1 INTRODUCING THE HAGUE ABDUCTION CONVENTION

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§ 1.01 INTRODUCTION

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

The Convention is an international treaty that seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. It has been signed by more than 80 countries, including the United States. It provides that a child who has been taken to or retained in a foreign country without the consent of a person with "rights of custody" over the child under the law of the child's "habitual residence" must be returned to the habitual residence unless one of six exceptions applies.

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

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

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

§ 1.02 PARTIES TO THE CONVENTION

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

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

Currently 87 states are contracting parties to the Convention. However, the Convention is not in force between all of these states because many have not accepted the accessions of all other contracting states. The Convention provides that it will not enter into force between an existing contracting state and a newly acceding state unless and until the existing state expressly accepts the accession of the new state.[1]

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

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

1. Hague Convention, Articles 38 and 39.

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and the acceding country. The State Department posts these details on its website and the Permanent Bureau maintains a current status list on its website.

The Permanent Bureau of the Hague Conference monitors and supports international implementation on a continuing basis. It maintains a website, http://www.hcch.net, which is a useful source of information concerning the operation of the Convention.

Professor Elisa Pérez-Vera was the Convention's "Rapporteur." She wrote a legislative history of the Convention, which is known as the "Pérez-Vera Report." It is frequently used to assist in interpreting the key terms and intent of the Convention. It may be accessed at http://www.hcch.net/upload/expl28.pdf.

§ 1.03 THE PURPOSE OF THE TREATY

It is often of substantial importance in a Hague case for the petitioner to remind the court of the purpose of the Convention. The Hague process is unusual, and it may be surprising to a judge who is not fully familiar with such cases, especially if the judge has a background in handling conventional child custody cases, where the emphasis is always on the best interests of the child. Indeed, the decisions in many cases reflect a struggle between the instinct of a judge to do what is in the best interests of the child and the philosophy of the Hague Convention that the best interests determination should be left to the courts of the child's prior habitual residence.

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

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

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

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The U.S. brought the Convention into U.S. law by means of the International Child Abduction Remedies Act (ICARA).[2] Congress expressly declared in ICARA its findings that:

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

The U.S. Supreme Court has reviewed the Convention only once, in the *Abbott* case.[3] There, the Court stated that the purpose of the Convention is "to prevent harms resulting from abductions" that "can have devastating consequences for a child" and may be "one of the worst forms of child abuse."

The Supreme Court also referred with approval to findings that international child abduction "can cause psychological problems ranging from depression and acute stress disorder to post-traumatic stress disorder and identity formation issues" and can lead to a child's experiencing "loss of community and stability, leading to loneliness, anger, and fear of abandonment" and "may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature."

The Convention procedures are designed "to restore the status quo prior to any wrongful removal or retention and to deter parents from engaging in international forum shopping in custody cases."[4] It is a simple remedy to a complex problem but in many ways the simplicity is its strength.

Most critically, the Convention is not intended or designed to settle international custody disputes, but rather to ensure that cases are heard in the proper court.[5] Article 19 of the Convention expressly states that, "A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Indeed,

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2. 42 U.S.C. § 116011.
3. Abbott v. Abbott, 130 S. Ct. 1983 (U.S. 2010).
4. Baxter v. Baxter, 423 F.3d 363 (3d Cir.2005) (citation omitted).
5. *In re* B. Del C.S.B., 559 F.3d 999 (9th Cir.2009).

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

§ 1.04 BEST INTERESTS AND THE HAGUE CONVENTION

Central Concept

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

The Hague Convention is a jurisdiction-selection treaty. A case brought pursuant to it does not determine the custody of the child but merely determines where that determination shall be made.

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

States adopted the Convention because they agreed with this philosophy and they expected that their treaty partners would adhere to it. When the United States was considering whether to adopt the Hague Convention, the U.S. State Department explained to Congress that, "The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests." It specifically explained that the grave risk exception "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."[6]

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6. Hague Int'l Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 19,494 (1984).

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

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

Indeed the Ninth Circuit refused to grant comity to a Greek order in a Hague case because it concluded that the Greek court had "strayed from the objective inquiries prescribed by the Convention" and had focused on matters largely irrelevant to its ultimate decision, such as the details of the breakdown of the parties' relationship, the father's alleged infidelity, and his failure to be the sole breadwinner for the family.[7]

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§ 1.05 THREATS TO THE CENTRAL TENET

Currently, the central idea underlying the Convention is under threat on two fronts.

First, in Europe the European Court of Human Rights (ECHR) has embarked on an interpretation of the Convention that betrays an understanding of and appreciation for the ideas embodied in the Convention. In June 2010 the ECHR ruled in *Neulinger & Shuruk v. Switzerland*[8] that the European Convention on Human Rights requires that courts in states that are parties to the European Convention may not return an abducted child to its habitual residence, even when the child's return is mandated by the Hague Convention, unless it is first established that it is in the best interests of both the child and the child's family to do so. The ECHR thereby overruled 30

7. Asvesta v. Petroutsas, 580 F.3d 1000 (9th Cir. 2009).
8. Neulinger & Shuruk v. Switzerland, 41615/07 [2010] ECHR 1053.

years of international case law, discounted the fundamental purposes of the Hague Convention of deterring international child abduction and of not rewarding international child abduction, and ensured that any Hague case that follows its precepts will be lengthy and expensive, as well as often unfair to the left-behind parent who must now defend what could be almost a custody case on the taking parent's home turf.

Notwithstanding extensive criticism of its decision, the ECHR has followed the *Neulinger* case in more recent cases. In *Šneersone and Kampanella v. Italy,*[9] the ECHR applied *Neulinger* to override an Italian return order since the Italian courts had not "conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material, and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin." Equally disturbing is the case of *X v. Latvia,*[10] decided on December 13, 2011. Here the ECHR ruled that a Latvian return order violated Article 8 of the European Convention because the Latvian court did not sufficiently consider "what would happen as regards the child's material well-being if returned to Australia."[11]

The second front of the attack on the central idea of the Hague Convention comes from advocates of domestic violence victims who contend that the Convention does not provide sufficient protection for women who take their children back to their country of origin when fleeing domestic violence. While this campaign is directed primarily at an effort to broaden the grave risk of harm exception to the Convention it is sometimes expressed in broader terms as seeking to subordinate all Hague cases to a best interests test. Its influence has been felt in other countries that have enacted legislation that weakens the application of the Convention in their countries, by expanding the definition of the grave risk of harm exception (e.g., Switzerland[12]) and in other countries that may join the Convention (e.g., Japan).

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9. Šneersone and Kampanella v. Italy (ECHR Appl. no. 14737/09).
10. X v. Latvia (ECHR Appl. 27853/09).
11. *See* Jeremy D. Morley, *The Hague Abduction Convention and Human Rights: A Critique of the* Neulinger *Case,* Int'l Academy of Matrimonial Lawyers L. J, *available at* http://www.iaml.org/cms_media/files/the_hague_ abduction_ convention_and_human_rights_a_critique_of_the_neulinger_case_revised.pdf.
12. *See* http://www.international-divorce.com/Swiss-Law-Undermines-the-Hague-Convention.

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

Such results are magnified enormously by the fact that there may be lengthy delays before a case can be heard; that there may be overwhelming logistical difficulties for a parent who accompanies a child who is returned to the habitual residence; that local courts may act parochially in favor of the local left-behind parent; that the returning parent may be branded an "international child abductor"; and that restoring the child to the post-abduction, pre-return status quo will uproot the child yet again. In addition, the returning parent is often in financial ruin, since she will likely be unemployed and perhaps unemployable in the original habitual residence; she may well have exhausted her financial resources by defending the Hague case in the U.S. case; she will almost certainly be the subject of an enormous award against her of legal fees and expenses, especially if the petitioner was represented by pro bono counsel whose theoretical hourly rates are high and who have thrown many lawyers into the case; she will often face a contested divorce case in the place to which she is being returned; and she must fund and provide the emotional strength to fight what is likely to be a hotly contested custody case in that country.

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

§ 1.06 ESSENCE OF THE CONVENTION

Article 12 of the Convention requires judicial authorities in the state in which a child is found to order the return of the child if an application for such relief is made by a person who has a "right of custody" over the child under the laws of the child's "habitual residence" immediately before the removal or retention and if the judicial authorities in the state in which the child is located determine that the child was "wrongfully" removed or retained within

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the meaning of Article 3 of the Convention. Article 11 calls for the expeditious conclusion of the proceedings.

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

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

> (a) it is a breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

A reading of Article 3 shows that its application hinges on three key terms—"child," "rights of custody," and "habitual residence."

§ 1.07 THE KEY TERMS IN ARTICLE 3

Child

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

Rights of Custody

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

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Habitual Residence

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

§ 1.08 OVERVIEW OF THE EXCEPTIONS

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

1. **Consent**
   If the petitioning parent is proved to have consented to the child being taken to live in the new jurisdiction, this will act as a complete defense in a Hague case.

   The key to the consent inquiry is the petitioner's subjective intent. In many cases, a parent allows a child to be taken out of the habitual residence and then there is a dispute as to whether the permission was for a temporary visit or permanent residence. In such cases, it is critical to focus on what the petitioner actually contemplated and agreed to in allowing the child to travel outside his or her home country. The burden of proof rests with the respondent to establish that the petitioner harbored a subjective intent to permit the respondent "to remove and retain the child for an indefinite or permanent time period."
2. **Acquiescence**
   Acquiescence by the left-behind parent is also a defense to a Hague petition, but it is far harder to prove than consent. It requires formalities, such as testimony in a judicial proceeding, a convincing written renunciation of rights, or a consistent attitude of acquiescence over a significant period of time.

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3. Child's Objections and the Hague Convention

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

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

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

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

4. One Year and Settled

It is also an exception if both of the following are established: That more than one year has elapsed from the date of the alleged wrongful removal or retention to the date that a Hague case is commenced; and that the child is now settled in the new environment.

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

5. Human Rights Exception to the Hague Convention

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

6. The Grave Risk of Harm Exception in the Hague Convention

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

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

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

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

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

The structure of the Convention means that a court in any Hague case must follow a step-by-step process in order to apply the Convention logically and correctly.[13] Those steps are as follows:

- First, the court must determine when the removal or retention took place. It cannot determine the habitual residence of the child without first deciding the relevant date as of which the habitual residence must be determined.
- Second, the court must determine the child's habitual residence immediately prior to that date.
- Third, it must determine what rights the petitioner had at that time under the law of the child's habitual residence and whether or not those rights constitute "rights of custody" within the meaning of the Convention.
- Fourth, it must determine whether the petitioner was exercising those custody rights at the time of removal or retention.
- Fifth, it must determine whether the removal or retention breached those custody rights.
- Sixth, it must determine whether any exceptions to the Conventions have been established.
- Seventh, if an exception is established it must determine whether to exercise its discretion to nonetheless return the child.

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

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§ 1.10 ACCESS CLAIMS

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

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

Accordingly, the Fourth Circuit has ruled that neither the Convention nor ICARA provides any authority for federal courts to exercise jurisdiction over access claims, as opposed to claims for the return of children.[14] Many other federal courts have stated that access claims are far better left to the state courts.[15] Thus, the strange result is that, although the Convention was expressly intended to assist noncustodial parents to enforce their rights of visitation, it does not in fact do so. The issue is not particularly significant in practice in the United States if the left-behind parent has a court order from his home country, because the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) provides an excellent and effective remedy for the enforcement of all of the terms of any such order if the foreign jurisdiction was the child's "home state" within the meaning of the UCCJEA.

It should be noted that some countries, such as Australia and New Zealand, have made specific statutory provisions for the enforcement in their domestic courts of Hague access claims.[16]

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

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

16. State Central Auth. & Quang [2009] FamCA 1038; Gumbrell v. Jones [2001] NZFLR 593.

§ 1.11 RELATIONSHIP OF THE CONVENTION TO THE UCCJEA

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

A left-behind parent often has the choice of proceeding under the UCCJEA instead of under the Hague Convention. If a child's "home state" (as that term is defined in UCCJEA Sec.102(7)) is a foreign country, then, as far as U.S. courts are concerned, courts of that country have primary jurisdiction to make a custody order (Sec. 201), and they have "continuing exclusive jurisdiction" concerning custody of the child as long as the "substantial connection" provisions of Section 201 are met.[17]

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

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

- The UCCJEA requires a court in the U.S. state in which a child is located to register and enforce a custody order issued by the child's home state, even if the home state is a foreign country. This means that the primary venue for the litigation is the jurisdiction from which the child was taken. It allows the left-behind parent to bring suit on his or her home turf, which is likely to be far more convenient and comfortable than a distant and unfamiliar American court. The left-behind parent can use a local lawyer in the home state to handle the bulk of the work, and the local court will most likely be more sympathetic.
- The foreign country will normally be the child's home state for UCCJEA purposes once the child has lived there for six months. However, that may or may not be sufficient to constitute habitual residence. In any event, if habitual residence is to be an issue in a

17. Uniform Child Custody Jurisdiction & Enforcement Act [hereinafter UCCJEA], § 202.

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Hague case, it is an expensive issue to prove since it is extremely fact-based and often requires lawyers to collect, evaluate, and present extensive evidence and extensive testimony.

- The UCCJEA does not permit the alleged abductor to assert in the U.S. court the exceptions that can be asserted in a Hague case. Once a notice to register a foreign custody order is properly given, the foreign order must be registered unless the respondent establishes that (1) the issuing court had no jurisdiction to enter the child custody determination; or (2) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having proper jurisdiction to modify same; or (3) notice or an opportunity to be heard was not given to the person contesting jurisdiction provided he or she was entitled to receive notice.[18] Once the order is registered, there are no defenses. By contrast, exceptions are invariably claimed in Hague Convention cases. If one exception is upheld, return may be denied.
- Many countries are not parties to the Hague Convention. A case can be brought under the UCCJEA to register and enforce a foreign custody order issued by any country in the world provided only that the country was the child's "home state," that the action was initiated in compliance with U.S. concepts of due process and that the foreign custody law does not violate human rights.
- The Hague Convention does not provide for the enforcement of access rights. The UCCJEA has no such restriction.
- The Hague Convention applies only in respect of children under the age of 16.
- Hague cases generally raise "interesting" (i.e., expensive) issues. UCCJEA enforcement cases generally (but not always) do not. Therefore UCCJEA cases are generally substantially cheaper.

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

- The courts in the child's habitual residence might not exercise custody jurisdiction if the child is no longer located there. From a U.S. perspective, the courts of that country might have jurisdiction but if those courts do not have jurisdiction under their own jurisdictional

18. UCCJEA § 305.

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rules and if there was no custody order in place prior to the child's removal, there will be no foreign custody order to register and enforce in the United States.

- If the foreign country was not the home state for purposes of the UCCJEA, because the child lived there for less than six months (unless he or she was a baby less than six months old), a custody order issued by a court in that country will generally not be enforceable under the UCCJEA since it will not have been "a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act]."[19]
- If proper notice or a proper opportunity to be heard was not provided by the foreign court, this should be fatal to an effort to register and enforce the order in the U.S. UCCJEA § 105(b) requires that a foreign custody order should not be recognized and enforced unless it was made "under factual circumstances in substantial conformity with the jurisdictional standards" of the UCCJEA.
- If the courts in the child's habitual residence act slowly it may be better to bring a Hague case forthwith in the place where the child is currently located.
- If the courts of the habitual residence will not handle the custody case unless and until the child is returned there, it would be possible for the left-behind parent to wait until the U.S. court has custody jurisdiction, usually after six months, and then to sue for custody in the U.S. state where the child is located. In such a situation, however, a Hague case would invariably be a far wiser course, since it would be much quicker and it would not open the door to a full-blown best interests analysis.
- Financial considerations might favor a Hague case, especially if the foreign country provides legal aid to its nationals for Hague cases but not for UCCJEA cases.

The fact that the UCCJEA and the Hague Convention are entirely separate creatures was well illustrated in a 2012 Colorado decision.[20] There, a respondent mother won the battle but lost the war, because although she successfully defended the father's petition under the Hague Convention, the

19. UCCJEA § 105(b)).
20. *In re* T.L.B., ___ P.3d ___, 2012 WL 150204 (Colo. App., 2012).

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father was able to enforce a custody order under the UCCJEA that required the children's return to Canada. The left-behind father filed a Hague petition in a Colorado state court seeking the return to Canada of children born out of wedlock. The mother filed in another Colorado state court under the UCCJEA for an allocation of parental responsibilities. The petition in the Hague case was dismissed because the mother established the exception of grave risk of harm in that returning the children would risk subjecting them to sexual abuse. The proceedings were then consolidated in one proceeding and that court ruled that Canada had jurisdiction under the UCCJEA because it was the "home state." However, the court ordered that the children would remain in Colorado under temporary emergency jurisdiction until a Canadian court took action. The mother appealed. During the pendency of her appeal, the Canadian court entered an order awarding sole custody and guardianship to the father. The Canadian court rejected the allegations of the father's abuse and ordered a brief period of reintegration therapy before the children would be reunited with him.

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

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§ 1.12 HAGUE CONVENTION AND CRIMINAL LAW

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

The United States has enacted federal legislation to prevent children from being removed from or retained out of the United States by one parent without the consent of the other parent or a court order,[21] but such legislation, and criminal provisions in state statutes, do not have any bearing on the Hague process.

On the other hand, the issue of criminality may arise in connection with a claim that returning the child to the habitual residence will endanger the child, since the parent who took the child may face arrest in that country.

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

§ 1.13 WHAT THE HAGUE CONVENTION IS NOT

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

1. The Convention does not provide for the international registration of custody orders.
2. The Convention does not deal with the international service of process. That is the province of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
3. The Convention does not deal with international child support
4. The Convention does not deal with international divorce jurisdiction.
5. The Convention does not deal with international travel of children, except to the extent that courts may be more inclined to allow a child to travel to a country that is a compliant Convention partner and less likely to allow such travel to a country that is not a compliant treaty partner.
6. The Convention does not provide any substantive rights.
7. The Convention does not allow the court in which a Hague Convention action is filed to consider the merits of any underlying child custody claims.
8. Neither the Convention nor ICARA nor any other treaty or legislation authorizes the U.S. Secretary of State to re-abduct an abducted child or to take any other direct action to take back an abducted child.
9. The State Department does not initiate Hague court cases.
10. There is no international court for Hague cases.
11. Submitting an application to the State Department does not constitute the commencement of a judicial proceeding and it does not stop the clock on the running of the one year period in Article 12.

Instead, the Hague Convention only establishes a procedure to be used in those countries that have adopted the Convention to return children under the age of 16 if their removal or retention is determined to be "wrongful" under the Convention.

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