
CONTENTS

<i>Series Editors' Preface</i>	vii
<i>Foreword</i>	xi
<i>Acknowledgements</i>	xiii
<i>Table of Cases</i>	xxiii
<i>Table of Legislation</i>	xliv
<i>Table of Conventions, Treaties, etc</i>	li
Introduction	1
Part I – Overview	5
1. The Birth of the Abduction Convention and its Inter-Relationship with Other Legal Instruments	7
I The Birth of the Abduction Convention	7
A Background	7
B The Structure of the Abduction Convention	9
C Ratification and Accessions	12
II Inter-Relationship with Other Legal Instruments	14
A National Legislation	14
B The European Custody Convention	17
C Brussels II bis Regulation	19
D European Convention on Human Rights	25
E The 1996 Hague Child Protection Convention	29
F United Nations Convention on the Rights of the Child 1989	33
2. The Operation of the Abduction Convention	35
I Sources of Information and Statistics	35
A Introduction	35
B The Empirical Studies	35
C Statistics	36
II Institutions and other Actors Involved in the Operation of the Convention	38
A Central Authorities	38
B Judicial and Law Enforcement Authorities	39
C Lawyers	39
D The Permanent Bureau	40
III The Abduction Convention Process	43
A The Application	43
B Locating the Child	43
C Protecting the Child	44

D	Voluntary Return	44
E	Commencing Proceedings	45
F	Conduct of the Proceedings	46
G	Ensuring Safe Return	46
H	Enforcement of Return Orders	47
IV	After Return	50
A	Obtaining Information	50
B	The Surveys	51
3.	Inter-Disciplinary Aspects of International Child Abduction	54
I	Sociological Aspects	54
A	Introduction	54
B	Which Parents Abduct and Why	55
C	Gender Issues	58
II	Psychological Aspects of Abduction	61
A	Introduction	61
B	The Impact of Moving	63
C	The Impact of Abduction	64
D	The Impact of a Move Away from a Primary Carer	65
E	The Impact of a Move Away from a Non-Primary Carer	67
F	Parental Alienation	69
4.	International Relocation and its Inter-Relationship with Child Abduction	71
I	Introduction	71
II	Relocation Law	72
A	The Different Approaches	72
B	Empirical Evidence	77
C	Scholarly Analysis	79
D	International Harmonisation Initiatives	82
III	Inter-Relationship between Child Abduction and Relocation	84
A	The Implications of Abduction Law for Relocation Law	84
B	The Implications of Relocation Law and Research for Abduction Law	86
	Part II – Parameters for Analysis	91
5.	Parameters Relating to Text and Objectives	93
I	Introduction	93
II	Explanation of the Parameters	94
A	Internal Coherence	94
B	Consistency with the Intention of the Drafters	94
C	Promotion of the Objectives of the Convention	96
D	Compatibility with the Summary Nature of Convention Proceedings	106
6.	Consistency with General Legal Doctrines	108
I	Introduction	108
II	Rights and Interests of Children	109

A	Children's Rights and the Abduction Convention	109
B	The Best Interests of the Child and Article 3 of the CRC	111
C	The Child's Participation Rights and Article 12 of the CRC	113
D	The Child's Right to Protection and to Survival and Development	118
E	The Child's Right to Contact with his Parents	118
F	The Child's Right to Identity	121
III	Rights of Parents	121
A	Introduction	121
B	The Status of Parental Rights	122
C	The Scope of Parental Rights	123
D	Conflicts between Children's Rights and Parental Rights	124
IV	Private International Law Principles	126
A	The Abduction Convention and Private International Law	126
B	Jurisdiction Rules	127
C	Choice of Law Rules	128
D	Rules for Recognition of Foreign Judgments	129
E	Comity of Nations	132
V	Certainty versus Flexibility	136
Part III – Conditions for Application of Mandatory Return Mechanism		139
7. Wrongful Removal or Retention		141
I	Introduction	141
II	Removal or Retention	142
A	Relationship between the Concepts	142
B	Identifying the Date of the Wrongful Retention	142
C	Analysis in Relation to the Concept of Retention	144
III	Rights of Custody	146
A	Introduction	146
B	Local Law versus Autonomous Definition	147
C	<i>Ne Exeat</i> Rights	148
D	Unmarried Fathers	151
E	Article 15 Declarations	154
F	Actual Exercise of Custody Rights	156
IV	Analysis in Relation to Breach and Exercise of Custody Rights	157
A	Internal Coherence	157
B	Intention of the Drafters	159
C	Promotion of the Objectives of the Convention	161
D	Compatibility with the Summary Nature of Convention Proceedings	165
E	Consistency with Rights and Interests of Children	166
F	Consistency with Rights of the Parents	167
G	Consistency with Private International Law Principles	169
H	Certainty versus Flexibility	173
V	Conclusions	173

8. Habitual Residence	175
I Introduction	175
A Structure of the Chapter	175
B Origin of the Concept of Habitual Residence	175
C Use of Habitual Residence in Relation to Children	176
D Does a Person have a Single Habitual Residence at all Times?	178
E Nature of the Determination of Habitual Residence	179
II Role of Habitual Residence in the Abduction Convention	180
A In Determining the Applicability of the Convention	180
B In Determining Whether the Removal or Retention was Wrongful	182
C As the Place to Where the Child is Returned	182
III The Different Models	186
A The Parental Intention Model	186
B The Independent/Child-Centred Model	189
C The Combined/Hybrid Model	192
IV Illustrating the Different Models	195
A Permanent Relocations	195
B Fixed Term Relocations	197
C Relocations for an Indefinite Period	198
D Shuttle Custody Arrangements	200
E Newborn Child	201
F Re-Abduction	203
V Analysis	204
A Internal Coherence	204
B Consistency with the Intention of the Drafters	206
C Promotion of the Objectives of the Convention	207
D Compatibility with the Summary Nature of Convention Proceedings	211
E Consistency with Rights and Interests of Children	212
F Consistency with Rights of the Parents	213
G Consistency with Matrimonial Law	215
H Consistency with Contract Law	216
I Certainty versus Flexibility	218
VI Conclusions	220
Part IV – Defences to Mandatory Return	223
9. Article 12(2)	225
I Introduction	225
II The Case Law	226
A Expiration of the 12-Month Period	226
B The Child is Settled in his New Environment	228
C Discretion to Order Return	233
III Analysis	236
A Internal Coherence	236
B Consistency with the Intention of the Drafters	237

C	Promotion of the Objectives of the Convention	237
D	Compatibility with the Summary Nature of Convention Proceedings	242
E	Consistency with Rights and Interests of Children	242
F	Consistency with Private International Law Principles	243
G	Certainty versus Flexibility	243
IV	Conclusions	244
10.	Consent and Acquiescence	245
I	Introduction	245
II	Normative Framework	247
A	Content of Acquiescence or Consent	247
B	Subjective or Objective Test	248
C	Ignorance of Rights	249
D	Need for Reliance	250
E	Irrevocability	251
III	Specific Situations	252
A	Vitiating Factors	252
B	Statements Made During Negotiations	252
C	Advance Consent	253
D	Statements Made in Immediate Aftermath of the Removal or Retention	254
E	Pursuance of Other Remedies	255
F	Actions for the Benefit of the Children	255
G	Inaction	256
H	Acquiescence Following Initiation of Proceedings	256
IV	Exercise of Discretion	257
A	The Nature of the Discretion	257
B	The Relevant Factors	258
V	Analysis	261
A	Internal Coherence	261
B	Consistency with the Intention of the Drafters	262
C	Promotion of the Objectives of the Convention	263
D	Compatibility with the Summary Nature of Convention Proceedings	265
E	Consistency with Rights and Interests of Children	265
F	Consistency with Principles of Private International Law	266
G	Consistency with Contract Law	267
H	Certainty versus Flexibility	268
VI	Conclusions	268
11.	Grave Risk of Harm	270
I	Introduction	270
A	The Dilemma	270
B	Scope of the Investigation	271
II	Interpretation and Application of the Grave Risk Defence	273
A	General	273
B	Specific Situations	277

III	Protective Measures	289
A	Introduction	289
B	Undertakings	291
C	Ensuring Enforceability of Undertakings/Conditions	294
D	Judicial Liaison	296
IV	Analysis	298
A	Internal Coherence	298
B	Consistency with the Intention of the Drafters	300
C	Promotion of the Objectives of the Convention	301
D	Compatibility with the Summary Nature of Convention Proceedings	305
E	Consistency with Rights and Interests of Children	306
F	Consistency with Rights of the Parents	311
G	Consistency with Private International Law Principles	312
H	Consistency with Domestic Abuse Policy	314
I	Certainty versus Flexibility	314
V	Conclusions	315
12.	Child's Objection	317
I	Introduction	317
A	The Dilemma	317
B	The Scope of the Court's Discretion	319
II	Interpretation and Application of Article 13(2)	323
A	Age and Maturity	323
B	The Child's Objections	327
C	Considerations Relevant to the Court's Exercise of its Discretion	336
III	Analysis	343
A	Internal Coherence	343
B	Consistency with the Intention of the Drafters	344
C	Promotion of the Objectives of the Convention	345
D	Compatibility with the Summary Nature of Proceedings	348
E	Consistency with Rights and Interests of Children	348
F	Consistency with Private International Law Principles	349
G	Certainty versus Flexibility	349
IV	Conclusions	351
13.	Violation of Fundamental Human Rights and Freedoms	354
I	Introduction	354
II	The Case Law	355
A	Claims Based on Inconsistency with the Best Interests of the Child	355
B	Claims Based on Lack of Due Process in the Requesting State	358
C	Claims Based on Right to Freedom of Movement	360
III	Analysis	361
A	Internal Coherence	361
B	Consistency with the Intention of the Drafters	362
C	Promotion of the Objectives of the Convention	363

D	Compatibility with the Summary Nature of Convention Proceedings	365
E	Consistency with Rights and Interests of Children	365
F	Consistency with Rights of the Parents	366
G	Consistency with Private International Law Principles	368
H	Certainty versus Flexibility	368
IV	Conclusions	369
Part V: The Voice of the Child		371
14. Ascertaining the Child's Views		373
I	Requirement to Ascertain the Child's Views	373
II	Method of Ascertaining the Child's Views in Abduction Convention Cases	375
A	Introduction	375
B	Specific Jurisdictions	376
III	Analysis	380
A	Arguments in Favour of Judges Hearing Children Directly	380
B	Arguments against Judges Hearing Children Directly	384
C	Making Participation Meaningful	386
IV	Conclusions	387
15. Status of the Child in Abduction Convention Proceedings		389
I	Introduction	389
II	The Child's Right to Separate Representation	391
A	The Source of the Right	391
B	The Scope of the Right	392
III	Separate Representation in Abduction Convention Cases	396
A	The Arguments Against	396
B	The Arguments in Favour	399
IV	Application by the Child	403
A	The Legal Provisions	403
B	The Need for Provision for Application by Children	404
V	Conclusions	405
Part VI: Related Proceedings and Processes		407
16. Mediation		409
I	Introduction	409
II	Advantages of Mediation	410
III	Problems and Solutions	412
A	International Nature	412
B	Delay	412
C	Enforceability	413
D	The Voice of the Child	414
E	Domestic Violence	415
IV	Conclusions	416

17. Compensating the Left-Behind Parent	417
I Introduction	417
II To What Extent is Compensation Appropriate?	417
A Arguments in Favour of Compensation	417
B Arguments against Compensation	418
III Analysis of the Various Models	419
A The Tort Model	419
B The Criminal Model	419
C The Abduction Convention Model	420
IV Conclusions	422
18. Enforcing Rights of Access	423
I Introduction	423
II Article 21 of the Abduction Convention	424
A Interpretation and Application of Article 21	424
B Analysis	426
III Other International Instruments	430
A The 1980 European Custody Convention	430
B The 1996 Hague Convention on the Protection of Children	430
C The 2003 European Convention on Contact Concerning Children	431
D The Brussels II bis Regulation	431
IV Conclusions	432
Part VII: The Way Ahead	435
19. Conclusions and Recommendations	437
I Introduction	437
II Significance of the Developments Since 1980	437
A Children's Rights	437
B Primary Carer Abductions	439
C The Call for a Protocol	441
III Conclusions	442
A Hierarchy of Objectives	442
B Recommendations in Relation to the Interpretation and Application of the Abduction Convention	444
C Recommendations Concerning other Aspects of Implementation of the Abduction Convention	447
Appendix – Hague Convention on the Civil Aspects of International Child Abduction	451
<i>Index</i>	461