 16);
 - authorities to *exceptionally* apply or take into account the law of another State where the child has a “substantial connection” (Art. 15(2)).

Chapter IV – Recognition and enforcement

- Consider whether any implementing measures are needed to amend existing legislation or procedures that are contrary to the following provisions:
 - measures of protection taken by the authorities of a Contracting State must be recognised “*by operation of law*” (Art. 23(1));
 - recognition of measures of protection taken in another Contracting State may only be refused on the grounds provided in Article 23, paragraph 2;
 - any “*interested person*” may request a decision on the recognition or non-recognition of a measure taken in another Contracting State (Art. 24). It may be that the interested person is located outside the requested State;
 - the procedure for the declaration of enforceability or registration of measures of protection must be “*simple and rapid*” (Art. 26);
 - enforcement of measures of protection takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child (Art. 28).
- Examine any existing domestic laws outside the Convention that apply to the recognition, declaration of enforceability or registration for enforcement of foreign measures of protection taken by another State and consider how these laws relate to the Convention.

Chapter V – Co-operation

a) Central Authorities

Central Authorities will play an important role in the effective operation of the Convention. Ideally, Central Authorities will be established and managed to provide a point of contact as well as complementing any existing domestic and cross-border arrangements.

When planning to establish a Central Authority, consider:

- which authority is best placed to perform the functions of a Central Authority. This is most likely to be an authority with responsibilities that are closely related to the subject matter of the Convention. The Central Authority should also be in a position to promote co-operation amongst the national authorities responsible for the different aspects of child protection, as well as to co-operate with other Central Authorities in Contracting States.

The Central Authority might, for example, be a government authority such as a ministry of justice or a ministry of child and family issues. Alternatively, a non-governmental organisation with similar responsibilities for children could be appointed;

- the functions that Central Authorities will perform and the functions that other authorities will perform (see Annex III);
- the measures needed to ensure that each authority has the necessary powers and resources to effectively perform their functions under the Convention;
- whether internal procedures are needed to ensure that requests are transmitted and processed quickly. For example:
 - communication between Central Authorities, competent authorities and other authorities *within* your State;
 - communication with authorities in other States.
- how mediation, conciliation or similar means can be used to reach agreed solutions for measures of protection (Art. 31 *b*). Identify what services are available to enable and support parties to engage in making consensual solutions;
- while Central Authorities and other public authorities of Contracting States are required to bear their own costs in carrying out their obligations under the Convention, consider whether “reasonable charges” might be imposed for the provision of certain services (Art. 38).¹⁷

If your State is a Party to the 1980 Child Abduction Convention, consider whether the designated Central Authorities will be the same for both Conventions.

- If the Central Authorities to be designated are not the same, ensure that the Central Authorities are able to consult in cases involving wrongful removal or retention of a child,¹⁸ or contact / access cases.

¹⁷ See Explanatory Report, para. 152.

¹⁸ See Art. 7.

Co-operation – Chapter V continued

b) Access – Article 35

- Consider whether any implementing measures or amendments to existing legislation are needed to:
 - assist in “securing the effective exercise of rights of access” for a parent residing in another Contracting State. Identify which authorities will transmit and receive requests for assistance;
 - enable authorities that are seized of proceedings relating to access to consider information from another Contracting State as to the suitability of a parent residing in another State.

- Identify what legal assistance or other advice may be available to foreign parents seeking measures of protection relating to access in respect of a child that is habitually resident in your State.

For further advice on this aspect of the Convention, see *General Principles and Guide to Good Practice – Transfrontier Contact Concerning Children*, available at < www.hcch.net > under “Child Abduction Section” then “Guides to Good Practice”.

c) Cross-border placement of children – Article 33

- Consider whether implementing measures or amendments to existing legislation are necessary in respect of the cross-border placement of a child in a foster family or institutional care or the provision of care by *kafala* or an analogous institution.

- Consider which authorities are best placed to:
 - consult on proposed placements
 - prepare reports on the child
 - receive and transmit requests from another Contracting State.

- Consider what safeguards and standards should apply before the Central Authority or other competent authority gives consent to a cross-border placement or provision of care.

- A designation under Article 44 may be necessary (Contracting States may designate the authorities to which requests under Art. 33 are directed).

- Ensure that communication procedures are implemented within the State and with other Contracting States, to avoid placements being made without the consent of the receiving State.

*Co-operation – Chapter V continued***d) Judicial communications**

The International Hague Network of Judges facilitates direct judicial communications between, and information sharing among, judges in different countries.

- If your State is represented in the Network consider whether the designated judge should also be available to communicate information relating to the Convention. Consider whether it may be useful to designate an additional judge with an interest or expertise in the Convention.
- If your State is not represented in the Network, consider whether a member of the judiciary in your State has a specialist interest in the operation of the Convention and would be willing to participate. Further information on the Network is available from the Permanent Bureau of the Hague Conference.
- Consider the possible role of direct judicial communications in the operation of Articles 8 and 9 in your State.
- Consider whether any implementing measures are necessary to provide the legal basis for direct judicial communications.

Confidentiality (Arts 41-42)

- Consider whether existing domestic laws are sufficient to protect the confidentiality of information that is gathered or transmitted under the Convention.
- If there are existing limitations in your State on the type of information that can be released to third parties, consider whether exceptions could be made for an exchange of information where it would be consistent with the objects of the Convention, for example, where a child is in need of urgent protection.

Relationship between the Convention and other instruments

- Identify any other international instruments to which your State is a Party which deal with the protection of children and consider how they will relate to the Convention. If appropriate, consider, together with other Parties to the instruments, whether any declaration is needed to ensure compatibility with the 1996 Convention (Art. 52).

ANNEX I

Checklist of provisions in the 1996 Hague Child Protection Convention that may require changes in domestic laws or procedures

The following table provides a summary of provisions where it may be necessary to consider legislative or procedural changes for the effective implementation and operation of the Convention. The need of such changes will obviously be less for those countries in which the provisions of the Convention are automatically incorporated into the legal system.

Article	Provision	Issue
Article 5	The State of the child's "habitual residence" has jurisdiction to take measures of protection.	Do authorities have jurisdiction to take measures based on a child's "habitual residence"?
Articles 6, 11, 12	Contracting States may take certain measures of protection in respect of a child that is not habitually resident but is present in the State.	Do authorities have jurisdiction to take measures of protection when a child is <i>present</i> in the State but not <i>habitually resident</i> ? Can authorities take measures of protection under Article 12 that are provisional and limited in territorial effect?
Article 7	In cases of child abduction, the authorities of the State of the habitual residence of the child immediately before the wrongful removal or retention retains jurisdiction for measures of protection until a number of conditions have been met.	Are there mechanisms in place to ensure that the authorities with jurisdiction are aware that the case is an international child abduction matter? Is the jurisdiction of authorities where the child is located limited so as to take measures only in case of urgency?
Articles 8, 9	Jurisdiction may be transferred between authorities of Contracting States once certain conditions are fulfilled.	Can authorities assume or transfer jurisdiction in accordance with the Convention? Are procedures in place to facilitate the transfer of jurisdiction?
Article 10	Where certain conditions are fulfilled, authorities may be able to take measures of protection for a child <i>habitually resident</i> in another Contracting State where the measures are taken as part of an application for divorce or legal separation or annulment in respect of the parents' marriage.	Ensure that, if authorities in your State can take measures of protection as a part of an application for divorce or legal separation of parents, they do so only where the conditions in Article 10(1) <i>a</i>) and <i>b</i>) are fulfilled.
Articles 1, 3, 16-18	The Convention defines parental responsibility in Article 1(2). Measures of protection include the attribution, exercise, delegation and termination or restriction of parental responsibility.	Is the concept of "parental responsibility" familiar to your system of law? What are the rights and responsibilities in your State that reflect the concept of parental responsibility? Will parental responsibility attributed or extinguished under the laws of the child's habitual residence, <i>i.e.</i> , laws of another State, be recognised?
Article 23	Measures of protection shall be recognised in all Contracting States "by operation of law".	Are measures of protection taken in another Contracting State recognised in your State by operation of law, <i>i.e.</i> , a measure will be recognised without the need to take proceedings?
Article 24	Any "interested person" may request a decision on the recognition or non-recognition of a measure taken in another Contracting State.	Can an interested person seek the recognition or non-recognition of a measure of protection? It may be that the interested person or child concerned by the measure is located in another Contracting State.
Article 26	The declaration of enforceability or registration of measures of protection shall be "a simple and rapid procedure".	Are procedures for registration of measures of protection "simple and rapid"?
Articles 30-39	Co-operation under the Convention.	Does each authority have the necessary powers and resources to effectively perform their functions under the Convention?

ANNEX II

Information to be communicated to the depositary or the Permanent Bureau by States Parties to the 1996 Hague Child Protection Convention

Designations which Contracting States must provide directly to the Permanent Bureau of the Hague Conference on Private International Law (Art. 45(1))

Article 29	<p>Contracting States shall designate a Central Authority to discharge duties which are imposed by the Convention on such authorities. As a matter of priority, contact details of Central Authorities and the language(s) of communication should be communicated to the Permanent Bureau.</p> <p>Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority.</p> <p>Where more than one Central Authority is designated, the State shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.</p>
Article 44	Contracting States may designate authorities where requests under Articles 8, 9 and 33 are to be addressed.

It is recommended that the following information be communicated to the Permanent Bureau:

Article 40	Each Contracting State may designate the authorities competent to issue certificates under Article 40. The contact details and language(s) of communication of the designated authorities should be communicated to the Permanent Bureau.
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Notifications to be communicated to the depositary¹

Article 57	Instruments of ratification, acceptance and approval.
Article 58	<ul style="list-style-type: none"> • Instruments of accession. • Objections to accession. Contracting States may object to the <i>accession</i> of an acceding State within six months after the receipt of a notification of accession.²
Article 62	A State Party to the Convention may denounce the Convention by notification to the depositary.

Declarations which may be made and must be communicated to the depositary

Article 45	A State may declare that requests for information under Article 34(2) shall only be communicated through its Central Authority.
Article 52	The Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by States Parties to such instrument.
Article 59	Where a State has two or more territorial units in which different systems of law are applicable, it may declare that the Convention shall extend to all or to one or more of the territorial units of the Contracting State (which must be identified). The declaration may be modified.

Information to be provided to the depositary regarding agreements between Contracting States:

Article 39	Contracting States may enter into agreements with other Contracting States with a view to improving the operation of the Convention. A copy of any such agreements shall be transmitted to the depositary.
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Reservations which may be made and must be communicated to the depositary

Article 54(2)	States may make a reservation objecting to the use of either French or English, but not both.
Article 55	A Contracting State may reserve the jurisdiction of its authorities to take measures of protection directed to the property of a child situated on its territory, and reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property.
Article 60(2)	The withdrawal of any reservations.

¹ Ministry of Foreign Affairs of the Kingdom of the Netherlands.

² Note that an objection in respect of an earlier accession may be raised by States at the time they *ratify, accept or approve* the Convention.

ANNEX III

Functions of Central Authorities and other authorities under the 1996 Hague Child Protection Convention

Direct obligations of Central Authorities	
Article 30(1)	Central Authorities shall co-operate with each other and promote co-operation amongst competent authorities in their States.
Article 30(2)	Central Authorities shall take appropriate steps to provide information as to the laws of, and services available in, their State relating to the protection of children.
Functions where Contracting States may designate specific authorities to whom requests be directed (Art. 44)	
Article 8(1)	Requests to transfer jurisdiction: the authority of a Contracting State which has jurisdiction can request or ask the parties to request an authority in another Contracting State to assume jurisdiction in a particular case.
Article 9(1)	Requests to assume jurisdiction: the authority of a Contracting State which does not have jurisdiction can request or ask the parties to request an authority in the Contracting State of the habitual residence to transfer jurisdiction in a particular case.
Article 33	Requests regarding cross-border placement: the Central Authority or competent authority of Contracting States must consult the Central Authority or competent authority in another Contracting State regarding placement in that other State of a child in a foster family or institutional care, or the provision of care by <i>kafala</i> or other analogous institution. The requesting State must provide a report with reasons for placement. The requested State shall communicate its decision regarding the proposed placement.
Other functions which may be performed by Central Authorities, competent authorities or other public authorities as determined by the Contracting State¹	
Article 23, 24	Receipt and transmittal of requests related to the recognition or non-recognition of measures.
Article 26	Declaration of enforceability or registration for enforcement of measures of protection taken in another Contracting State.
Article 28	Enforcement of measures of protection.
Article 31 a)	Authorities to facilitate communication and offer assistance under Articles 8 and 9 and Chapter V.
Article 31 b)	Facilitate consensual solutions for protection measures to which the Convention applies.
Article 31 c)	Provide assistance, on request from competent authorities, in locating missing children in need of protection.
Article 32 a)	Provide a report on the situation of the child in the State of habitual residence.
Article 32 b)	Request a competent authority to consider taking measures of protection for a child.
Article 34(1)	Receive or transmit requests for information relevant to the protection of a child. States may declare that requests under Article 34(1) be communicated only through its Central Authority.
Article 35(1)	Assist in securing the effective exercise of rights of access.
Article 35(2)	Authorities of the Contracting State where a non-custodial parent resides may, on request, gather information and make a finding on suitability of the parent to exercise access. Authorities of a Contracting State considering a request from a foreign parent for access to a child shall admit and consider information gathered, or findings made, by authorities of the Contracting State where the foreign parent resides.
Article 36	Where a child has been moved and is exposed to serious danger, competent authorities seized of the proceedings shall inform the State where the child is located about the danger (notwithstanding Art. 37).
Article 40	A certificate may be issued under Article 40 to a person having parental responsibility or a person who is entrusted with the protection of the child's person or property. The certificate should indicate the capacity in which the bearer is entitled to act.

¹ For example: government agencies, courts, administrative authorities / tribunals, child welfare services, health professionals, social welfare services, counselling services, court services, police services, mediation professionals. States should ensure that each authority has the necessary powers and resources to perform effectively their functions under the Convention. Procedures may also be necessary to ensure that authorities are aware of the responsibilities and functions performed by different authorities in the State.