

4 PAPER BUILDINGS

1996 Hague Convention Seminar

22nd June 2012

CHAIRS

Henry Setright QC & Marcus Scott-Manderson QC

KEYNOTE SPEAKER

Lord Justice Thorpe
Head of International Family Justice

SPEAKERS:

Henry Setright QC

Marcus Scott-Manderson QC

Teertha Gupta QC

David Williams

Mike Hinchliffe and John Mellor
CAFCASS

Helen Blackburn
International Family Law Group



The Chambers of Jonathan Cohen QC

INDEX

1. 4 Paper Buildings: Who we are

2. Overview

Henry Setright QC

3. Jurisdiction and Applicable Law

David Williams

4. Impact on the 1980 Abduction Convention

Marcus Scott-Manderson QC

5. Registration and Enforcement

Teertha Gupta QC

6. The Role of Cafcass

**Mike Hinchliffe and John Mellor
CAFCASS**

7. Practical application of the 1996 Convention

**Helen Blackburn
International Family Law Group**

8. Profiles of the speakers

9. Members of Chambers



Section 1

4 Paper Buildings: Who we are

The Chambers of Jonathan Cohen QC

4 Paper Buildings

This expanding set houses "the best children lawyers in London," who are regularly instructed to handle the most complex public and private children law matters around. It also receives praise for its ability to handle high net worth ancillary relief, and for the high level of client service it offers across the board. Its excellent clerking team is applauded for always providing a "great service even with difficult timeframes." One observer notes: "I think 4 Paper Buildings must rank highest as the most experienced, specialist international children set of chambers in the country, if not the world." Peter Jackson QC's recent appointment to the High Court Bench is testimony of the set's high quality and reputation.

Chambers UK 2012

4 Paper Buildings has an 'unrivalled collection of senior and junior barristers in the field'. 'Predominantly known for its children work, but also has some 'really excellent people for matrimonial finance cases'

Legal 500 2011

This set is a first port of call for highly complex, public and private children disputes. "Simply the best in the business for children work," it is blessed in housing many of the biggest names in the field. It adds further lustre to its reputation through the fact that it also boasts considerable expertise in high net worth matrimonial finance disputes.

Chambers UK 2011

At 4 Paper Buildings, Head of Chambers Jonathan Cohen QC has 'developed a really strong team across the board'. 'There is now a large number of specialist family lawyers who provide a real in-depth service on all family matters.' The 'excellent' 4 Paper Buildings 'clerks are very helpful' and endeavor to solve problems, offering quality alternatives if the chosen counsel is not available.'

Legal 500 2010

"This dedicated family set has expanded rapidly in recent years and now has a large number of the leading players in the field."

Chambers UK 2010

4 Paper Buildings has a long history as a friendly team of specialist barristers providing excellent expert yet common sense and practical advice and advocacy in all areas of family law. This reputation of Chambers is unrivalled and marks out Chambers as exceptional amongst its competitors.

4 Paper Buildings is consistently ranked as a leading family set of chambers, with currently 20 members recommended in the legal directories in all areas of family law

Many of the most serious, sensitive and significant family cases are undertaken by members of 4 Paper Buildings and instructions are received from a diverse array of clients including Government departments, media organizations, the rich and/or famous, parents seeking to prevent children from being removed into care and Guardians.



Section 2

Overview

Henry Setright QC

1996 Hague Convention

Henry Setright QC

Overview of the Convention:

- Background
- Implementation
- Interplay with BIIR
- Feedback on Operation

The background to the Convention

Origins

1. The *Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* ('1996 Convention'), is the third in a line of Conventions set up with the same fundamental purpose of ensuring the protection of children in international situations; the other two being the 1902 Convention on the Guardianship of Minors and the 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.
2. The 1961 convention, which replaced the 1902 Convention, despite its aim *to establish common provisions on the powers of authorities and the law applicable in respect of the protection of infants*¹ was criticised as creating obstacles in the actual implementation of the machinery of co-operation and enforcement of protective measures. One of the main failings of the 1961 Convention was that it organised the competing jurisdiction over the child protection between the places of habitual residence and nationality as well as countries where the child was present and, in the event of conflict, it gave precedence to the country of nationality (Art. 4, paragraph 4)². This created paralysis in cases of dual nationality and may not have provided the appropriate protection if, for instance, the child had fled from their country of nationality.³

¹ C/f 1961 Hague Convention Preamble

² Article 4(4)-(5): '*The application of the measures taken shall be assured by the authorities of the State of the infant's nationality. The measures taken by virtue of the preceding paragraphs of the present Article shall replace any measures which may have been taken by the authorities of the State where the infant has his habitual residence.*'

³ For an analysis of the improvements made the child protection by 1996 Hague Convention cf Dr Pirrung, *Improvements To Child Protection As A Result Of The 1996 Hague Convention*, International Family Law March 2012.

3. At the 17th (Centenary) Session of the Hague Conference, a review of the issues surrounding the 1961 Convention was undertaken and completed during the 18th Session on 19th October 1996. The review concluded in the completion of the 1996 Hague convention at the 18th Session. It is intended to provide practical mechanisms for co-operation between Contracting States in implementing child protection measures. It is not intended to change the substantive law on child protection of any signatory state.⁴ This is also consistent with the way the CJEU has interpreted the effect of BIIR: See JMCB-v-LE [2011] 1 FLR 518.

Aims/purpose:

4. The full title, *the Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, repeats the titles of the four principal chapters of the Convention so as to ‘not lend itself to any confusion’ (Lagarde). It does what it says on the tin.
5. The 1996 Convention does not aim to create a uniform international law of child protection. Instead, the Convention’s function is to improve the protection of children in international situations by providing the mechanics for an integrated system of co-operation, recognition and enforcement. It aims to *avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems (Outline)*. It is intended that the mechanisms for co-operation, recognition and enforcement created by the 1996 Convention will reduce delay and uncertainty in international.
6. It is intended to have a broader scope than the 1980 Hague Convention and the 1993 Hague Convention on adoption as it covers ‘*a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or care, and from matters of representation to the protection of children’s property*’ (Outline).
7. The purpose of 1996 convention is set out in both the preamble and Article 1. The preamble is longer than that of previous Conventions and seeks, as a compromise between the delegations at the conference, some of whom wanted simply the object set out and others who wanted broad principles stated, to set out its objects, its relationship with the UNCRC and the need to revise the 1961 Convention.

⁴ Explanatory Report by Paul Lagarde, para 7.

8. The objects of the Convention are defined in Article 1:

The objects of the present Convention are:

- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c) to determine the law applicable to parental responsibility;
- d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

9. By Article 2 the Convention applies to children from birth until their 18th birthday. It applies to most commonly encountered measures that might be taken in respect of a child including specifically public law measures: Article 3. Article 4 sets out some exclusions, such as the establishment of a parent-child relationship and adoption.

10. The draft Practical Operation Handbook, 2011 envisages that 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;
- e. Those who are refugees or unaccompanied minors.

Practical information

Signatories/ entry into force

11. The Convention took effect on 1st January 2002 when ratified by a 3rd country (Monaco, Czech Republic and Slovakia). However its take up was then very limited until in 2010 when the EU member states began to ratify. At present, there appear to 40 Signatory States (38 members of the Hague Conference and 2 non-Members {Armenia and the Dominican Republic}) The Convention has entered into effect (or is soon to do so) in 36. The five signatory states where it has not yet entered into effect are Belgium, Italy, Sweden, the UK and the USA. Greece and Montenegro are the most recent ratifications and it enters into force in Greece on 1st June 2012 and in Montenegro on 1st January 2013.

12. Morocco was the first signatory state to the Convention signing on the same day that the Convention was completed (19th October 1996). They were also one of the first to ratify doing so on 1st December 2002. This was of great significance given that the Moroccan legal system is set in Islamic Law as it provides support for the proposition that *the Convention provides a remarkable opportunity for the building of bridges between legal systems having diverse cultural or religious backgrounds (Outline)*. An example of the attempt to engage with Islamic systems within the Convention is the inclusion of the Islamic institution of *Kafala*, an equivalent to adoption, when making provisions for cross-frontier placements of children in institutional care.

13. The UK became a signatory to the Convention on 1st April 2003 but is yet to ratify the Convention. Ratification has been delayed by various issues including the preparation of the relevant rules for other parts of the UK, including the Isle of Man. It was due to be ratified on 1st May and thus to enter into force on 1st August 2012 but Data Protection issues have been raised at the last minute in relation to transmission of information pursuant to Article 32 and 34. No date for ratification is currently available.

Interface with BIIR

14. The European Union recognised the potential benefits of the 1996 Convention and as a result incorporated much of the Convention into BIIR. Article 61 of BIIR gives the Regulation primacy over the Convention where the child is habitually resident in a Member State or where recognition or enforcement of an order of a Member State is sought in another Member State even if the child is habitually resident in a Third State which is a contracting party to the 1996 Convention. The 1996 Convention will continue to have effect in matters which are not governed by BIIR: Article 62.

15. The correlation between the 1996 and BIIR is illustrated below

1996 Hague Convention Article	BIIR Equivalent
Recital and Article 1:object/purpose	Recital
Article 3: scope	Article 1
Article 5: Habitual residence jurisdiction	Article 8
Article 6: presence jurisdiction	Article 13
Article 7: jurisdiction retention following abduction	Article 10
Article 8 & 9: transfer of jurisdiction	Article 15
Article 10: PR jurisdiction attached to divorce	Article 12
Article 11: Urgent temporary measures	Article 20
Article 12: Provisional measures based on presence	No direct equivalent although see Art 20
Article 13: Lis pendens/first seised	Article 19
Articles 23 - 28: Recognition and enforcement	Article 21, 23, 26,28, 30, 31, 47
Articles 29 – 39: Co-operation	Articles 53 – 57.
Article 33: Placement of child in another Member State	Article 56
Article 43: documents	Article 52
Article 53: transitional/retrospectivity	Article 64
Article 47: Member state with 2 or more territorial units/legal systems	Article 66

16. As we will see later there are some significant differences between BIIR and the Convention. BIIR has no equivalent of the applicable law provisions but there are also differences in respect of provisional measures based on presence, on defences to recognition and on enforcement of protective measures made in 1980 Hague Abduction cases which are recognised under the 1996 Convention but not under BIIR: *Purrucker-v-Perez* (Case C-256/09). Conversely the 1996 Convention does not contain divorce/separation jurisdictional provisions and has no equivalent of BIIR Article 11, in particular the ‘second

bite of the cherry’ provisions or the fast-track enforcement for contact or the certification provisions.

17. The majority of Members of the EU and thus to whom BIIR applies have also ratified the 1996 Hague Convention. However this is not so for all.

EU Member State (BIIR) and 1996 HC ratified	EU Member State (BIIR) and 1996 HC not ratified	EU Non BIIR 1996 HC ratified	Non EU and 1996 HC ratified
Austria Bulgaria Cyprus Czech Republic Estonia Finland France Germany Greece Hungary Ireland Latvia Lithuania Luxembourg Malta Netherlands Poland Portugal Romania	Belgium Italy Sweden UK	Denmark	Albania Armenia Australia Croatia Dominican Republic Ecuador Monaco Montenegro Morocco Switzerland Ukraine Uruguay

Slovakia			
Slovenia			
Spain			

18. The status table detailing the progress of the signatory states can be found at:
http://www.hcch.net/index_en.php?act=conventions.status&cid=70

Sources of Information

19. The Convention has its own. Explanatory Report by Paul Lagarde:
<http://www.hcch.net/upload/expl34.pdf> There is also a draft Practical Operation Handbook which is currently still under revision

20. In 2010 the Hague Conference sent out a Questionnaire on the operation of the Convention and we will return to the results of that later.

Implementation in England and Wales

21. The FPR 2010 Rules 12 and 31 contains the procedural requirements in respect of applications under the 1996 Convention.

22. The Central Authority for England and Wales is expected to be the ICACU.

Response to Questionnaire

23. In November 2010, The Permanent Bureau of the Hague Conference sent questionnaires concerning the practical implementation of the 1980 and 1996 Conventions to the States which were parties to either of these conventions. In relation to the implementation of 1996 Convention, the questionnaire asked (amongst others):

- a. Its implementation and any difficulties in implementation;
- b. How well it is operating;
- c. Designation of a Central Authority;

- d. Difficulties in communication and co-operation with other Central Authorities;
- e. Difficulties encountered in practice by the Central Authority;
- f. Interpretation and application difficulties; and
- g. Publicising the Convention;

24. They received responses from 50 contracting States, including the International Social Service and the European Union, by April 2011.

Entry into Force

25. At the time of writing the response, the Convention was in force in 20 out of the 50 States that responded. Out of that number, 12 expressly stated that it was not possible to comment upon the success of its operation, interpretation or application as there had been little experience of cases to the date of response. To highlight how recent the application of the 1996 Convention has been between Contracting States: between 2010-2012 the Convention had only entered into force in 18 out of 37 contracting States.

26. The benefits of the Convention were generally recognised and its implementation is being considered by those States that were not parties to the Convention (see Israel, USA and Canada). Only Malaysia expressly stated that it was not considering accession at this time. Working groups have been set up in States such as Chile and the Dominican Republic to analyse and discuss the implications of ratifying the Convention. Only Canada stated that accession would be problematic due to its broad scope and the extent of necessary amendments that implementation would entail. Canada stated that it hopes to set up an informal international network of experts to discuss strategies, problems and outcomes of implementation. This has been approved by the Permanent Bureau of the Hague Conference.

27. As the Lithuanian response points out, there are only a small number of Contracting States to the 1996 Convention in comparison to the 1980 Convention. Such a small community reduces the effectiveness of the provisions of the Convention. It is to be borne in mind that EU States are regulated by BIIR however subscription to this alone does not assist in establishing measures for child protection outside of Europe.

28. The same issue faces the success of the 1996 Convention as with the 1980 Convention; namely the problems that arise because certain States have not ratified the Conventions, such as Japan, Egypt or some African countries. The responses to the questionnaire repeatedly request that these countries are encouraged to join. The letter from the Director of the European Commission recommends that more time is spent on encouraging accession to the 1980 and 1996 Convention and for the Special Commission to discuss which countries should be considered as target countries for accession and to explore possible ways of co-financing actions aimed at raising the awareness of the advantages of the two Conventions.

Central Authorities and co-operation between Contracting States

29. The general response of those States where it had come into force was that there had been no concerns regarding delegating a Central Authority to deal with cases arising under the 1996 Convention. It is not clear what percentage of States utilised the same Central Authority which dealt with cases under the 1980 Hague Convention as opposed to creating a new authority. Finland, Germany and Spain acknowledge using the same Central Authority whereas Slovakia stated that the Central Authority was split between 3 authorities to deal with the 1996 Convention.

30. The Spanish response highlights how, given the similarities with BIIR as well as with the general principles of the 1980 Hague Convention, the majority of Contracting States, particularly those members of the EU, will already be well equipped to implement the provisions of the 1996 Convention.

31. In the majority of States' responses no specific concerns are raised regarding communication with other Central Authorities or the interpretation, application and practical operation of the 1996 Convention. However, as noted above and qualified within the responses, these responses were given in the early days of implementation and before the majority of the States had successfully implemented the Convention. Therefore it may be premature to rely too heavily upon these observations as more problems may surface once the 1996 Convention has entered into force in more States and there has been more time for cases to immerge.

32. Germany states that they have experienced difficulty in communication between other Central Authorities as some States have not designated one or have not made their contact

details available. Germany also raised the potential benefit of legal certainty that the interpretation of Article 16 will bring, namely as to the attribution or extinction parental responsibility within different contracting States.

33. Canada's response raised a concern regarding the successful operation of the provisions relating to sharing information between Central Authorities in relation to child protection concerns as set out in Article 34 and 35 since legislation in Canada may prohibit the sharing of such confidential information. It is suggested that the confidentiality provision of the 1996 Convention at Article 42, States' internal procedures on confidentiality as well as the underlying principle of ensuring protection of children in international situations through co-operation would militate against a restriction on sharing such information if it was necessary in order to protect a child.
34. The International Social Service report dated June 2011 recommended and applauded the Permanent Bureau's greater emphasis upon mediation in international situations. They also recommended that Central Authorities apply their expertise of implementing 1980 Convention to implementing the 1996 Convention. The ISS is willing to assist any new signatory in implementing the Convention.

Trans-frontier access and contact disputes: Co-operation and Article 21 of the 1980 Hague Convention

35. The questionnaire asked about any difficulties in co-operation between authorities and implementation of Article 21 of the 1980 Hague Convention. Although this was not a specific reference to the 1996 Convention, it is relevant as the provisions on access and contact in the 1996 Convention aim to fill the gaps left in the 1980 Convention.
36. The main problem identified regarding co-operation between States in cross-border contact cases is the varying interpretation of the relevant provisions by other States. States also acknowledge delays and the cost of the application in creating difficulties with co-operation and implementation of orders.
37. The Netherlands and Hungary have raised compliance by parents as an obstacle to co-operation between the States. Hungary stated that access applications generally are made following a refusal to return by the Hungarian court under the 1980 Convention, however, by the time this application is made the parents' relationship has broken down to the extent

that they are no longer willing to co-operate with each other. The Netherlands observed that parental refusal to comply with orders causes difficulties in maintaining access rights and it hopes that more can be done for parents in terms of receiving help in gaining compliance when 1996 Convention comes into force. Israel and Mexico commented upon the ineffective methods of enforcement of access rights in international situations.

38. The International Social Service also recognised the issue raised by Hungary and stated that these cases are closely related to return or non-return cases. Another obstacle that the ISS raised was the problems created when one parent is not granted a permit to have contact with their child in another country.
39. The ISS strongly recommended greater use of mediation in trans-frontier access cases. The Netherlands has implemented cross-border mediation as a standard service in all Hague cases.

Analysis and discussion of the Convention itself

40. The Convention comprises 7 Chapters of which 4 contain the substance and which make up the Title of the Convention
 - (a) Jurisdiction, (Chapter II)
 - (b) Applicable Law (Chapter III)
 - (c) Recognition and Enforcement (Chapter IV)
 - (d) Co-operation. (Chapter V)

David Williams

Teertha Gupta QC

Marcus Scott Manderson QC deals with Reinforcement of the 1980 Hague Convention.

Helen Blackburn will deal with the practical issues including the FPR and some miscellaneous items.

Mike Hinchliffe and John Mellor will deal with it from the perspective of Cafcass.



Section 3

Jurisdiction and Applicable Law

David Williams

1996 Hague Convention

David Williams

Jurisdiction and Applicable Law

Introduction

1. Chapter II of the Convention contains the core provisions of the Convention – namely those which determine which country will have jurisdiction in matters of child welfare and protection. The Convention does away with any jurisdiction based on nationality or domicile and makes the central focus that of habitual residence.
2. Chapter II has a striking similarity to Articles 8 – 20 of BIIR and the EC Regulation draws very heavily on the Convention both in its philosophy and its terminology. They are not identical though.
3. Chapter III contains the provisions on Applicable Law. Some of it is readily accessible and understandable – other parts are (to English lawyers) quite incomprehensible. However for those host countries which would have applied the law of the nationality of the parents/child even though they were habitually resident in the host country the Convention makes fundamental changes.

Jurisdiction: Chapter II

4. Paul Lagarde's Explanatory Report describes the provisions in Chapter II on Jurisdiction as *'forming a complete and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them'*. He gives the example that *'a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6, where the child has his or her residence in a Contracting State. In the other situations the mere presence of the child gives rise to the application of Articles 11 and 12, but these articles do not exclude the broader bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law; only, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside of the scope of the Convention.'*

Habitual Residence

5. The basic jurisdictional foundation for the taking of measures is found in Article 5.

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

What meaning will be ascribed to habitual residence? The term habitual residence is not defined in the 1996 Convention. Will it be the EU definition found in *Re A and Mercredi-v-Chaffe*? Will it be the Hague Convention definition found in *Ex parte Shah* and most recently affirmed by the Court of Appeal in *H-v-K* where Ward LJ did seem to detect a difference between the two? Given the 1996 Hague Convention straddles states who are members of the EU and non-EU but 1980 Hague Convention states like Australia where will the issue lie? Will yet another definition arise? Or are *Mercredi-v-Chaffe* and *Ex parte Shah* really two sides of the same coin a readily reconcilable? It was however agreed that 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, for example, did not modify in principle the child's habitual residence (*Lagarde, para 40*).

6. Article 5(2) contains the provision recognising that a change of habitual residence leads to a shift of jurisdiction. There is no equivalent of the Article 9 BIIR reservation of access jurisdiction. However Article 14 of the Convention makes clear that orders continue to be valid despite a change in circumstances and the Explanatory Report suggests that a change in habitual residence alone would not be a change in circumstances rendering the order susceptible to challenge although a proposal to make this explicit was rejected. In addition the US delegation sought to introduce a form of wording that permitted the retention of jurisdiction for up to 2 years after a move of habitual residence – this would be consistent with the 'home state' approach of the US under the UCCJEA – but that was rejected.

Presence of the child

7. Article 6 provides the jurisdiction based on presence of the child – relevant both when the child has been displaced from their country of habitual residence or where their habitual residence cannot be established.

(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.

(2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.

8. Article 6 provides for situations, such as refugee or internationally displaced children, where the child has no habitual residence. If the child has no place of habitual residence then the jurisdiction that the child is present in will assume jurisdiction of necessity.
9. The jurisdiction will cease when it is determined that the child has obtained habitual residence somewhere. If this habitual residence is on the territory of a Contracting State, the authorities of this State will henceforth have jurisdiction. If it is situated in a non-Contracting State, the authorities of the State on the territory of which this child is present will no longer have anything more than the limited jurisdiction given to them by Articles 11 and 12 (*Lagarde*). This is very much in keeping with the aim of child protection within the Convention as it enables the Contracting State to put in place immediately any temporary protective measures pursuant to Art 11 and 12 (discussed below) which are necessary to protect children who find themselves vulnerable to exploitation and harm after leaving their country of origin. The co-operation provisions at Articles 29-39 provide further assistance in ensuring displaced children are temporarily but immediately afforded appropriate protection throughout the community of Contracting States.
10. The Explanatory Report states that although the text does not specify whether the court of the Contracting State, on the territory of which the child who has no habitual residence is present, is to retain the jurisdiction attributed to it by Article 6, paragraph 2, where measures of protection for the child have been taken in a non-Contracting State, for example in the State of the child's nationality. It seems reasonable to think that the Convention does not limit the jurisdiction of a court based on presence, but rather leaves it free to determine according to its law whether it should recognise and give effect to the measures taken in this third State (*Lagarde*).

Abduction cases

11. In abduction cases the jurisdiction of the country of habitual residence immediately prior to the abduction is retained by Article 7. This in large part mirrors Article 10 of BIIR although there are some slight differences as to the circumstances in which jurisdiction is lost (arising largely from the absence of the Article 11(6-8) equivalent in the Convention).

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) 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, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

This Article (as does Art 10 BIIR) raises directly the issue of habitual residence changing even though an abduction has occurred. It has long been considered a fundamental principle of English law that habitual residence cannot change in the absence of consent to the presence of the child in the other country: *Re J* (HL). The principle on which that was founded was of course the desire to preserve jurisdiction in the country of habitual residence. The principle is no longer relevant where a specific retention of jurisdiction provision exists. That principle had always conflicted with the other fundamental principle that habitual residence is a question of fact (rather than intent). The focus in EU cases on the degree of integration into a social and family environment and the relative unimportance of the intentions of the parties confirms the fact based nature of the enquiry.

The Article also makes explicit reference to the fact that the courts of the requested state can make protective orders under Article 11.

Transfer of Jurisdiction

12. Articles 8 and 9 taken together provide a ‘forum conveniens’ route to the transfer of jurisdiction. The wording and thus the mechanism is somewhat different from Article 15 BIIR, for instance Article 8 refers to the court considering another is better placed to assess the best interests of the child whereas Art 15 BIIR refers to another court being better placed to hear the case. As in BIIR Article 15 it is a ‘forum conveniens’ which is explicitly founded on the best interests of the child. This would seem to make it clear that any argument about the English court declining jurisdiction when the child is habitually resident here (for instance in US cases where the US court asserts a continuing jurisdiction) can only be declined on the basis that it is in best interests of the child not a pure ‘forum conveniens’ basis: See *Owusu-v-Jackson* (ECJ) and *DKN* (Theis QC). Interestingly Article 9(3) makes clear that the country where the child is not habitually resident cannot take measures unless the authority of the state of habitual residence has accepted the request. This would seem to be an equivalent of BIIR Article 19 although it goes further in that Article 19 only deals with ‘first seised’ whereas this Article would seem to imply that a court must expressly consider whether it has habitual residence jurisdiction as a preliminary. This may not be so novel when one considers the requirement on domestic court to recognise ‘abduction’ situations in particular or cases with a foreign dimension and to consider their own jurisdiction: *Re H* (Holman).

Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or*
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.*

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- 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 seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,*
- d) a State with which the child has a substantial connection.*

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or*
- invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.*

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

Prorogation in divorce or legal separation

13. Article 10 permits a court dealing with divorce or separation to take jurisdiction over matters of parental responsibility as Article 12 of BIIR does. Article 10 is not quite as exacting in that it only requires the parents to accept the jurisdiction rather than to ‘unequivocally’ accept it as in Article 12: See *Re I* (UKSC). The other significant difference is that Article 10 does not have the equivalent of Article 12(3) and thus jurisdiction cannot be assumed merely by the agreement of the parties and nor does it have the equivalent presumption of best interests found in BIIR Art 12(4).

(1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

(2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.

Urgent Measures

14. Article 11 provides for situations where protective measures are urgently needed in relation to a child present in the territory of the contracting state. It is the equivalent of BIIR Article 20. It can be used in abduction situations (Explanatory Report, para 71-2). Because of the terms of Article 23 and automatic recognition these measures would be recognised in the country of habitual residence and would have effect (although query if they need

enforcement they would still have to be declared enforceable or registered). Marcus Scott Manderson QC will consider these issues in more detail.

Article 11

(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.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

15. The Convention provides no definition of urgency. The explanatory report suggests that a situation of urgency within the meaning of Article 11 may be present in circumstances where if remedial action were only sought through the normal channels of Articles 5 to 10 it might bring about irreparable harm for the child.
16. The explanatory report states that the situation of urgency therefore justifies derogation from the normal rules set out in Article 5-10 and ought for this reason to be construed rather strictly. The jurisdiction provided in Article 11 is, as an exception to the principle on which the Convention is based, a jurisdiction which is concurrent with that of the authorities of the State of the child's habitual residence. Its justification is precisely the existence of a case of urgency (*Lagarde*).
17. The ECJ in *Deticek-v-Sguelia* [2010] 1 FLR 1381 considered Article 20 and applied a restrictive interpretation to its use, in particular confirming that delay in enforcement of substantive orders would not justify using Article 20 in a way which conflicted with orders of the court with primary jurisdiction.

Provisional Measures

18. Article 12 provides a jurisdiction by which provisional measures may be taken in respect of a child present in the state even where there is no urgency. Those measures must not be

incompatible with measures taken in the state of primary jurisdiction and lapse as soon as the authorities of that state have taken a decision on protection. Article 12 cannot be used in abduction situations (Art 7(3)) For instance, when the child is temporarily within another contracting state on a holiday or for school. The idea behind this provision is that prevention is better than cure. It enables local authorities to take measures without waiting for an emergency to arise.

Article 12

(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Court first seised/Lis Pendens

19. Article 13 prevents a court to whom an application has been made (and which might have jurisdiction under Articles 5 – 10) from exercising jurisdiction if at the time of commencement of those proceedings similar measures have been requested from another court having jurisdiction under Articles 5-10 and which are still pending. It is the equivalent of Article 19 BIIR. Although Art 19 refers to the court staying its proceedings until the court first seised has determined whether it has jurisdiction and Art 13 refers to abstaining there may be no material difference.

(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.

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

Orders of Continuing effect notwithstanding loss of jurisdiction

20. Article 14 seeks to ensure that an order made in one country remain valid notwithstanding that the jurisdiction of that court has been lost, for instance following a lawful move. The Article makes clear that such an order may be superceded by a subsequent order of the court with the later jurisdiction which modifies, replaces or terminates the original measure. In this way it makes clear (in a way that BIIR does not) that a court which subsequently acquires a substantive jurisdiction based on habitual residence may make orders which contradict an earlier order. What is not clear and there remains a dearth of guidance from the CJEU/ECJ or the English courts as to the circumstances in which, for instance, following a lawful move, it would be appropriate to re-visit the basis of the original order. This of course arises regularly in cases of applications for enforcement of, for instance, contact orders made in connection with the grant of leave to remove. Under BIIR applications to enforce access orders when certificated cannot be challenged – but when can the court of the state of later habitual residence make orders which conflict with that order?

Article 14

The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

Applicable Law: Chapter III

21. This part of the Convention aims to bring some clarity to the circumstances in which the laws of one country may be exercised in the courts of another or where they may be relevant to the operation of the laws of another country by reason of a move across borders.

Law applicable to measures of protection

22. Article 15(1) provides that in exercising their jurisdiction under Part II (Articles 5-14) courts shall apply their own law. For English lawyers this is self-evident but for jurisdictions which might have applied the law relating to the nationality of the parties and the child (i.e. Spain) it is important.

23. An exception to this general rule is provided in Art 15(2).

24. By Article 15(3) where protective measures have been taken in State A and the child moves to State B the law of State B governs the operation of those measures. So for instance where parental responsibility is granted by the courts of State A and the family moves to State B the laws of State B will thereafter govern the exercise of PR. Thus State A's law might require a guardian to obtain court authority for certain acts but the law of State B would not then the measure may not operate in the way originally intended. Shared residence orders which define how parental authority is exercised may also create interesting issues

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.

Attribution or extinction of parental responsibility

25. Article 16 (1) provides that the attribution or extinction of PR by operation of law and without the intervention of a judicial or administrative authority is governed by the law of the state of the child's habitual residence. This covers for instance section 2(1), (2) and 4(1)(a) of the Children Act 1989
26. Article 16(2) provides the same in respect of the attribution or extinction of PR by agreement or unilateral act. This would cover section 4(1)(b) Children Act 1989 or appointment of a testamentary guardian.
27. Article 16(3) provides that PR acquired in State A will continue to exist in State B even if it would not have been acquired in State B on the same facts. Art 16(4) then provides the converse that if a person had not acquired PR by operation of law in State A they may acquire it in State B if habitual residence moves to that state. How this would work for instance in relation to unmarried fathers who are registered on a birth certificate in State A (but did not acquire PR) and moved to England is unclear as the Act sets out clear requirements as to the way registration is effected.

Article 16

(1) 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 State of the habitual residence of the child.

(2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect.

(3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

(4) If the child's habitual residence changes, 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 new habitual residence.

Exercise of parental responsibility

28. This Article is self-explanatory. It's relevance may arise where for instance under the law of State A the holder of PR could act alone whereas under the law of State B he must act in conjunction with another.

Article 17

The exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence.

Termination or modification of parental responsibility

29. Article 18 confirms that measures may be taken to extinguish or modify PR created by operation of law, agreement or unilateral act and might be particularly relevant where following a number of moves too many individuals or authorities had acquired PR.

Article 18

The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention.

Protection of Third Parties,

30. Article 19

(1) The validity of a transaction entered into between a third party and another person who would be entitled to act as the child's legal representative under the law of the State where the transaction was concluded 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 provisions of this Chapter,

unless the third party knew or should have known that the parental responsibility was governed by the latter law.

(2) The preceding paragraph applies only if the transaction was entered into between persons present on the territory of the same State.

Applicable law rules apply to laws of non-Member states

31. Article 20

The provisions of this Chapter apply even if the law designated by them is the law of a non-Contracting State.

Renvoi and conflicts between choice of law systems

32. Article 21

(1) In this Chapter the term "law" means the law in force in a State other than its choice of law rules.

(2) However, if the law applicable according to Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If that other non-Contracting State would not apply its own law, the applicable law is that designated by Article 16.

Public Policy

33. Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

This does not provide a general get-out in respect of all the provisions of the Convention but only in respect of the Applicable Law provisions.

Conclusion

34. Taken together with the recognition and co-operation provisions the jurisdictional and applicable law rules should combine to provide clarity as to which courts should exercise jurisdiction and which law they should be applying.

35. As with BIIR the effects will no doubt take some time to filter down. The retrospectivity provisions means the Convention will apply once it is in force between both relevant states.

David Williams

18th June 2012



Section 4

Impact on the 1980 Abduction Convention

Marcus Scott-Manderson QC

Reinforcement of the 1980 Child Abduction Convention by the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

Marcus Scott-Manderson QC

Reinforcement objectives

1. The objectives of the original 1980 Hague Convention are set out in art. 1:

‘That the objects of the present Convention are:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States’.

2. The Hague Conference Outline with regard to the later 1996 Convention records that:

‘The 1996 Convention reinforces the 1980 Convention by underlining the primary role played by the authorities of the child’s habitual residence in deciding upon any measures which may be needed to protect the child in the long term. It also adds to the efficacy of any temporary protective measures ordered by a judge when returning a child to the country from which the child was taken, by making such orders enforceable in that country until such time as the authorities there are able themselves to put in place necessary protections.’

3. Paragraph 1.2 of the Revised Draft Practical Handbook on the operation of the 1996 Convention comments that the children who could benefit from an implementation of the 1996 Convention include:

- (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 Intercountry Adoption Convention;

(d) Those who are the subject of cross-border trafficking and other forms of exploitation, including sexual abuse;

(e) Those who are refugees or unaccompanied minors.

4. The preamble to the 1996 Convention includes the following:

‘The States signatory to the present Convention,

Considering the need to improve the protection of children in international situations,

Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children,

Recalling the importance of international co-operation for the protection of children,

Confirming that the best interests of the child are to be a primary consideration...’

5. Art. 1 of the 1996 Convention does not expressly refer to reinforcement of the 1980 Convention:

‘(1) The objects of the present Convention are -

a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;

- b)* to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c)* to determine the law applicable to parental responsibility;
- d)* to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- e)* to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

(2) For the purposes of this Convention, the term 'parental responsibility' 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.'

Jurisdictional reinforcement in abduction cases

6. The provisions of the 1996 Convention, where it refers to jurisdiction, on the other hand present a clear overarching structure for the 1980 Convention. Art. 7 of the 1996 Convention states:

'(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) 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, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.’

7. The transfer provisions under arts 8 -9 raise the question as to whether in a 1980 Convention case there would be any scope for an invitation to transfer. Previous practice with regard to the EU BIIR provision of art. 15 would suggest not.

Article 8

‘(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- 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 seised of an application for divorce or legal separation of the

child's parents, or for annulment of their marriage,

d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.'

Article 9

'(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or

- invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

(2) The authorities concerned may proceed to an exchange of views.

(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.'

8. Art. 10 of the 1996 Convention should assist and promote jurisdictional clarity in the resolution of 1980 Convention cases. Art 10 states:

'(1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage,

may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

- a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and
- b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

(2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason.’

9. However the 1996 Convention where it involves abduction cases has limits: it does not contain an art. 11.8 BIIR procedure.
10. Further, the concept of habitual residence in the 1980 Convention and the 1996 Convention is arguably thrown into more difficulty by art. 10 of the 1996 Convention. Is the EU approach to habitual residence now to prevail?

Reinforcement of protective measures in abduction cases

11. A key area of reinforcement of the 1980 Convention is in the urgent protective measures scheme of the 1996 Convention.
12. The practice under the 1980 Convention is to consider undertakings: *Re M (Child Abduction: Undertakings)* [1995] 1 FLR 1021; *Re K (Abduction: Psychological Harm)* [1995] 2 FLR 550.
13. The 1996 Convention raises the important question of reciprocal recognition and enforcement of urgent protective measures in 1980 Convention cases. Can measures made in a 1980 Hague Convention case be implemented in the requesting state when it is the state of habitual residence?
14. Lagarde Explanatory Report paragraphs 68 – 73:

68 ...The jurisdiction provided in Article 11 is, as an exception to the principle on which the Convention is based, a jurisdiction which is concurrent with that of the authorities of the State of the child's habitual residence. Its justification is precisely the existence of a case of urgency....

70The Commission deliberately abstained from setting out what measures might be taken on the basis of urgency in application of Article 11

71 The jurisdiction of authorities based on urgency, even though it is concurrent with the jurisdiction of the authorities normally having jurisdiction, should remain subordinate to the latter At that moment, the situation is under the control of the authorities which normally have jurisdiction, and there is no longer any reason to maintain the jurisdiction of the authorities of

the State of the child's presence nor the measures that they have taken in urgent circumstances.

72 This provision presupposes that the measures taken on the basis of urgency are recognised in all the Contracting States. The corresponding paragraph of Article 9 of the 1961 Convention sets it out that the measures taken lapse after action has been taken by the authorities which normally have jurisdiction, but 'subject to the continued effectiveness of action completed thereunder'. The Convention did not retain this phrase which seemed to say something

which was obvious. It is obvious indeed that one cannot go back on a surgical operation or a sale of property which has already taken place.

73 If the authorities ...of the non-Contracting State of the habitual residence of the child, or as the case may be of another State whose jurisdiction may be recognised, have taken the measures required by the situation, there is no reason to maintain the measures taken by the court acting under urgency

jurisdiction. The recognition in the Contracting States of the measures taken by a non-Contracting State may only depend on the national law of each of the Contracting States concerned, in such a way that the cessation of the effects of measures taken by the court acting under the urgency jurisdiction will not occur in a uniform and simultaneous manner in the different Contracting States. For this reason paragraph 3 sets out that the measures taken by the court acting under the urgency jurisdiction ‘shall lapse in each Contracting State, as soon as measures required by the situation, and taken by the authorities of another State are recognised in the Contracting State in question.’

15. Art. 11 provides:

‘(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.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.’

16. Compare with art. 20 BIIR.

17. Art 7.3 of the 1996 Convention states:

‘(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.’

18. This appears to rule out measures in 1980 Hague cases under art. 12 of the 1996 Convention. Article 12 states:

‘(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.’

19. The draft handbook cites some examples at pages 45 – 56. Example 6 (g) is the most interesting in this context.

‘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 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. This urgent measure will be recognised by operation of law in Contracting State A and will be enforceable under Chapter IV of the Convention. It will lapse as soon as Contracting State A takes the necessary measures of protection in this regard.’

Re-emphasis on cooperation and mediation

20. Central Authorities:

Art 29

‘(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities....’

Article 30

‘(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.’

21. Mediation:

Article 31

‘The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

- a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;
- b) 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;

c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.’

Reinforcement of international access rights

22. Article 21 1980 Convention is now supplemented by art. 35:

Article 35

‘(1) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under 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.

(2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.

(3) An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

(4) Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.’

M. Scott-Manderson QC

18.6.2012



Section 5

Registration and Enforcement

Teertha Gupta QC

1996 Hague Convention

Teertha Gupta QC

Recognition, Enforcement and Co-operation

Recognition and Enforcement: Chapter IV

1. Chapter IV contains 6 Articles – in contrast to Chapter III of BIIR which contains 31. Part of this is explained by the greater detail given in BIIR to the procedure to be followed and part by the certification provisions in BIIR and the separate treatment of enforcement of access rights and Article 11(6-8) return orders.

Recognition and grounds for refusal of recognition

2. Article 23 contains the basic principle that a measure taken one Contracting State shall be recognised by operation of law in other contracting states. Some delegations had wanted automatic recognition of orders of non-Contracting States but this was rejected. Recognition by operation of law means simply that no proceedings are required to obtain recognition – however if a party seeks to enforce then this will require proceedings and within these another party may challenge recognition. Article 43 provides that documents (including orders) are exempt from legalisation or other formality. BIIR provides the certification process to support authenticity but the Convention does not have an equivalent. In *Re Rinau* the ECJ confirmed a certificate could not be challenged in any way, save as to its authenticity. How will this operate in relation to documents from other Contracting States – particularly where such measures are taken by an administrative authority rather than what we would recognise as a judicial authority? Questions over the meaning and effect of orders made in other states may provide interesting questions of interpretation. For instance an order which suspends the PR of a mother?

3. Article 23 (2) provides the grounds on which recognition (and therefore enforcement) may be refused. They are very similar to those found in Article 23 (a) – (g) of BIIR – although not identical.

(a) *The measure was taken by an authority whose jurisdiction was not based on the grounds provided in Chapter II (jurisdiction)*

In distinct contrast to Article 24 BIIR the Convention allows the requested court to examine the jurisdiction of the originating court. However this is plainly intended to be a limited exception because Article 25 prohibits the court from challenging findings of fact on which the originating court's jurisdiction was based. So if a court finds a person was present in the country for 3 days and had registered with the civil authorities and was thus habitually resident in the Contracting State that would presumably be binding. In contrast if a court determined it had jurisdiction based on the nationality of the child or the domicile of a parent that would be open to challenge.

(b) *Non-urgent decisions taken without the child having been given an opportunity to be heard. {BIIR Art 23(b)}*

(c) *Non-urgent decisions taken without a person with PR being given an opportunity to be heard. {BIIR Art 23(d)}*

(d) *Recognition manifestly contrary to public policy of requested state taking into account the best interests of the child. {BIIR Art 23(a)}*

The Explanatory Text offers no guidance on how this is to be interpreted. Case-law in England has set a high threshold: Re S, LAB-v-KAB There are as yet no CJEU or ECJ decisions on its meaning.

(e) *Measure incompatible with later measure taken in non-Contracting State of habitual residence. {BIIR Art 23 (f)}*

(f) *If the procedure in Article 33 has not been complied with {BIIR Art 23 (g)} For placements abroad in residential or foster care, including kafala, the correct procedure must be followed.*

Interestingly the Convention does not have an equivalent to Article 23 (e) – namely that the measure is irreconcilable with a later judgment on PR in the requested state. This would seem to be because the Convention is so clear in Chapter II on jurisdiction that it shifts to the new country of habitual residence that it is unnecessary to specify this. In BIIR no clear resolution has been reached in decided cases on the circumstances in which a requested court may decline to enforce an order (particularly on access rights) where the child is now habitually resident in the requested state (and jurisdiction has shifted to that state and not been retained by operation of BIIR Art 10).

Article 23.

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may be taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

a) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without however be refused -

b) if the measure was taken without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 has not been complied with.

Preventive action for recognition or non-recognition

4. Article 24 provides the procedure for seeking recognition or non-recognition of a ‘measure’ (hence not including PR acquired by operation of law). Thus a left behind parent on a relocation case may seek to have the order which permits the custodial parent to live in England recognised so as to prevent a further move on or a father deprived of PR by a court order may seek non-recognition to prevent mother entering transactions for the child without his consent. There is no requirement, as there is in Article 26 for this to be by way of a simple and rapid procedure.

Article 24

Without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Findings of jurisdictional facts

5. Article 25

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

Declaration of enforceability

6. If recognition alone is insufficient and enforcement/registration for enforcement is required Article 26 provides that such shall take place by a simple and rapid procedure as determined by the laws of the requested state. This is now found in the FPR. Enforcement may be refused on the grounds set out in Article 23.

(1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.

(2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.

(3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Prohibition of review on the merits

7. Article 27 ought to be self-explanatory and perhaps is. Subject to any decision on non-recognition/enforcement in an enforcement application the requested court cannot review the merits of the decision taken. Again – in cases of a transfer of habitual residence – this brings us back to when a court may feel it appropriate to make orders based on its own substantive jurisdiction which conflict with an earlier order.

Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken.

Enforcement.

8. Article 28 confirms that in enforcement applications the measure to be enforced is treated as a domestic order. If the measure is one which has no equivalent in the law of the requested state - the Explanatory Report gives an example of a public law measure – then the requested state may adapt it to fit what it can achieve or may need to exercise its own substantive jurisdiction (assuming a change of habitual residence). The Explanatory Report suggests that such a situation would call for co-operation between the authorities of the requested state and the originating state. The reference to the best interests of the child seems likely not to create an entirely free discretion to enforce/not enforce but would appear only to be relevant where no direct equivalent is available. A completely free discretion would in effect contradict Article 27 itself.

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement 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.

Co-Operation: Chapter V

9. In support of the implementation and effectiveness of Chapters II, III and IV the Convention aims to improve the exchange of information between jurisdictions. Two lines of communication are envisaged. One is via the creation of Central Authorities and the other is by direct communication between competent authorities. This it seems may include courts as well as relevant public bodies.

Creation of a Central Authority

10. It is understood this will be the ICACU. Given the wide obligations imposed there is a difficulty for Central Authorities which are not embedded in a Child Welfare Department or similar. A quick look at the Central Authorities for other Contracting States show many within Child or Social Welfare Ministries and Justice Ministries. Feedback from the ICACU over the operation of Articles 55 and 56 BIIR suggest they have been heavily reliant on voluntary co-operation of social services departments to obtain specific information about children.

Article 29

(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention on such authorities.

(2) 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 and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

General Obligation of Co-operation

11. Article 30

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

Communication, mediation, localisation

12. Article 31 contains the core obligations. The Central Authority may delegate the functions to other bodies – this is deliberately not defined. A proposal by ISS to limit it to ‘designated professional bodies’ was rejected.

13. The first obligation is to facilitate communications in relation to applications for the transfer of jurisdiction under Articles 8 and 9 {BIIR Art 15}.

14. The second is to facilitate by mediation, conciliation or similar means agreed solutions for the protection of the child. What this means in practice for the ICACU is unknown. It seems unlikely they will provide mediation themselves. It may only mean that they will refer people to LSC franchised or private mediators.

15. Lastly is to provide assistance on discovering the whereabouts of a child where it appears the child may be present and in need of protection in the requested state. Again how this will operate in England is unclear. The ICACU has no authority (at present) to interrogate other public authorities and in the usual case an application would need to be issued. It is understood negotiations were taking place as to how this function could be undertaken without the need for court proceedings.

Article 31

The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

- a) facilitate the communications and offer the assistance provided for in Articles 8 and 9 and in this Chapter;*
- b) 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;*
- c) provide, on the request of a competent authority of another Contracting State, assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested State.*

Request for a report for measures

16. A Central Authority (or other competent authority) may make a request to another Central Authority in respect of a child who has a substantial connection with the requesting state but who is habitually resident and present in another state for a report on the situation of the child and request that protective measures are taken. The requested state is not obliged to provide the report. This would certainly cover relocation cases where the left behind parent continues to reside in the requesting state but has lost contact or who has concerns over the situation of the child.

Article 32

On a request made with supporting reasons by the Central Authority or other competent authority of any Contracting State with which the child has a substantial connection, the Central Authority of the Contracting State in which the child is habitually resident and present may, directly or through public authorities or other bodies,

- a) provide a report on the situation of the child;*
- b) 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.*

Transborder placements

17. Article 33 is the direct equivalent of BIIR Article 56 and imposes a mandatory requirement on the placing authority to consult with the CA or other competent authority of the requested state. The consent of the CA or other competent authority is also mandatory before placement can occur. In HSE-v-SC & AC Case C-92/12 PPU in the CJEU the ICACU confirmed they were not ‘the competent authority’ within Art 56. The CJEU confirmed that the phrase must mean an authority governed by public law. The CJEU also confirmed that the placement order would have to be declared enforceable before placement occurred and that any appeal against such a declaration should not have a suspensive effect. This is in fact directly contrary to the wording of FPR R 31.16. Interim orders would require fresh declarations.
18. In particular this contemplates that the arrangements for the placement, the immigration situation and the costs consequences will be the subject of consultation. Surprisingly the Explanatory Report suggests that Article 38 (which deals with the costs of applying the Convention) might apply to costs in connection with a cross-border placement. This seems surprising – mainly because the payments for instance to foster-carers or to a residential home would not seem at first blush to be a cost of applying the Convention.

Article 33

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Furnishing of concrete information about a specific child

19. This simply formalises and facilitate the exchange of information about children the subject or potential subjects of protective measures. A state may designate that such requests only be made through a Central Authority.

Article 34

(1) Where a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority of another Contracting State which has information relevant to the protection of the child to communicate such information.

(2) A Contracting State may declare that requests under paragraph 1 shall be communicated to its authorities only through its Central Authority.

Assistance in the implementation of measures; access rights

20. The first part of Article 35 is an attempt to ‘beef up’ Article 21 of the 1980 Abduction Convention in respect of access rights. A request for assistance in securing effective exercise of rights of access or securing the right to maintain direct access would both usually require court involvement although in theory at least one could conceive of local authority or other child welfare authority involvement in seeking to promote access.

21. The second part enables a left behind parent who seeks access to his child (who is habitually resident in another Contracting State) to ask the authorities of his country to carry out an assessment of him for use in proceedings in the other country. That report may both gather information and evidence but also assess the left behind parents suitability to have access and under what conditions. That report **shall** be admissible as evidence in proceedings over access in the other country. A court considering such an application may adjourn pending the outcome of a request under paragraph 2.

Article 35

(1) The competent authorities of a Contracting State may request the authorities of another Contracting State to assist in the implementation of measures of protection taken under 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.

(2) The authorities of a Contracting State in which the child does not habitually reside may, on the request of a parent residing in that State who is seeking to obtain or to maintain access to the child, gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised. An authority exercising jurisdiction under Articles 5 to 10 to determine an application concerning access to the child, shall admit and consider such information, evidence and finding before reaching its decision.

(3) An authority having jurisdiction under Articles 5 to 10 to decide on access may adjourn a proceeding pending the outcome of a request made under paragraph 2, in particular, when it is considering an application to restrict or terminate access rights granted in the State of the child's former habitual residence.

(4) Nothing in this Article shall prevent an authority having jurisdiction under Articles 5 to 10 from taking provisional measures pending the outcome of the request made under paragraph 2.

Child in serious danger

22. Article 36 deals with the situation Thorpe LJ was recently highlighting of children the subject of, particularly public law proceedings being moved across a border to avoid the authorities. The Article imposes an obligation to inform the authorities of the other state.

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.

Information creating a risk for the child

23. Article 37

An authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be 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.

Costs

24. The rule in Article 38 mirrors that in the 1980 Hague Convention that Central Authorities shall bear their own costs of implementing Chapter V. However the Article does contemplate the possibility of imposing charges. Given the potentially quite extensive enquiries that might be required the possibility of imposing charges would seem likely to be relied on. Assessing a parents suitability for access, locating a child, obtaining reports for the purposes of considering transfer of jurisdiction might all be lengthy.

(1) Without prejudice to the possibility of imposing reasonable charges for the provision of services, Central Authorities and other public authorities of Contracting States shall bear their own costs in applying the provisions of this Chapter.

(2) Any Contracting State may enter into agreements with one or more other Contracting States concerning the allocation of charges.

Agreements between contracting states

25. Article 39

Any Contracting State may enter into agreements with one or more other Contracting States with a view to improving the application of this Chapter in their mutual relations. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

END



Section 6

The Role of Cafcass

Mike Hinchliffe and John Mellor

CAFCASS

HAGUE 1996

CAFCASS HIGH COURT TEAM AND CAFCASS LEGAL

Mike Hinchliffe and John Mellor

1. **Work of Cafcass High Court Team**
 - Children and Family Reporter reports
 - Children's guardian per r16.4
 - High Court Team have taken over Hague 80 work from PRFD Team

2. **Work of Cafcass Legal**
 - Acting for High Court team: "In house tandem model"
 - Advocate to the court
 - Legal help line
 - Roadshows – Internal Cafcass Training

3. **Family Justice Service**
 - Family Justice Review
 - Massive increase in care cases
 - Legal aid restrictions will mean more LIPs

4. **You scratch my back.....**
 - Court order appointing Cafcass: email to High Court Team
 - Essential reading list for the CFR
 - Full details of client for police checks

5. **Child perspective**
 - Use of wardship for direct instruction of solicitor
 - Hague 80 rules do not permit it
 - Children in fear or anxiety

6. **The Future**
 - Enforcement of contact reducing the need for return applications
 - More mirror orders facilitating leave to remove applications
 - International co-operation for police checks
 - Increasing local authority awareness

7. **Contacting us**
 - Highcourtgm@cafcass.gsi.gov.uk
 - High Court Team Service Manager : 0844 353 3350
 - Cafcass Legal Helpline: 0844 353 33892

17 June 2012



Section 7

Practical application of the 1996 Convention

Helen Blackburn

International Family Law Group

1996 Hague Convention

Helen Blackburn

Practical Application of the Convention

How will the 1996 Hague Convention affect my cases and the advice that I give my clients?

Look out for cases involving the following countries not previously covered by BIIr (Council Regulation (EC) No 2201/2003) and/or the 1980 Hague Convention

- **Albania** non 1980 Hague Convention and non BIIr
- **Australia** non BIIr
- **Croatia** non BIIr
- **Denmark** non BIIr
- **Ecuador** non BIIr
- **Monaco** non BIIr
- **Morocco** non 1980 Hague Convention and non BIIr
- **Switzerland** non BIIr
- **Ukraine** non 1980 Hague Convention and non BIIr
- **USA** non BIIr
- **Uruguay** non BIIr
- **Armenia** non 1980 Hague Convention and non BIIr

Look out for cases involving 16 or 17 year olds

Article 2 The 1996 Hague Convention applies from the moment of birth until a child reaches the age of 18 – this is a major difference from 1980 Hague Convention.

The Practical application of the 1996 Hague Convention

Although the 1996 Hague Convention is currently in force in a number of contracting states (Australia, Armenia, Albania, Bulgaria, Czech Republic, Ecuador, Estonia, Hungary, Latvia,

Lithuania, Monaco, Morocco, Slovakia, Slovenia and Ukraine) there doesn't appear to be any reported case law yet.

As a consequence the best we can do at this stage is to look at some theoretical case studies to show how the 1996 Hague Convention should work in practice.

Case 1 – The contact case

- Father living in the Ukraine with his new partner.
- Mother and their 7 year old son living in England with the mother's British husband.
- Child is Ukrainian but has been living in UK for 18 months after mother secured a relocation order from the Ukrainian court.

- The Father seeks advice as:
 - (a) He is concerned about his son's welfare - during a recent telephone conversation the child disclosed that he was being beaten by his stepfather.

 - (b) The Mother is not complying with the contact provisions in the Ukrainian order made at the time that the mother was granted permission to relocate to the UK. The Mother states that she is afraid that the Father will retain the child in Ukraine if she sends the child for contact as ordered.

How the 1996 Hague Convention should apply in practice:

- **Article 5** – child is habitually resident in England and Wales and this jurisdiction therefore has jurisdiction to deal with any disputes;
- As the father has child protection concerns under **Article 32 (a)** the Ukraine can ask the English authorities to provide a report on the child's situation (like a welfare check) or under **Article 32 (b)** request the English authorities to consider taking measures of protection.
- **Article 31 (b)** - both countries' authorities are under an obligation to mediate solutions to protect the child.
- **Article 7** – England and Wales retains jurisdiction if Father wrongfully retains the child at the end of a contact visit in Ukraine.
- **Article 35** – Ukrainian authorities can request that the English authorities help secure the father's rights of contact.
- **Articles 23-28** – the father can seek enforcement of the Ukrainian contact Order in England. (procedure set out in **FPR 2010 r31.1-31.22, PD 31A**).

Case 2 – The Child abduction case:

- Father is Moroccan and Mother is British
- Parents married in England and have lived in England for 10 years
- They have one child, a 9 year old born in England.
- The Father takes the child to Morocco to visit his family. They are scheduled to return to the UK 2 weeks later but the Father retains the child in Morocco
- The Mother seeks advice.

How the 1996 Hague Convention should apply in practice:

- **Article 5** – England and Wales have jurisdiction, child is habitually resident in this jurisdiction.
- **Article 7** – establishes that jurisdiction remains with England and Wales as child has been in Morocco for less than a year and the child has been wrongfully retained in Morocco.
- **Article 23** – any order that the courts of England and Wales make should be automatically recognised in Morocco with limited exceptions such as if it were contrary to public policy in Morocco.
- **Article 26** – if the English order is recognised in Morocco then it can be enforced and thus, even though Morocco has not ratified the 1980 Hague Convention, an order for return could be achieved by securing an English court order directing the return of the child.
- **Article 28** – enforcement of the order would be in accordance with Morocco's own laws.
- **Article 31 (c)** – the Mother could ask the English Central Authority to ask the Moroccan Central Authority to provide assistance in discovering the whereabouts of the child - if this is necessary.
- **Article 8** – The English Court could request that Morocco assume jurisdiction if it was considered better placed (procedural rules are set out in **FPR 2010 r 12.61-12.64**)

NB **Article 50** provides that when both states are parties to the 1996 and 1980 Hague conventions nothing precludes the 1996 Convention being used to securing a return of a child wrongfully removed or retained child or securing access rights. The 1996 Hague Convention therefore provides an independent way of dealing with abduction cases but I am uncertain as to whether the same non means assessed funding will be available for 1996 Hague Convention applications though these cases will be distributed in the same way to panel solicitors.

When both could be used, consider using the 1996 Hague Convention rather than 1980 Hague Convention when

- The child is 16 or 17;
- there is a pre-existing order or
- where the abducting /retaining parent will find it harder to prevent recognition pursuant to **Article 23 (2)** than raise a successful defence under the 1980 Convention.

Case 3 – Parental Responsibility:

- Unmarried parents (Mother is Australian and Father is British)
- Child born in 2001 in the UK.
- Whilst the Father is named on the child's British birth certificate the parties do not enter into a PR agreement nor is the child the subject of a PR order.
- Parents and child relocate to Australia in 2004 and live in Sydney, Australia until 2011.
- Family relocate back to England in October 2011.
- Parents separate 2 years later.
- Mother seeks advice – she would like to relocate back to Australia
 - (a) Does the Father have PR?
 - (b) Does the Mother need the father's permission to relocate with the child back to Australia?
 - (c) Does the father have rights of custody if the Mother takes the child back to Australia without his consent?

How the 1996 Hague Convention should apply in practice:

- 2001-2004 the Father did not have PR for the child as unmarried father of a child born and registered prior to 1/12/03
- In Australia unmarried fathers have PR thus the Father acquired PR when the child became Hab Res in Australia – **Article 16 (1)**
- The Father's PR would not be extinguished when the family returned to the UK. – **Article 16 (3)**
- Therefore:
 - (a) the Father has PR,
 - (b) his permission is required; and
 - (c) the Father would have rights of custody and could seek the child's summary return if the child was wrongfully removed or retained

NB. Any interested party may apply for a declaration that a person has or does not have parental responsibility for a child or as to the extent of a person's parental responsibility for a child where the question arises by virtue of the application of Article 16. The application must be made in the principal registry and heard in the High Court. (**FPR 2010 r 12.71**)

NB. As a consequence of the 1996 Hague Convention rules providing for notice to be given in respect of certain court applications to persons with so called “*foreign parental responsibility*” (e.g. **FPR 2010 r14.4** regarding Adoption applications) have been added to the new Family Procedure Rules 2010 which came into force on 6th April 2011

Case studies 4 + 5 – advance recognition and its use in relocation cases and international contact cases

4.

- Married parents with 4 children.
- Mother wishes to relocate with the children to Australia.
- Father does not object but is anxious to ensure that he maintains contact with the children and that the children will return to the UK every July- August for 6 weeks.
- What can the Father do to seek reassurance?

The Father could make an application under **Article 24** in Australia to determine if the English contact order will be recognised before the mother relocates with the children. If the answer is in the affirmative then everyone will be aware that the English decision can be enforced (if necessary) in accordance with Australian law if the Mother fails to comply. If the decision is that the order will not be recognised then the Father can take steps to remedy any defect in the order which would preclude recognition.

5.

- Separated parents.
- Mother resident in the US with 2 children.
- Father resident in the UK.
- Father issues proceedings in the US seeking contact with the children in the UK
- US court is inclined to grant the Father's application but wishes to stipulate a number of conditions for contact and the Mother has an underlying concern that the Father will retain the children.

Mirror orders are frequently requested by foreign courts in these types of international contact cases and parties have, on occasion, encountered problems obtaining mirror orders because of jurisdictional hurdles. The ability to seek Advance Recognition pursuant to the 1996 Hague Convention should prove to be a very useful mechanism in this situation.

The Application process for the registration of orders under the 1996 Hague Convention

The procedure rules for the registration of orders under the 1996 Hague Convention are contained within **Part 31 of the FPR 2010** and **Practice Direction 31A**

Which court?

r31.1 Every application must be issued in the Principal Registry save where recognition of a judgment is raised as an incidental question.

Which form?

FPR 2010 PD 5A indicates that the correct form is a **C69** application form though this is curiously only headed “*Application from registration, recognition or non recognition of a judgment under Council Regulation (EC) 2201/2003*”. It remains to be seen whether the C69 form will be amended once the 1996 Hague Convention comes into force to make it easier for practitioners to ascertain its use for the registration of orders under the 1996 Hague Convention too.

Who can apply?

r31.4(1) “any interested party”

Evidence?

- a. A sworn statement or affidavit exhibiting the judgment or a verified, certified or otherwise authenticated copy of the judgment.
- b. An English translation of the judgment. (**PD 31A r2.2**)
- c. There are no equivalent forms to the certificates set out in Annex I-IV of the Council Regulation and therefore the information ordinarily contained within such certificates has to be collated by alternative means and the FPR stipulate that applicants must also supply

a witness statement or affidavit exhibiting the following documents and giving the following information depending on the nature of the application.

Application for registration.

- i. Documents necessary to show that the judgment is enforceable according to the law of the contracting state in which it was given;
- ii. A description of the opportunities provided by the authority which gave the judgment in question for the child to be heard, except where the judgment was given in a case of urgency.
- iii. Where the judgment was given in a case of urgency, a statement as to the circumstances of the urgency that led to the child not having the opportunity to be heard;
- iv. Details of any measures taken in the non contracting state of habitual residence of the child (if applicable) specifying the nature and effect of the measure, and the date on which it was taken;
- v. In as far as not apparent from the copy of the judgment provided, a statement of the grounds on which the authority which gave the judgment based its jurisdiction, together with any documentary evidence in support of that statement;
- vi. Where appropriate (i.e. if it concerns the placement of the child in a foster family or institutional care, the provision of care by *kafala* or an analogous institution), a statement regarding whether Article 33 of the 1996 Hague Convention has been complied with, and the identity and address of the authority or authorities from which consent has been obtained, together with evidence of that consent;
- vii. Whether the judgment provides for the payment of a sum or sums of money;
- viii. Whether interest is recoverable on the judgment in accordance with the law of the state in which the judgment was given, and if that is the case the rate of interest, the date from which interest is recoverable and the date on which interest ceases to accrue;
- ix. An address within the jurisdiction of the court for service of process on the party making the application (this is likely to be their solicitors details if they are represented) and stating, in so far as it is known to the applicant, the name and usual or last known address or place of business of the person against whom judgment was given.

Application for an order that a judgment should not be recognised.

- i. A statement of the ground or grounds under Article 23 on which it is requested that the judgment be not recognised, the reasons why the applicant asserts that such ground or grounds is or are made out and any documentary evidence on which the applicant relies;
- ii. An address within the jurisdiction of the court for service of process on the applicant and stating, in so far as it is known to the applicant the name and usual or last known address or place of business of the person in whose favour judgment was given.

Application for recognition only

- i. A description of the opportunities provided by the authority which gave the judgment in question for the child to be heard, except where the judgment was given in a case of urgency.
- ii. Where the judgment was given in a case of urgency, a statement as to the circumstances of the urgency that led to the child not having the opportunity to be heard;
- iii. Details of any measures taken in the non contracting state of habitual residence of the child (if applicable) specifying the nature and effect of the measure, and the date on which it was taken;
- iv. In as far as not apparent from the copy of the judgment provided, a statement of the grounds on which the authority which gave the judgment based its jurisdiction, together with any documentary evidence in support of that statement;
- v. Where appropriate (i.e. if it concerns the placement of the child in a foster family or institutional care, the provision of care by *kafala* or an analogous institution), a statement regarding whether Article 33 of the 1996 Hague Convention has been complied with, and the identity and address of the authority or authorities from which consent has been obtained, together with evidence of that consent; and
- vi. Whether the judgment provides for the payment of a sum or sums of money;
- vii. Whether interest is recoverable on the judgment in accordance with the law of the state in which the judgment was given, and if that is the case the rate of interest, the date from which interest is recoverable and the date on which interest ceases to accrue;
- viii. An address within the jurisdiction of the court for service of process on the party making the application (this is likely to be their solicitors details if they are represented) and stating, in so far as it is known to the applicant, the name and usual or last known address or place of business of the person against whom judgment was given.

Directions

If the applicant is unable to produce any of the aforementioned documents at the time that the application is issued the court may:

- a. Fix a time within which the documents are to be produced;
- b. Accept equivalent documents; or
- c. Dispense with production

After the application has been issued the court will give directions and the court officer will, as soon as practicable serve a copy of the directions order on every party.

Notice of Decision

If the court ultimately refuses the application for the judgment to be registered for enforcement the court will serve the order (refusing the application) on the applicant and the person against whom judgment was given in the state of origin.

If the court orders that the judgment should be registered for enforcement the court will:-

- a. Register the judgment in the central index of judgments kept by the principal registry;
- b. Confirm on the order that the judgment has been registered; and
- c. Serve the court order on the parties endorsed with the court officer's confirmation that the judgment has been registered.

Helen Blackburn, Partner

The International Family Law Group LLP



Section 8

Speakers Profiles



Henry Setright QC

Year of call: 1979

Year of silk: 2001

Appointments

Henry Setright QC sits as a Recorder, and as a Deputy High Court Judge (Family Division)

Specialist practice areas

Adoption

Care Proceedings

International Child Cases and Child Abduction

Children Act Proceedings

Human Rights

International Movement of Children

Forced Marriage

DR

Early Neutral Evaluator

Profile

Henry Setright QC was called to the English Bar in 1979 and was appointed Queen's Counsel in 2001. He has for many years specialised in international children's and family work at the highest level, including cases in the UK Supreme Court, the Court of Justice of the European Union, the European Court of Human Rights, the House of Lords, the Court of Appeal, and the High Court, and as lead English counsel in an Amicus brief in the United States Supreme Court.. He has (so far) appeared in more than 100 leading cases reported in the English Family Law Reports, a total not to date equalled by any other member of the Bar. These include (for example) consideration of issues relating to acquiescence, adoption, asylum, attempted assassination, care proceedings, children's representation, children's views, conflict of jurisdiction, custody rights, diplomatic privilege, forced marriage, habitual residence, domestic violence, human rights, immigration, marriage, relocation, risk of harm, Sharia law, settlement, surrogacy, and welfare in the context of international family litigation.

He has appeared in landmark international family cases in the House of Lords in 2005, 2006, 2007 and 2008.

In October 2009 he appeared in *Re: I UKSC 10 [2010] 1 FLR 361*, on jurisdiction and the interface in a non EU (Anglo-Pakistan) case with the Brussels II revised regulation – it was the first Family case in the UK Supreme Court. He led an English team presenting a brief in the landmark rights of custody appeal of *Abbott v Abbott*, the first 1980 Hague Convention case to be heard in the United States Supreme Court (judgment in USSC 17th May 2010). He has also appeared in Hague Convention cases in the ECtHR, notably *Ignaccola-Zenide v Romania* and *Carlsson v Switzerland*.

The 2010 Family Law Reports feature eight of his recent cases.

He has recently appeared in landmark decisions before the President (Chief Constable and Another v YK and others [2010] EWCA Fam 2438) in relation to disclosure and the conduct of forced marriage hearings and in the Court of Appeal on marriage/immigration policy (*R (Aguilar Quila) v Secretary of State for the Home Department (Advice on Individual Rights in Europe and another intervening)*, *R (Bibi) v Secretary of State for the Home Department*) [2010] EWCA Civ 1482 judgment 21st December 2010 and successfully in the first family case referred by the English Court of Appeal to the Court of Justice of the European Union (*Mercredi v Chaffe Case C 497/10 PPU* judgment 23rd December 2010) on habitual residence in children's cases.

In addition to his court appearances, he lectures regularly in England and internationally at conferences and seminars. He is the author of numerous articles on international family law, and is co-author of *International Parental Child Abduction (Jordans/Family Law)*.

He is one of the originators of, and sits on the steering group of, the Reunite/Nuffield Foundation pilot scheme for mediation in child abduction cases, and assisted in the drafting of the Forced Marriages Bill introduced by Lord Lester of Herne Hill in late 2006, and now passed into law.

What the directories say

When it comes to cross-jurisdictional children disputes, Henry Setright QC "is amongst the best advocates in the market." He was recently involved in Mercredi v Chaffe, the first family case referred by the English Court of Appeal to the Court of Justice of the European Union. Sources say that "he is tactically astute and has excellent cross-examination skills
Recommended as a Leading Silk in Chambers and Partners 2012 (Star Performer)

Henry Setright QC is a leading expert in cross-jurisdictional children disputes. He recently represented the interveners in Re I (A Child), the first family law case to be heard in the Supreme Court. According to sources, "he is an unbeatable cross-examiner with an encyclopaedic knowledge of international law."
Recommended as a Leading Silk in Chambers and Partners 2011 (Star Performer)

'Devastating advocate' Henry Setright QC is 'unrivalled in this area'.
Recommended as a Leading Family Silk in the Legal 500 2011 (First Tier for Children Law)

Henry Setright QC. "Setright is a distinguished figure in the field of international abduction".
Recommended as a Leading Silk in Chambers and Partners 2010

Recommended as a Leading Family Silk in the Legal 500 2010

'Henry Setright QC is the go-to man when it comes to international work' as 'there isn't anything he doesn't know', according to market sources. A 'formidable advocate', he is a 'wonderful tactician with a sharp analytical mind' who applies his skills to a high-profile practice focusing on international children and family work.
Chambers & Partners 2009

4 Paper Buildings recently welcomed international family law specialist Henry Setright QC
Recommended as a Leading Family Silk in the Legal 500 2009

A very impressive advocate at the peak of his powers... Henry Setright QC routinely argues several cases a year in the Court of Appeal and/or the House of Lords – most but not all of these relate to international child abduction or other cross-border child issues falling under Brussels II regulations. 'Very notable in the area, and justifiably so', he sets the tone for many of the juniors in the set.

Chambers and Partners 2008

Henry Setright QC is 'your man in child abduction' matters due to his 'unrivalled knowledge of abduction law'. In addition to his sterling international children law practice, he has also ventured into the field of forced marriages.

Chambers and Partners 2007

Henry Setright QC has been in over 80 reported family cases (more than anyone else at the bar) and has 'accumulated more knowledge and kudos than many could hope for in a lifetime.' International child abduction is his strong suit in a practice that takes in children matters generally. He has further been a pioneer in the area of forced marriages.

Chambers and Partners 2006

Henry Setright QC is rated as a leading Silk by Chambers Directory. His particular bent is towards legal matters pertaining to child abduction, an area where few can effectively challenge him. 'The most experienced and well-regarded international child abduction barrister – he is a wonderful tactician.

Chambers and Partners 2005



Marcus Scott-Manderson QC

Year of call: 1980

Year of silk: 2006

Education / Qualifications

BCL MA (Oxon)

Harrow School, Christ Church Oxford, Boulter Exhibition in Law, Glasgow University (Department of Forensic Medicine), Hague Academy of International Law Dana Fellowship, Hardwicke Scholarship Lincoln's Inn, Droop Scholarship Lincoln's Inn, Ver Heyden de Lancey Prize in Forensic Medicine, Inns of Court School of Law

Specialist practice areas

International Child Cases and Child Abduction

DR

Early Neutral Evaluator

Profile

International cases relating to children.

Professional Memberships

British Academy of Forensic Sciences

Family Law Bar Association

Lincoln's Inn

What the directories say

For international children matters, Marcus Scott Manderson QC "is amazing and really knows his stuff inside-out." Complex child abduction is his forte, with sources going out of their way to praise his excellent attention to detail. Recommended as a Leading Silk in Chambers and Partners 2012

Marcus Scott-Manderson QC has 'outstanding attention to detail and an encyclopaedic knowledge of the law'. Recommended as a Leading Family Silk in the Legal 500 2011 (Top Tier)

With a high success rate is Marcus Scott Manderson QC, "a conscientious silk who knows everything there is to know about international child abduction." His "calm and impressive manner in court" inspires confidence in clients.

Recommended as a Leading Silk in Chambers and Partners 2011 (Ranked 1st)

Marcus Scott-Manderson QC has 'outstanding attention to detail and an encyclopaedic knowledge of the law'.

Recommended as a Leading Family Silk in the Legal 500 2011 (Top Tier)

A distinguished figure in the field of international abduction, Marcus Scott-Manderson QC, who is "immensely respected by the courts for his fair-minded approach.

Recommended as a Leading Silk in Chambers and Partners 2010

Marcus Scott Manderson QC is 'one of the top silks for abduction cases', and has 'an encyclopaedic knowledge of all children cases, as well as old-school manners.'

Recommended as a Leading Family Silk in the Legal 500 2010

Marcus Scott-Manderson QC remains sought after for his "encyclopaedic knowledge of the law" and "vim and vigour in pursuit of his goals." He is best known for his international work, particularly in the field of child abduction.

Recommended as a Leading Family Silk in Chambers and Partners 2009.

Recommended as a Leading Family Silk in the Legal 500 2009

Marcus Scott-Manderson QC is a "clear leader in the field of child abduction work," as well as in related cross-jurisdictional family law battles like those concerning wives abandoned following failed arranged marriages. "A stickler for detail," he also does some domestic public law work.

Recommended as a Leading Silk, Chambers and Partners 2008.

Marcus Scott-Manderson QC receives exceptional feedback from solicitors who say he is 'very knowledgeable on child abduction', and is 'always prepared to go that extra mile', being a 'conscientious silk with an encyclopaedic knowledge of the subject'.

Legal 500, 2008.



Teertha Gupta QC

Year of call: 1990
Year of silk: 2012

Education & Qualifications

Mill Hill School, London, Leeds University, Inns of Court School of Law.
Qualified Collaborative Lawyer

Appointments

Recorder 2009

Specialist practice areas

Care Proceedings
International Child Cases and Child Abduction
International Movement of Children
Wardship/Inherent Jurisdiction
Forced Marriage
Court of Protection

DR

Collaborative Lawyer
Mediator
Early Neutral Evaluator

Profile

Teertha is a Family Law Practitioner with particular experience in public and private international child abduction, stranded spouses and forced marriage matters and cases involving jurisdictional complications e.g. international surrogacy and adoption and media interest. He represents adults and children as well as institutions in the High Court (Family Division) on a daily basis. He has also made oral submissions in the European Court of Justice, The House of Lords, and several times in the Court of Appeal. In 2007 he represented the intervening children in his second of three recent successful cases in The House of Lords; on that occasion he conducted the case without a leader: *Re M* [2007] UKHL 51.

In Oct/Nov 2008 Teertha was instructed as amicus curiae in a public law child trafficking case before the High Court, Family Division because it required specialist knowledge of the interrelation between s31 of

the Children Act 1989, the 1980 Hague Convention, Brussels II revised and the Warsaw Child Trafficking Convention: Re S [2008] EWHC 3013.

Teertha Gupta deals with public and private international children's cases including relocation of children abroad or to this jurisdiction on a daily basis.

Together with his leader, Henry Setright QC Teertha represented the charities "The Centre for Family Law and Practice" and "Reunite International Child Abduction Centre" intervening in the Supreme Court's first international children's case: Re I (A Child) [2009] UKSC 10; [2009] WLR (D) 351 where he made oral submissions.

His recent case on stranded spouses, in which judicial guidance has been set down: Re: S [2010] EWHC 1669 (Fam) has been in the media

<http://www.bailii.org/ew/cases/EWHC/Fam/2010/1669.html>

Teertha Gupta won the Jordan's Family Law Barrister of the Year Award 2011, he was the only junior to be shortlisted in a field of silks. The judges noted his commitment to the causes of women from the Asian sub-continent, such as forced marriage and how he often acts pro-bono for such individuals. Teertha has appeared in about 40 reported cases and 'he revels in test cases that result in judgements that provide guidance for other practitioners in the field.' The judges noted the Supreme Court decision of Re E (Children), the Justices gave consideration of the meaning and relevance of ECHR dicta (eg Neulinger) in English Hague cases and In Re S (Wardship: Stranded Spouses) Teertha brought to the public's attention the issue of women who are brought over from the Asian sub-continent as brides to UK citizens, only to be abandoned back abroad and without their passports, after they have given birth.



Teertha Gupta was voted as 'Family Junior Barrister of the Year' at the Chambers and Partners Bar Awards in September 2008.



Professional Memberships

Barristers Benevolent Association;
Inner Temple;
Family Justice Council (Diversity sub-committee);
FLBA Elected Committee Member.

Languages

Conversational Bengali

What the directories say

Teertha Gupta is held in extremely high regard for his children work: "He is a solid advocate and the go-to junior for all international children work." International child abduction and relocation matters are his forte, and solicitors flock to him as he has "not only first-class legal expertise, but also a delightful and charming style."

Recommended as a Leading Family Junior in Chambers and Partners 2012 (Ranked 1st)

Teertha Gupta is the 'leading child abduction junior at the family Bar'

Recommended as a Leading Family Junior in the Legal 500 2011 (Top Tier)

Teertha Gupta is a premier junior for international children work. "He has an approachable and relaxed manner and knows exactly what he is doing," sources say. They comment admiringly that "charm allied to brains always makes for a potent combination."

Recommended as a Leading Family Junior in Chambers and Partners 2011 (Ranked 1st)

Teertha Gupta represents a recent excellent hire for the set. Noted for his encyclopaedic knowledge of the law and his interest in abduction and forced marriage, he is "an enthusiastic and thoroughly committed lawyer who gives it his all every time."

Recommended as a Leading Family Junior in Chambers and Partners 2010 (Ranked 1st)

Teertha Gupta was voted as 'Family Junior Barrister of the Year' at the Chambers and Partners Bar Awards in September 2008.

Recommended as a Leading Family Junior in the Legal 500 2010

Teertha Gupta is, like Setright, mightily impressing peers and clients with his expert understanding of international child abduction, forced marriages and matters relating to stranded spouses. Widely regarded as 'one of the leading juniors,' he has 'courage and tenacity when faced with the toughest challenges'.

Chambers and Partners 2009 (Ranked 1st)

Recommended as a Leading Family Junior in the Legal 500 2009

Described as 'the cat's whiskers' by opposing counsel for his combination of 'sophisticated legal knowledge, good cross examination and effective case presentation', Gupta spends much of his time on cross border disputes regarding children. In addition he has established himself as one of only a tiny handful of experts in the niche area of international forced marriages.

Chambers and Partners 2008

Gupta's practice is heavily built on this topic and also child abduction cases. Clients find him 'professional and expeditious' singling him out as a 'barrister who is going places'.

Chambers and Partners 2007

Gupta is a great favourite of the Home Office-Foreign Office's Forced Marriage Unit and is known for both his accessibility and his 'unflinching devotion to the cause'.

Chambers and Partners 2006

Teertha Gupta is 'a rising star in international abduction work'.

Legal 500 2008

Teertha Gupta is highly recommended in forced marriage and child abduction matters.

Legal 500 2007

Teertha Gupta is widely viewed as the leading junior in forced marriage cases and is also highly recommended for his expertise in child abduction matters.

Legal 500 2006



David Williams

Year of call: 1990

Education & Qualifications

LLB

Specialist practice areas

International Child Cases and Child Abduction

Divorce

International Movement of Children

Matrimonial Finance

Rights of Cohabitees - Family Law

Wardship/Inherent Jurisdiction

Forced Marriage

Profile



‘A supremo when it comes to international children cases David Williams is commended for his meticulous preparation, ‘penetrating’ cross-examination and ‘insightful advocacy’. Uniquely for a junior, in the last year, David has appeared both in the Court of Justice of the European Union and the UK Supreme Court.’

Blog: <http://childabduction-dw.blogspot.com/>

After 21 years at the Family Bar David has developed a practice concentrating on the international aspects of the movement of children, including child abduction, international relocation and contact and the enforcement of foreign orders. In the last 12 months he has appeared in the first family case from England to be referred to the Court of Justice of the European Union (Mercredi-v-Chaffe) and the first child abduction case to be heard by the UK Supreme Court (Re E) In abduction cases he acts for Applicants, Respondents and children in Hague, BIIR and non-Convention cases. He represented the Applicant in the Court of Justice of the European Union in 2010 and for the Plaintiff in the House of Lords in Re M in 2007. He appeared for the Respondent mother in Re E in the Supreme Court in 2011. He regularly appears in the Court of Appeal and has appeared in many other reported cases with an

international dimension. Prior to concentrating on international work David's previous practice at the Bar included criminal work and he developed a particular specialisation in cases involving confiscation of assets and in other 'intervener' cases and represented the Respondent in X-v-X (CPS Intervening) and the children in the final round of the Mubarak litigation. David has an interest and particular experience in representing children within abduction and other cases with an international dimension.

David acts on behalf of children, parents, guardians, local authorities and adult patients and his practice covers most tribunals from the High Court to the ECHR. He has also acted as an expert on English family Law. Prior to being called to the Bar he worked for the Legal Services Commission for three years and he is committed to ensuring that publicly funded clients are able to compete on a level playing field.

His approach combines rigorous analysis and preparation and an emphasis on seeking a consensual resolution where practical with a robust presentation of the case when agreement proves impossible.

David lectures and writes regularly. He spoke at the Centre for Family Law and Practice Inaugural Conference on International Family Law and regularly presents lectures and webinars on relevant topics. He has had articles published in International Family Law, Family Law, New Law Journal and others.

His other interests include membership of the Society of Labour Lawyers, of which he is a member of the Executive Committee. Cycling, vintage motorbikes and history keep him out of trouble at weekends.

Professional Memberships

Family Law Bar Association
Bar Pro Bono Unit
Inner Temple

Languages

Conversational French

What the directories say

The "extremely hard-working" David Williams, meanwhile, is praised as "one of the best junior child abduction barristers in the country." He garners plaudits.

Recommended as a Leading Junior in Chambers and Partners **2012** (Ranked in First Tier)

David Williams is a 'recognised expert'

Recommended as a Leading Family junior in areas of Children Law and Family Law The Legal 500 **2011**

David Williams, who has an ever-growing reputation for Hague Convention work.

Recommended as a Leading Family Junior in Chambers and Partners **2011**

The 'insightful' David Williams 'really knows his stuff'.

Recommended as a Leading Family junior in The Legal 500 **2010**

David Williams, a lawyer who has carved a niche for himself in Hague Convention matters. Williams has a large number of reported cases under his belt and is known for his "extreme perspicacity."

Recommended as a Leading Family Junior in Chambers and Partners **2010**

Recommended as a Leading Family junior in **The Legal 500 2009**

David Williams is recommended for his burgeoning International child abduction practice. He is praised for his "calm and efficient" demeanour and his "sensitivity to clients' needs."

Recommended as a leading Family Junior in the area of Children in Chambers & Partners **2009**

David Williams.. 'comes highly recommended'.

Recommended as a Family Law leading Junior in **Legal 500, 2008**

John Mellor

John Mellor has unrivalled experience of Hague 80 and other complex High Court international cases in more than 15 years as a practitioner and as manager the Cafcass High Court Team and previously the Principal Registry Team. Before joining Cafcass he was a senior court welfare officer.

Mike Hinchliffe

Mike Hinchliffe is a specialist in international children law. He is a Principal Lawyer in Cafcass Legal and a member of the Family Procedure Rule Committee and of the Law Society Children Committee. Before joining Cafcass he was head of the Child Abduction Unit and a Senior Lawyer at the Official Solicitor's department.



Helen Blackburn

Qualified 1998

Education & Qualifications

LLB Hons (Nottingham)

Resolution accredited specialist in child abduction and private children law

Specialist practice areas

Adoption

Children Act proceedings

Wardship/Inherent jurisdiction

Forced marriages

Child Abduction

Relocation

Cross border enforcement of orders concerning children

Profile

Helen Blackburn is a solicitor and partner at The International Family Law Group LLP (iFLG). She specialises in all aspects of child law with a particular expertise in child abduction and children cases with an international dimension (adoption, Wardship, leave to remove, Brussels IIr, residence, contact, cross border enforcement of orders concerning children etc). She has been listed as a specialist in “Children: Cross-Border Disputes” in Chambers and Partners for several years. Helen writes for various legal journals/publications and was most recently contributed two chapters to the second edition of Jordan’s “*The International Family Law Practice*” published in 2012 and also contributed to Resolution’s recent publication “*The Modern Family*”.

Helen worked in the Family Department of Reynolds Porter Chamberlain LLP before joining iFLG as a partner in September 2009.

What the directories say

She is “*incredibly hard-working, clear-headed and her presentation is excellent.*”

Chambers and Partners 2012

Helen Blackburn has rapidly built up a strong reputation for cross jurisdictional children disputes

Chambers and Partners 2011



Section 9

Members List



MEMBERS OF CHAMBERS

Jonathan Cohen QC
Baroness Scotland QC
Henry Setright QC
Marcus Scott-Manderson QC
Kate Branigan QC
Alex Verdán QC
Jo Delahunty QC
Michael Sternberg QC
Catherine Wood QC
Rex Howling QC
Teertha Gupta QC
Harry Turcan
Amanda Barrington-Smyth
Robin Barda
Jane Rayson
Mark Johnstone
Elizabeth Coleman
Alistair Perkins
Christopher Hames
Stephen Lyon
Jane Probyn
James Shaw
Mark Jarman
Sally Bradley
Rebecca Brown
Barbara Mills
Sam King
David Williams
Joanne Brown
Alison Grief
Joy Brereton
David Bedingfield
John Tughan
Cyrus Larizadeh
Charles Hale
Michael Simon
Justin Ageros
Rob Littlewood
Paul Hopher
Ruth Kirby
Judith Murray
Cliona Papazian
Stefano Nuvoloni
Nicholas Fairbank

Sarah Lewis
James Copley
Justine Johnston
Oliver Jones
Lucy Cheetham
Hassan Khan
Cleo Perry
Harry Gates
Rebecca Foulkes
Katie Wood
Rhiannon Lloyd
Kate Van Rol
Ceri White
Matthew Persson
Dorothea Gartland
Samantha Woodham
Laura Morley
Nicola Wallace
Jacqueline Renton
Michael Gratton
Andrew Powell
Henry Clayton
Jasper Baird-Murray
Sophie Connors
Michael Edwards
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