

General Principles  
and Guide to  
Good Practice,  
Hague Conference  
on Private  
International Law

# Transfrontier Contact Concerning Children



Family Law



# **TRANSFRONTIER CONTACT CONCERNING CHILDREN**

## **GENERAL PRINCIPLES AND A GUIDE TO GOOD PRACTICE**



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## THE OBJECTIVES AND SCOPE OF THE GENERAL PRINCIPLES AND GUIDE TO GOOD PRACTICE

The principles and good practices set out in this Guide serve the following purposes –

- they assist in the more effective implementation and application of those provisions of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which concern transfrontier contact;
- they draw attention to provisions of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* which relate to transfrontier contact and which supplement the 1980 Convention, and provide guidance concerning their application;
- they provide an overall model for constructing an international system of co-operation designed to secure effective respect for rights of contact. As such, the Principles and Guide are intended to be helpful also to those States, which are not Parties to the Hague Conventions, but are considering how best to develop effective structures.

The Guide is intended to be of particular use to judges and Central Authorities appointed under the 1980 or 1996 Conventions, as well as to governments engaged in the development of policies concerning transfrontier contact. It may also be of assistance to other professionals working in the area.

Three Guides to Good Practice relating to the 1980 Convention have already been published: Part I relating to Central Authority Practice, Part II on Implementing Measures and Part III on Preventative Measures. This Guide differs from them in two respects. First, it contains general principles as well as examples of good practice. Second, it relates to the 1996 Convention, as well as to the 1980 Convention.

While in relation to some matters covered by this Guide, one approach is recommended, such as where it has already been endorsed by a Special Commission, in relation to other matters it will be indicated that there is more than one possible approach. This allows States and other interested parties to give full consideration to the approach that would best suit their legal system.

The Guide received the general endorsement of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. However, nothing in this Guide may be construed as binding on State Parties to the 1980 Convention or the 1996 Convention. The general principles set forth in this Guide are purely advisory in nature.

All State Parties, and in particular Central Authorities designated under the 1980 and 1996 Hague Conventions, are encouraged to review their own practices, and where appropriate and feasible, to improve them. For both established and developing Central Authorities the implementation of the Conventions should be seen as a continuing, progressive or incremental process of improvement.





## **EXECUTIVE SUMMARY**

## **1. THE IMPORTANCE OF CONTACT**

### ***1.1 The general principle***

- All possible steps should be taken to secure the rights of children to maintain personal relationships and have regular contact with both of their parents and of parents to maintain personal relationships and have regular contact with their children, unless it is determined that such contact is contrary to the interests of the children. This is equally applicable when the parents live in different countries.

### ***1.2 Restrictions on contact should be proportionate***

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

## **2. PROMOTING AGREEMENT**

### ***2.1 Promoting parental agreement***

- Legal and administrative arrangements should support the exercise of contact by promoting and facilitating agreement between parents or other holders of parental responsibility

### ***2.2 Facilitating and encouraging the achievement of agreed solutions***

- Agreed solutions should be facilitated and encouraged by mediation, conciliation, negotiation and similar means.

### ***2.3 The role of the State in promoting and supporting parental agreement on contact***

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

### ***2.4 Further elements in the legal framework***

2.4.1 The legal framework that should be provided should ensure fairness in negotiations between the parents and respect the rights of the child, including the right of the child to express his / her views and to have those views taken into account in accordance with the child's age and maturity.

2.4.2 Confidentiality, impartiality and independence of mediation should, as a general rule, be guaranteed, as it should for other means of alternative dispute resolution used to reach an amicable agreement.

2.4.3 Training for mediators should be provided or encouraged, with special regard to the difficulties of cross-border family disputes, including ongoing training concerning the applicable legal instruments.

2.4.4 Quality of mediation should be assured, for instance, by promoting the establishment of and adherence to voluntary codes of conduct.

2.4.5 The views of the child should be taken into account in mediation in accordance with the child's age and maturity.

## **2.5 Legal framework to give the contact agreement cross-border effect**

2.5.1 A legal framework should be provided, which gives effect to agreements on contact reached between the parents in both countries in which the parents live.

2.5.2 An agreement based on mediation which is intended by the parties to be legally binding should be made enforceable in both States concerned. This also applies to agreements achieved through other means of alternative dispute resolution.

# **3. THE FRAMEWORK FOR INTERNATIONAL LEGAL CO-OPERATION**

## **3.1 The basic framework**

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

- common rules which define the circumstances in which the courts (or their equivalents) in each legal system may exercise jurisdiction to make or modify binding decisions relating to custody and contact;
- mutual respect for, including the recognition and enforcement of, decisions concerning contact which are made on the common jurisdictional bases.

## **3.2 The Hague Convention of 1996**

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

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

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

## **3.3 A common approach to jurisdiction**

Common jurisdictional standards –

- help to avoid litigation and further conflict between the persons involved in a contact dispute;
- ensure that appropriate courts / authorities have the right to make decisions concerning contact when needed in the interests of the child;

- set limits to the circumstances in which an existing contact order may be modified;
- provide certainty for the parties and discourage forum shopping and abductions.

### **3.4 *The recognition and enforcement of decisions concerning contact***

3.4.1 There is a need for swift recognition and enforcement.

- An essential element of international co-operation is a system which provides for the recognition and enforcement between States of decisions concerning contact, as well as custody decisions, which are made on the agreed or approved jurisdictional grounds.
- The procedures for recognition and enforcement should be simple, inexpensive and swift.

3.4.2 Advance recognition can provide a guarantee that contact orders will be complied with.

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

3.4.3 The obtaining of a mirror order can also be used to ensure the recognition and enforceability of contact arrangements.

## **4. INTER-STATE ADMINISTRATIVE CO-OPERATION**

### **4.1 *The need for permanent structures for international co-operation***

- A permanent structure for inter-State co-operation at the administrative level is needed to give effective protection to contact rights across borders.

### **4.2 *The Central Authority model***

- The administrative authorities which act as a focal point for cross-border co-operation need to have the legal capacity and mandate to enable them to carry out their functions effectively.

### **4.3 *Specific functions of Central Authorities in the context of transfrontier contact under the 1980 and 1996 Conventions***

4.3.1 In the context of transfrontier contact the Central Authority should, as far as possible, act as a focal point for the exchange of information between States about the laws and procedures applicable and the services available in the context of specific cases.

4.3.2 The Central Authority should also act as the centre for channelling information about the progress of specific cases.

4.3.3 The Central Authority should be the central point of access for the provision of certain services to help give effect to contact rights by taking appropriate measures –

- to assist in locating a child;

- to prevent further harm to a child through provisional measures;
- to bring about an amicable resolution of issues;
- to exchange information about the background of the child;
- to eliminate obstacles to the functioning of the Convention.

4.3.4 The Central Authority should respond to requests from other Central Authorities or competent authorities for assistance in implementing access rights or decisions in respect of access rights.

4.3.5 The Central Authority may also be requested to provide a report in respect of a child who is the subject of a contact dispute.

4.3.6 The Central Authority should act as the focal point for removing obstacles to the exercise of contact rights.

4.3.7 The Central Authority should also be the focal point for assisting in the implementation of decisions concerning contact rights.

#### **4.4 Proactive approach towards the provision of Central Authority services**

4.4.1 It is the role of the Central Authority to assist in removing barriers to contact through provision of information and advice, by helping to promote effective access to local procedures, as well as by providing specific services.

4.4.2 All Central Authorities should, as far as possible, adopt a progressive approach to their responsibilities in this area.

4.4.3 Contracting States should consider in the allocation of resources to Central Authorities the positive obligation which they have to provide a framework which supports rights of contact.

#### **4.5 Appropriate measures to initiate or facilitate the institution of proceedings**

4.5.1 The Central Authority has the responsibility under the 1980 Convention to take all appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings either directly or through any intermediary.

#### **4.6 Scope of contact cases in which Central Authorities should offer services**

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

4.6.2 In the context of abduction or alleged abduction, this includes cases where an interim order for contact is sought by an applicant pending a decision on the return of the child, as well as cases in which contact arrangements are sought (for example, by the

abducting parent) in the country to which the child has been returned or, where return is refused, in the country to which the child has been taken.

#### **4.7 Detailed information concerning services provided**

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

#### **4.8 Expeditious, responsive and transparent procedure**

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

## **5. THE PROCESSING OF INTERNATIONAL APPLICATIONS CONCERNING CONTACT BY COURTS OR OTHER AUTHORITIES**

### **5.1 Effective access to procedures**

5.1.1 Persons seeking to establish or to exercise transfrontier contact rights should have effective access to the procedures which exist for that purpose.

5.1.2 In the case of an applicant from abroad, effective access to procedures implies –

- the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;
- the provision of appropriate assistance in instituting proceedings;
- that lack of adequate means should not be a barrier;
- that there is an opportunity to raise issues of contact at all relevant times.

### **5.2 Speed**

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

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

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

### **5.3 Concentration of jurisdiction**

- Consideration should be given to the advantages of concentrating jurisdiction in cross-frontier contact cases, or certain categories of such cases, among a limited number of courts or judges. In countries where jurisdiction has already been concentrated in this way for return proceedings under the 1980 Convention, consideration should be given to using the same system in transfrontier contact cases.
- Where it is not possible or it is inappropriate to concentrate jurisdiction, other measures should be considered to ensure that judges with the necessary specialisation hear international contact cases.

### **5.4 Case management**

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

## **6. ORDERS RELATING TO CONTACT**

### **6.1 Safeguards and guarantees**

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

### **6.2 Unlawful retention**

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

### **6.3 Examples of guarantees and safeguards**

- Examples of other guarantees and safeguards to ensure respect for the terms and conditions of contact are –
  - the surrender of passport or travel documents,
  - requiring that the requesting parent report regularly to the police or some other authority during a period of contact,
  - the deposit of a monetary bond or surety,
  - supervision of contact by a professional or a family member,



- various other restrictions attached to contact, *e.g.*, forbidding overnight visits or extended visits, restricting the locations where visitation may occur, etc.,
- requiring that the requesting parent provide the custodial parent with a detailed itinerary and contact details, etc.,
- requesting that foreign consulates / embassies should not issue new passports / travel documents for the child,
- requiring the swearing of a religious oath,
- requiring that a mirror order should be made in the country where contact is to be exercised.

#### **6.4 Taking account of traditions of the parties**

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

#### **6.5 Proportionality**

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

#### **6.6 Specifying the terms and conditions**

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

#### **6.7 Modern means of preserving contact**

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

#### **6.8 Safeguards may include measures to ensure that the terms and conditions of contact will be enforceable in another country**

#### **6.9 Financial arrangements and child support**

- In order to facilitate contact courts should have a broad discretion to order financial arrangements tailored to the particular needs and resources of family members.
- The costs involved in organising and exercising transfrontier contact should be capable of being taken into account in the assessment of child support.

## **7. ENFORCEMENT OF CONTACT ORDERS UNDER NATIONAL LAW**

### **7.1 *Effective enforcement procedure***

7.1.1 Effective mechanisms should be available for enforcing a contact order, including effective coercive measures.

7.1.2 Additional requirements, which are to be fulfilled in order to commence and pursue the enforcement process, should be limited.

7.1.3 Separate challenges allowed against the order of specific enforcement measures and / or decisions on additional formality requirements for enforcement should be limited or avoided altogether.

### **7.2 *Practical arrangements***

- Practical arrangements, which are necessary for an effective exercise of contact, should be as precise as possible.

### **7.3 *Promoting voluntary compliance***

- Central Authorities and courts should encourage the parties at any stage, including the enforcement stage, to consider the possibility of mediation or other ways to find an amicable resolution.
- The wishes and feelings of the child should be taken into account according to his or her age and maturity.

### **7.4 *Co-operation of bodies and professionals involved***

- Bodies and professionals involved in the enforcement of a contact order should closely co-operate.
- Great emphasis should be placed on the facilitation of cross-border co-operation in this matter.

### **7.5 *Training and education***

- The professionals involved in enforcement of contact orders in cross-border contact cases should receive appropriate training, especially in regard to the aims and mechanisms of the applicable Hague Conventions and other international instruments.
- It is recommended that practice guidelines, manuals, checklists and / or other documents which can be of assistance to the different professionals involved in the enforcement of contact orders in cross-border cases be developed.

## **8. RELOCATION AND CONTACT**

### **8.1 Decisions on relocation**

- In this context, concern is centred on the approach taken by the court to guaranteeing and securing the contact rights of the “left-behind” parent.

### **8.2 Respect for terms and conditions**

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

### **8.3 Advance recognition**

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

### **8.4 Mirror orders and direct judicial communications**

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

### **8.5 Applications to vary contact conditions and the 1996 Convention**

8.5.1 The court of the Contracting State to which a child is relocated should allow review and variation of contact orders of another Contracting State only in the circumstances in which it would allow such review or variation of its own domestic orders.

8.5.2 The order should continue to enjoy this status even after the child’s habitual residence has changed and until such time as the courts in the country of the child’s new habitual residence order otherwise.

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

8.5.4 The court should in particular –

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

- consider whether adjournment of proceedings is appropriate in accordance with Article 35, paragraph 3, of the 1996 Convention; and
- where appropriate, give due weight to a finding made by the court permitting relocation concerning the suitability of the “left-behind” parent to exercise access and the conditions under which access should be exercised, in accordance with the procedure set out in Article 35, paragraph 2, of the 1996 Convention. However, it should not be necessary to reconsider these issues where contact arrangements have recently been made by the courts of the State of the child’s former habitual residence in the context of relocation.

8.5.5 Even in situations where the 1996 Convention does not apply, consideration should be given to the importance of recognising recently made contact orders from foreign jurisdictions, and caution should be exercised before disturbing their essential elements.

## **9. ACCESS / CONTACT RIGHTS AND RIGHTS OF CUSTODY**

### ***9.3 Veto on removal – A custody right under the 1980 Convention?***

The preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention.

### ***9.4 Approach to interpretation***

Concepts such as access rights and rights of custody should be interpreted having regard to the autonomous nature of the 1980 Convention and in the light of its objectives.

### ***9.5 Rights of custody include rights of access / contact***

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

### ***9.6 Rights of access not confined to those already established by court order***

The right to apply under Article 21 of the 1980 Convention to make arrangements for recognising or securing the effective exercise of “rights of access” should not be limited to cases where there is an existing court order recognising or establishing rights of access, but should include cases where the applicant relies on access rights which arise by operation of law or has status to seek the establishment of such rights.



## INTRODUCTION

### A. BACKGROUND WORK OF THE HAGUE CONFERENCE ON TRANSFRONTIER CONTACT

The matter of transfrontier access / contact, and in particular the adequacy of Article 21 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*,<sup>1</sup> has been a concern of the Hague Conference for many years. Indeed the drafters of the 1980 Convention recognised that, despite the fact that an objective of the Convention was to “secure protection for rights of access”,<sup>2</sup> the Convention provisions on this subject were limited.<sup>3</sup>

The framers of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children<sup>4</sup> were also well aware of these limitations and took the opportunity to fill in some of the gaps left by the 1980 Convention. The measures of protection in respect of children, which are a primary focus of that Convention, include those which deal with rights of access.<sup>5</sup> Thus the uniform rules defining jurisdiction to take child protection measures, as well as the related provision for the recognition and enforcement of such measures in other Convention countries, apply to decisions relating to access / contact. In addition Article 35, within the chapter on co-operation, makes specific provision for inter-State requests for assistance especially in securing “the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis”.

More recent work began with a decision of the Special Commission on General Affairs and Policy in May 2000 to request the Permanent Bureau to prepare a report on the desirability and potential usefulness of a protocol to the 1980 Convention which would “provide in a more satisfactory and detailed manner than Article 21 of that Convention for the effective exercise of access / contact between children and their custodial and non-custodial parents in the context of international child abductions and parent relocations, and as an alternative to return requests”. This led first to the drawing up of a preliminary report on transfrontier access / contact<sup>6</sup> which was discussed during the Fourth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. This Report drew in part on responses to a questionnaire circulated among States Parties to the 1980 Convention, Member States of the Hague Conference and certain international organisations prior to the Special Commission of March 2001.<sup>7</sup>

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<sup>1</sup> Hereinafter, “1980 Convention”.

<sup>2</sup> Preamble to the 1980 Convention, para. 3. See also Art. 1 *b*).

<sup>3</sup> See E. Pérez-Vera, “Explanatory Report on the Convention on the Civil Aspects of International Child Abduction”, *Proceedings of the Fourteenth Session, Tome III, Child abduction*, The Hague, SDU, 1980, at p. 426 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>4</sup> Hereinafter, “1996 Convention”.

<sup>5</sup> Art. 1, 1996 Convention.

<sup>6</sup> W. Duncan, “Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. A Preliminary Report”, Prel. Doc. No 4 of February 2001 for the attention of the Special Commission of March 2001 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>7</sup> Available on the Hague Conference website, see *infra*, pp. 53-56.

Discussions at the March 2001 Special Commission led to a conclusion that the deficiencies in the 1980 Convention in securing protection for rights of access in transfrontier situations were “a serious problem requiring urgent attention in the interests of the children and parents concerned”.<sup>8</sup>

Following the Special Commission meeting of March 2001 the Permanent Bureau continued the process of consultation and, in January 2002, circulated a Consultation Paper on Transfrontier Access / Contact to Member States, States Parties to the 1980 Convention and relevant governmental and non-governmental organisations.<sup>9</sup> The Consultation Paper listed several possible approaches or techniques as possible solutions to those aspects of transfrontier access / contact (a protocol, recommendations, a Guide to Good Practice, model agreements), and it discussed some of their implications.

The Final Report 2002<sup>10</sup> on transfrontier access / contact, prepared and circulated in July 2002 for the attention of the Special Commission meeting in October 2002 drew attention to the diversity of legal elements that make up the framework for resolving international access / contact disputes. These included matters of jurisdiction, the recognition and enforcement of decisions relating to contact, assistance to foreign applicants, remedies for wrongful retentions, co-operation between authorities, promoting agreement and mediation, national laws and procedures, prior guarantees and safeguards and enforcement under national law.<sup>11</sup> The interrelationships between the different elements were pointed out and it was suggested that reform of isolated elements without regard to context carries a risk of failure.<sup>12</sup>

The Final Report 2002 considered the laws and practices, which had developed under the 1980 Convention in a number of Contracting States. As principal shortcomings, mentioned in responses to the Questionnaire and the Consulting Paper, the report named –<sup>13</sup>

- The lack of uniform rules determining jurisdiction of authorities in international cases to make or modify contact orders and adequate provisions for the recognition and enforcement of foreign access / contact orders;
- The absence of agreement among States on the nature and level of the supports that should be made available to persons seeking to establish or secure access / contact rights in a foreign country;
- The operation in some countries of procedures, both at the pre-trial and enforcement stages, which are not sufficiently sensitive to the special features and needs of international cases, and which are the cause of unnecessary delays and expense;
- An inadequate level of international co-operation at both the administrative and judicial levels.

The Special Commission concluded in October 2002 on the matter of transfrontier

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<sup>8</sup> See “Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)”, drawn up by the Permanent Bureau (hereinafter, “Conclusions and Recommendations of the Fourth Meeting of the Special Commission”), para. 6.1 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>9</sup> W. Duncan, “Consultation Paper on Transfrontier Access / Contact”, Prel. Doc. No 1 of January 2002 for the attention of the Special Commission of September / October 2002 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>10</sup> W. Duncan, “Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Final Report”, Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002. Hereinafter, “Final Report 2002” (available on the Hague Conference website, see *infra*, pp. 53-56). This report drew on the comments of experts, the previous questionnaire and reports of cases concerning the 1980 Convention which are made available in the International Child Abduction Database (INCADAT) (see *infra*, pp. 53-56).

<sup>11</sup> Chapter III.

<sup>12</sup> At para. 48.

<sup>13</sup> See *op. cit.*, note 10, para. 119.

access / contact<sup>14</sup> that it was premature to begin work on a Protocol to the 1980 Convention and that work should continue on a separate chapter of the Guide to Good Practice relating to transfrontier access / contact in the context of the 1980 Convention.

As objectives for the Guide the Special Commission named the promotion of consistent and best practices in relation to those matters which it is agreed fall within the competence and obligations of State Parties under the Convention, and the allocation of examples of practice even in relation to matters which fall within the disputed areas of interpretation.

The Special Commission 2002 recommended that work begin on the formulation of general principles and considerations. The idea was not to create a set of principles applying to access cases generally, but rather to draw attention to certain general considerations and special features, which need to be borne in mind by Contracting States and their authorities when formulating policies in respect of international access / contact cases. As well as offering general advice to States in formulating policy in this area; the general principles could be helpful to Central Authorities in informing their practice. They could possibly also be helpful to the courts and other authorities, as well as to applicants as they present their cases.

The Special Commission 2002 emphasised that the provisions of the 1996 Convention have the potential to make a substantial contribution to the solution of certain problems surrounding cross-frontier access / contact.

Following the meeting of the Special Commission in autumn 2002 the work on Central Authority practice relating to access applications was completed. This now forms Chapter 5 (Access applications: role of requesting and requested Central Authorities) of Part I of the Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Central Authority Practice, which was published in 2003.<sup>15</sup>

A number of international judicial conferences / seminars were subsequently organised by the Permanent Bureau which involved discussion of access / contact issues, in particular the Noordwijk Seminar,<sup>16</sup> the two Latin American Judges' Seminars held in Monterrey, Mexico, 1 to 4 December 2004<sup>17</sup> and in The Hague from 27 November to 3 December 2005.<sup>18</sup>

The "Malta Process" established by the Hague Conference in co-operation with the Government of Malta has addressed the question of how to secure better protection for cross-frontier rights of contact of parents and their children as between a number of States Parties to the 1980 Convention and a number of non-Party States whose laws are based on or influenced by Shariah law. Two judicial conferences have been held, both in St Julian's Malta, the first from 14 to 17 March 2004<sup>19</sup> and the second from 19 to 22 March 2006.<sup>20</sup> The

<sup>14</sup> See "Report and Conclusions of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (27 September – 1 October 2002)", drawn up by the Permanent Bureau, March 2003, at pp. 45-46 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>15</sup> *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*, Jordan Publishing, 2003. Hereinafter, "Guide to Good Practice – Part I". Also available on the Hague Conference website, see *infra*, pp. 53-56. See Appendix.

<sup>16</sup> Judges' Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Noordwijk, 19–22 October 2003, involving judges and Central Authority personnel from Austria, France, Germany, Israel, the Netherlands, Sweden, Switzerland, Turkey, the United Kingdom (England and Wales, Northern Ireland, Scotland) and the United States of America.

<sup>17</sup> Participating in the Seminar were 90 Judges, Central Authority officials and other experts from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, United States of America, Uruguay, and Venezuela and the following Organisations: Organization of American States, Inter-American Children's Institute, International Centre for Missing and Exploited Children, American Bar Association, Latin American Law Initiative Council, Texas-Mexico Bar Association and the Law School of *Instituto Tecnológico y de Estudios Superiores de Monterrey*; see *The Judges' Newsletter on International Child Protection*, published biannually by the Hague Conference on Private International Law (hereinafter, "*The Judges' Newsletter*"), Vol. IX, Spring 2005. The volumes of the *The Judges' Newsletter* are available on the Hague Conference website, see *infra*, pp. 53-56.

<sup>18</sup> See *The Judges' Newsletter*, Vol. X, Autumn 2005 (available on the Hague Conference website, *infra*, pp. 53-56).

<sup>19</sup> Participating in the Seminar were Judges and Experts from Algeria, Belgium, Egypt, France, Germany, Italy, Lebanon, Malta, Morocco, the Netherlands, Spain, Sweden, Tunisia, the United Kingdom, the European Commission, the Council of



Malta Process has provided the opportunity to consider in a rather fresh and radical way what are the essential building blocks for an effective system of international co-operation in matters of access / contact. These are reflected in the Declarations, which emerged from each of the conferences.<sup>21</sup>

Other influences on this Guide and General Principles include the work done by the Council of Europe in creating the Convention on Contact Concerning Children of 15 May 2003<sup>22</sup> and the promulgation by the European Community of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.<sup>23</sup>

An informal meeting of experts on transfrontier access / contact was held at the Permanent Bureau in October 2005. The meeting of experts, who attended in their personal capacities,<sup>24</sup> was convened to provide the Permanent Bureau with further advice and assistance in completing this Report.<sup>25</sup>

The Permanent Bureau has assisted at a number of other international meetings at which issues of transfrontier access / contact have been discussed, including an Informal Ministerial Meeting, convened in Sweden by the Minister of Foreign Affairs of Sweden on 4 November 2005, involving Ministers and other experts from Algeria, Ireland, Latvia, Malta, Morocco, Sweden, Tunisia and Turkey as well as the European Commission.<sup>26</sup>

This Guide is based on a Preliminary Document<sup>27</sup> drawn up by William Duncan, Deputy Secretary General of the Permanent Bureau for the attention of the meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children which took place in the Hague in October / November 2006. That document received the general endorsement of the Special Commission.

The Permanent Bureau would like to acknowledge the valuable assistance of several experts<sup>28</sup> who provided comments on the final draft of this Guide; and to thank Ms Juliane Hirsch and Ms Eimear Long, Legal Officers at the Permanent Bureau, for their assistance with the drafting of the Guide.

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the European Union, the International Social Service and Reunite. See *The Judges' Newsletter*, Vol. VIII, Autumn 2004 (available on the Hague Conference website, *infra*, pp. 53-56).

<sup>20</sup> Participating in the Seminar were Judges and Experts from Algeria, Australia, Belgium, Canada, Egypt, France, Germany, Indonesia, Lebanon, Libya, Malaysia, Malta, Morocco, the Netherlands, Sweden, Tunisia, Turkey, the United Kingdom, the United States of America, the European Commission, the European Parliament, the Council of the European Union, the International Social Service, the International Centre for Missing and Exploited Children and Reunite. See *The Judges' Newsletter*, Vol. XI, Spring 2006 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>21</sup> Available on the Hague Conference website, see *infra*, pp. 53-56.

<sup>22</sup> ETS No 192. Hereinafter the "Council of Europe Convention on Contact".

<sup>23</sup> Hereinafter the "European Community Council Regulation No 2201/2003". This regulation is also known as the Brussels II *bis* Regulation.

<sup>24</sup> See *The Judges' Newsletter*, Vol. X, Autumn 2005 (available on the Hague Conference website, see *infra*, pp. 53-56), article entitled "Informal meeting of experts on transfrontier contact / access", pp. 96-97. Participating in the meeting were Sarah Armstrong-Vigers, Eberhard Carl, Denise Carter, Mary Sue Conaway, Denise Gervais, Peter McEleavy, Joan MacPhail, Michael Nicholls, Kathy Ruckman, Adel Omar Sherif, Linda Silberman, Jennifer Degeling, Caroline Harnois, Philippe Lortie, Andrea Schulz and William Duncan.

<sup>25</sup> Other useful information was also found in N. Lowe and K. Horosova, "Good Practice Report on Access Under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*" (NCMEC, 2007).

<sup>26</sup> See "Informal Ministerial Meeting on incompatibility of norms as a source of conflicts – child abductions and related issues", *The Judges' Newsletter*, Vol. X, Autumn 2005, pp. 98-99 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>27</sup> See W. Duncan, "Transfrontier Access / Contact – General Principles and Good Practice", Prel. Doc. No 4 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>28</sup> Comments were received from Mathew Thorpe, Peter Boshier, Nigel Lowe, Eberhard Carl, Joan MacPhail, Michael Nicholls, Kathy Ruckman, Peter McEleavy and Andrea Schulz.

## B. THE CONTEXT – SOME TYPICAL CASES

It may be helpful to describe briefly some of the typical fact situations giving rise to difficulties over the exercise of contact in a transfrontier context.

- (a) In the context of an application for the return of a child under the 1980 Convention, the applicant may wish to establish contact with the child pending the decision on return. It has been suggested that in a case where delay occurs in determining the return application, denial of contact with the applicant parent may contribute to the alienation of the child from that parent, and may thereby increase the prospects of an Article 13 *b*) defence succeeding.<sup>29</sup> In any event, preserving the continuity of the child's relationship with the applicant parent requires that the issue of contact be dealt with as quickly as possible. This may in turn help to ensure that the child is not re-abducted to the original State.
- (b) When a return application is refused, *e.g.*, on the basis of an Article 13 defence, the question immediately arises of the appropriate arrangements for contact between the child and the left behind parent. On the other hand, if there has been a successful return application, the question of contact between the child and the abducting parent may arise if the return application resulted in the child leaving that parent's care.<sup>30</sup>
- (c) There are those cases where a parent from abroad applies, outside the context of an abduction, for the enforcement of a contact order made in another jurisdiction. A typical case is where a court of the country where the child had his or her previous habitual residence permits the parent who is the primary carer to relocate to another jurisdiction together with the child, but at the same time makes a contact order with respect to the left behind parent. There is a connection between this type of case and the phenomenon of abduction. If no respect is given abroad to contact orders made in the context of relocation orders, this may affect the willingness of judges to permit relocation, where such permission is required; and, if judges are unwilling to allow relocation, this may precipitate abductions by primary carers. In addition, if no respect is given to the contact orders once the child has moved abroad, this may precipitate an abduction by the contact parent who wishes to maintain contact with the child.
- (d) There are cases where a parent from abroad applies *de novo* for a contact order from the authorities of the State where the child lives. The importance of facilitating the application derives principally from the interest which the child has in maintaining beneficial links with both parents. In addition, as the framers of the 1980 Convention recognised, the failure to support a reasonable application for contact by a non-custodial parent may itself fuel the temptation to abduct.
- (e) There are cases where modification of existing cross-frontier contact arrangements is sought either by the custodial parent or the parent exercising contact. These cases may range from modification sought in order to restrict or even terminate the exercise of contact, to those where more extensive contact is sought, or to those cases where changes in circumstances are thought to require practical adjustments to contact arrangements.
- (f) There are cases where the custodial or non-custodial parent claims that transfrontier contact terms have been breached, and seeks an order to restore the status quo. The extreme case is unlawful retention where, following a period of transfrontier visitation, the non-custodial parent refuses to return the child. The alleged infringement may be less dramatic. The parent exercising contact may unilaterally decide to alter some of

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<sup>29</sup> Work. Doc. No 3, "Proposal submitted by the delegations of Australia, Spain, the United Kingdom and the United States of America at the Special Commission on General Affairs and Policy of the Conference (8–12 May 2000)".

<sup>30</sup> In addition to contact issues, these situations may also give rise to questions as to the custody of the child.

the terms on which contact was agreed / ordered, for example, by not providing details of the child's movements as had been agreed. Equally the custodial parent may place obstacles in the way of agreed contact by, for example, not allowing agreed telephone access, not passing on correspondence, etc.

- (g) There are cases where access is about to occur – e.g., the child is about to travel to spend a school holiday with the non-custodial parent, or the non-custodial parent is about to travel a long distance to visit the child – and the custodial parent at the last minute raises objections, based perhaps on fear that access terms will be breached. The non-custodial parent may in such a case need to have his / her application dealt with on an emergency basis if access is to go ahead as arranged.

In the above examples, the terms “custodial” and “non-custodial” parent are used. The cases may of course be more complicated where this distinction does not readily apply, for example, in some cases of joint custody where there may be an initial problem of determining whether the rights in question are access rights or rights of custody. For further treatment of this issue see below, section C and Chapter 9.

### C. SOME MATTERS OF TERMINOLOGY<sup>31</sup>

It should be explained that in this document the term “contact” has been used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means. It has been suggested that the use of the word “contact”, in preference to a term like “access”, reflects a child-centred approach and is more in line with modern concepts such as “parental responsibility” or “parental responsibilities”.<sup>32</sup> Occasionally, where the context requires, the term “access” is also used, and in the same broad sense.

Although in this document the distinction between contact and custody is frequently used, it should be noted that the difference between the two concepts is not always clear cut. Nor does it fit readily with those national systems, which have moved away from the concept of custody towards the concept of parental responsibility. For practical purposes, except where the context otherwise indicates, the term “custodial parent” should be read in a non-technical sense as referring to the parent with whom the child has his or her normal or habitual residence. There will, of course, be cases in which residence or custody rights are so equally shared that the distinction between custody and contact breaks down. There will also be cases where the custodial parent may himself or herself wish to exercise contact rights, as for example where the child is enjoying an extended visit to the non-custodial parent. Finally, it should be noted that existing international instruments may have specific definitions of custody and contact or access, as is the case with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.<sup>33</sup>

While this document refers generally to contact or access between parents and their children, it is recognised that other individuals, such as grandparents, may also be able to seek or hold contact or access orders.<sup>34</sup>

<sup>31</sup> See also, *infra*, Chapter 9 for further discussion of certain matters of terminology.

<sup>32</sup> See the Explanatory Report on the *Council of Europe Convention on Contact Concerning Children of 15 May 2003* at para. 6 (available at: <http://conventions.coe.int/Treaty/en/Reports/Html/192.htm>, last consulted on 21 July 2008).

<sup>33</sup> The 1980 Convention itself, in Art. 5, defines rights of custody as including not only “rights relating to the care of the person of the child”, but also “the right to determine the child’s place of residence”. There are divergences in the case law with respect to the precise definition of rights of custody in this context. See *infra*, Chapter 9.

<sup>34</sup> On this point, see further section 1.1.

## **THE GUIDE**

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# 1. THE IMPORTANCE OF CONTACT

## 1.1 *The general principle*

- **All possible steps should be taken to secure the rights of children to maintain personal relationships and have regular contact with both of their parents and of parents to maintain personal relationships and have regular contact with their children, unless it is determined that such contact is contrary to the interests of the children. This is equally applicable when the parents live in different countries.**

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

While different legal systems adopt varying approaches to the substantive issues surrounding contact,<sup>35</sup> certain fundamentals are subscribed to by almost all States. Under Article 9, paragraph 3 of the United Nations Convention on the Rights of the Child:<sup>36</sup>

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

In addition, under UNCRC Article 10, paragraph 2:

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

These exceptional cases comprise those where there is a history of physical or other abuse of the child, in addition to situations where physical abuse or other abuse of the primary carer has meant that the relationship between the contact parent and the child is too damaged. Where the implementation of a contact regime is the source of continuing conflict between the parents, the contact may also become injurious to the child. It is important also to note the caution that judges sometimes exercise in transnational cases when they balance the value of contact against the risk of non-return and find that as the consequence of a breach is that the children would be lost to the primary carer forever, even a slight risk of a breach will provide an exception to the general principle.

<sup>35</sup> See the Final Report 2002, *op. cit.*, note 10, para. 99, which points out that “these differences become more apparent and pronounced when issues of child abuse or domestic violence are involved.”

<sup>36</sup> *United Nations Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entered into force on 2 September 1990 in accordance with Art. 49. Hereinafter, the “UNCRC”. The UNCRC has 192 States Parties. See also the *International Covenant on Civil and Political Rights* of 1966 which, in Arts 23 and 24, gives protection to family and children’s rights.

The general principle applies whether expressed in terms of the rights of the child or of the parents, or of both the child and the parents.<sup>37</sup> The importance for the child of maintaining personal relationships with other persons with whom the child has close family ties is also widely recognised.<sup>38</sup>

This is not the place to develop a uniform law on the substantive issues.<sup>39</sup> Nevertheless, experience has shown that international structures designed to secure contact may be set at nought if, when a case comes to court, a restrictive approach is adopted by the deciding judge. Hence the importance of stressing fundamental principles.

## 1.2 Restrictions on contact should be proportionate

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

Limits on contact may include for example a requirement that the contact be supervised or that it take place only at certain times and in certain places. The principle expressed here is one of proportionality, reminding authorities that limits on parental contact should be justifiable in terms of the child's interests.<sup>40</sup> The concept of "necessity" when applied to restrictions on contact involves also the idea that there should be no other less restrictive methods available to protect the interests of the child. The European Court of Human Rights has recognised that unreasonable restrictions on visiting rights may lead to the increased alienation of a child from his or her parent.<sup>41</sup>

<sup>37</sup> For example, Art. 8 of the European Convention on Human Rights (hereinafter, "ECHR"), which recognises that "everyone has the right to respect for his private and family life", has been interpreted by the European Court of Human Rights as guaranteeing the right of a parent and his or her child to maintain regular contact with each other. The European Court of Human Rights has asserted on several occasions that the right of contact belongs to the parent as well as the child, and that it is a fundamental right, shared mutually between parent and child, and protected under Art. 8 of the ECHR. In its decision in the case of *Elsholz v. Germany* (Judgment of 13 July 2000, citing *inter alia Johansen v. Norway*, Judgment of 7 August 1996 and *Bronda v. Italy*, Judgment of 19 June 1998) the Court stated as follows: "The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention."

<sup>38</sup> See, e.g., the decision of the European Court of Human Rights in *Scozzari and Giunta v. Italy* (13 July 2000), in which it is recognised that ties between more relatives, such as grandparents and grandchildren, may also be protected under Art. 8 of the ECHR. See also Art. 5 of the Council of Europe Convention on Contact (*op. cit.*, note 22), which gives some protection to contact rights between "the child and persons other than his or her parents having family ties with the child." Rights of access are not confined to those existing between parents and children either under the 1980 Hague Convention or the 1996 Hague Convention. An application under Art. 21 of the 1980 Convention is not confined to a parent. Under Art. 21 of the *Inter-American Convention of 15 July 1989 on the International Return of Children*, "any person with visitation rights" may address for their enforcement the competent authorities of any State Party. However, it should be noted that in the United States the Supreme Court held in *Troxel v. Granville*, 530 U.S. 57 (2000) that the rights of parents are superior to the rights of grandparents or other non-parents; individual state laws vary widely.

<sup>39</sup> One of the objects of the Council of Europe Convention on Contact (*op. cit.*, note 22) is to establish a common approach to the principles to be applied to contact orders. Art. 1 a). The intention is that the adoption of common standards should enhance international co-operation. See the Preamble.

<sup>40</sup> See also *ibid.*, Art. 4(2).

<sup>41</sup> See for example, *Kutzner v. Germany*, Judgment of 26 February 2002.



## 2. PROMOTING AGREEMENT

### 2.1 Promoting parental agreement

- **Legal and administrative arrangements should support the exercise of contact by promoting and facilitating agreement between parents or other holders of parental responsibility**

The primary responsibility for ensuring that regular contact takes place, and for arranging such contact, rests with both parents.<sup>42</sup> The legal and administrative arrangements, whether adopted under the 1980 or 1996 Convention or otherwise, should support the exercise by parents of this responsibility by promoting and facilitating agreement between them.

The advantages of parental agreement concerning contact arrangements are that “[t]hey are more likely to be adhered to by the parties; they establish a less conflictual framework for the exercise of contact and are therefore strongly in the interests of the child; and once a certain level of co-operation between the parents is established, the painful and expensive pattern of re-applications to the court for orders for modification or enforcement is less likely to become established”.<sup>43</sup>

### 2.2 Facilitating and encouraging the achievement of agreed solutions

- **Agreed solutions should be facilitated and encouraged by mediation, conciliation, negotiation and similar means.**

The 1980 Convention recognises the need to promote agreed solutions in Article 7, paragraph 2 c), which requires Central Authorities to secure the voluntary return of the child or bring about an amicable resolution of the issues. The efforts made to secure an amicable solution in contact applications under the 1980 Convention differ widely. Typically, a requested Central Authority will as a minimum communicate with the respondent parent to determine whether agreement may be forthcoming and to point out any facilities, including mediation services, available. However, the patchwork nature of supports available to promote agreement is reflected in the findings of the Statistical Analysis of Applications made in 2003 which reports:

“The number of cases in which access was ultimately agreed has decreased from 35 applications (18%) in 1999 to 29 applications (13%) in 2003. This figure is also below the voluntary return rates [*i.e.*, in respect of applications for the return of a child under the Convention] of 19% and 18% recorded in 2003 and 1999 respectively.”<sup>44</sup>

The Report also indicates that “consent orders” were made in 4% of the cases in 2003. The Report does not indicate the number of international cases dealt with under domestic

<sup>42</sup> See Art. 5 of the UNCRC and Art. 5 b) of the *Convention on the Elimination of all Forms of Discrimination against Women*, adopted by United Nations General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981.

<sup>43</sup> Final Report 2002, *op. cit.*, note 10, para. 89.

<sup>44</sup> N. Lowe, E. Atkinson, K. Horosova, S. Patterson, “A statistical analysis of applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*”, Prel. Doc. No 3, Part I, of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available on the Hague Conference website, see *infra*, pp. 53-56), Section III, D.1.

procedures (*i.e.*, not under Article 21 of the 1980 Convention) in which consent orders or voluntary agreements were the outcome.

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

### **2.3 The role of the State in promoting and supporting parental agreement on contact**

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

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

In the international sphere this problem is illustrated when negotiations take place between parents who live in different countries which do not have full structures for legal co-operation, but which rely rather on mediating structures to try to achieve parental agreement. This is the case in particular in those countries which have entered into bilateral agreements which are consular in nature and are based on a model of mediation.<sup>45</sup> The absence of a legal framework defining the circumstances in which each country’s authorities have jurisdiction to make contact orders usually means that, if agreement between the parents is not forthcoming, little can be done. The effect of this on the negotiating process is to favour strongly the parent whose interest is in maintaining the status quo.<sup>46</sup> More will be said about the importance of effective structures for legal co-operation in the next section.

<sup>45</sup> See generally on the subject of promoting agreement between parents the Malta Declarations of 17 March 2004 (hereinafter, the “First Malta Declaration”) and 22 March 2006 (hereinafter, the “Second Malta Declaration”). The Malta Declarations are available on the Hague Conference website, see *infra*, pp. 53-56. The First Malta Declaration, at para. 3 stated:

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

The Second Malta Declaration, at para. 3 stated:

“Intensified activity in the field of international family mediation and conciliation, including the development of new services, is welcomed.

The importance is recognised of having in place procedures enabling parental agreements to be judicially approved and made enforceable in the countries concerned.

Legal processes concerning parental disputes over children should be structured so as to encourage parental agreement and to facilitate access to mediation and other means of promoting such agreement. However, this should not delay the legal process and, where efforts to achieve agreement fail, effective access to a court should be available.

International family mediation should be carried out in a manner which is sensitive to cultural differences.”

<sup>46</sup> See generally *The Judges’ Newsletter*, Vol. VIII, Autumn 2004 which features the Malta Judicial Conference on Cross-Frontier Family Law Issues involving certain Hague and non-Hague States and the explanation of the Malta Process given by W. Duncan at pp. 4-8 of that issue (available on the Hague Conference website, see *infra*, pp. 53-56).

## 2.4 Further elements in the legal framework

- 2.4.1 The legal framework that should be provided should ensure fairness in negotiations between the parents and respect the rights of the child, including the right of the child to express his / her views and to have those views taken into account in accordance with the child's age and maturity.**
- 2.4.2 Confidentiality, impartiality and independence of mediation should, as a general rule, be guaranteed, as it should for other means of alternative dispute resolution used to reach an amicable agreement.**
- 2.4.3 Training for mediators should be provided or encouraged,<sup>47</sup> with special regard to the difficulties of cross-border family disputes, including ongoing training concerning the applicable legal instruments.**
- 2.4.4 Quality of mediation should be assured, for instance, by promoting the establishment of and adherence to voluntary codes of conduct.<sup>48</sup>**
- 2.4.5 The views of the child should be taken into account in mediation in accordance with the child's age and maturity.**

A number of mediation projects or initiatives have been commenced in the context of the 1980 and 1996 Hague Conventions. The mediation schemes operating, or being considered, in the context of the 1980 Convention were subject of a study carried out by the Permanent Bureau in 2006.<sup>49</sup>

Among the schemes covered by this study are those between Germany and France<sup>50</sup> and between the United States of America and Germany<sup>51</sup> which have focussed on some particularly intractable international contact disputes as well as other applications under the 1980 Convention. The scheme initiated by Reunite<sup>52</sup> in the United Kingdom operates within the context of the 1980 Convention. One of its objectives is to promote agreement in those cases where there has been an application for the return of the child but where the underlying motive of the applicant may actually be to secure contact rights.

<sup>47</sup> This issue is also dealt with by Art. 4, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>48</sup> *Ibid.*, Art. 4(1).

<sup>49</sup> See S. Vigers, "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children, especially in the context of the Hague Convention of 1980", Prel. Doc. No 5 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006) (hereinafter, "Prel. Doc. No 5/2006 on Mediation") (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>50</sup> The Franco-German Parliamentary Mediation Commission was established in 1999 and replaced by the Franco-German Project of Bi-national Professional Mediation in 2003, which was terminated in March 2006. In 2005 the professional mediators involved in the Franco-German projects established the Association for Bi-national Family Mediation on Europe – *Médiation familiale binationale en Europe* (MFBE).

<sup>51</sup> The US-German Bilateral International Parental Abduction Working Group is currently working to establish a pilot project of bilateral mediation.

<sup>52</sup> The Reunite-International Child Abduction Centre, UK, Pilot Project, which commenced in 2003; see also < [www.reunite.org](http://www.reunite.org) >.

Programmes developed by MAMIF,<sup>53</sup> International Social Service<sup>54</sup> and others<sup>55</sup> are included in the study.<sup>56</sup>

The experiences in different mediation schemes show that confidentiality of mediation is an important condition for many parties to enter negotiation and re-establish dialogue. If the left-behind parent fears that his or her concessions in mediation might later be interpreted in court as acquiescence in connection with Article 13 a) of the 1980 Convention, he or she might refrain from mediation. Depending on the relevant State, confidentiality of mediation may be subject to statutory rules or may be guaranteed by a confidentiality agreement. It is important that confidentiality is respected in both States concerned.

To ensure confidentiality of mediation, countries may consider establishing as a principle that neither the mediators, nor parties, nor anybody else involved in the mediation process would have an obligation to disclose to a third party or to give evidence in civil judicial proceedings regarding information arising out of mediation.<sup>57</sup> This needs to be qualified where information arises indicating that a child is in danger as the mediator may be under an obligation to disclose this.

Independence and impartiality of the mediator should be guaranteed. The 1980 Convention and the 1996 Convention do not make a restriction as to the body which may facilitate mediation.<sup>58</sup> Mediation may be facilitated directly by the Central Authority or through a public authority or another body. To deal with the special problems of cross-border family disputes, involving problems with different languages and different cultures, some mediation schemes involve one mediator from the requesting State and one from the requested State. In any event, it is important that the mediator should not appear to be biased towards one of the parties or one of the concerned States.

The study on the development of mediation has shown an overall consensus that training of mediators for the specific task of mediation in cross-border family disputes is essential. The Special Commission emphasised in October / November 2006 that “professionals involved in mediation need to receive ongoing training, particularly with regard to the applicable legal instruments”.<sup>59</sup> Mediators also need to be aware of the applicable domestic law for both access establishment and access enforcement.

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<sup>53</sup> *Mission d'aide à la médiation internationale pour les familles* was established within the Ministry of Justice of France in 2001. It has since been dissolved and the mediation functions are now carried out by the French Central Authority (Bureau de l'entraide civile et commerciale internationale).

<sup>54</sup> This project, which is linked with the 1996 Convention, seeks to establish an international network of mediators.

<sup>55</sup> *E.g.*, the Argentine Central Authority, the England and Wales Judicial Alternative Dispute Resolution Scheme, the German Federal Ministry of Justice programme, and bi-national mediation schemes involving States that are not Parties to the 1980 Convention.

<sup>56</sup> Mediation initiatives not covered by the study include a proposal for an alternative dispute resolution scheme to be set up in the Family Division in England, and the adoption of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>57</sup> A similar principle is found in Art. 7 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

<sup>58</sup> See Art. 7 of the 1980 Convention “[...] In particular, either directly or through any intermediary, they shall take all appropriate measures - [...] c) [...] to bring about an amicable resolution of the issues; [...]”; see Art. 31 of the 1996 Convention, which states that mediation can be facilitated by “[t]he Central Authority of a Contracting State, either directly or through public authority or other bodies[...]”. In fact the mediation schemes in the context of the 1980 Convention differ immensely from State to State: in Argentina, for instance, the Central Authority directly engages in mediation; the French MAMIF programme was performed by a public authority, established within the Ministry of Justice in France but has recently been absorbed into the French Central Authority (Bureau de l'entraide civile et commerciale internationale); the English Reunite pilot project is performed by a non-governmental organisation; the German Federal Ministry of Justice both proposes and backs mediation in Convention cases, but the mediation itself is performed by professional mediators from non-governmental organisations.

<sup>59</sup> See “Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)”, drawn up by the Permanent Bureau, March 2007, p. 31. Hereinafter, “Report on the Fifth Meeting of the October-November 2006 Special Commission” (available on the Hague Conference website, see *infra*, pp. 53-56).

Some countries have regulated the education of mediators<sup>60</sup> and have introduced an official registry for mediators.<sup>61</sup> But in most countries use of the title “mediator” is not restricted. In the interest of credibility and quality of mediation it would be desirable to encourage and promote the introduction of certain standards in the training of family mediators.<sup>62</sup>

Certain regional initiatives are noteworthy, such as the introduction of basic standards for family mediation by the European Forum Training and Research in Family Mediation, which have already been adopted by 14 European countries<sup>63</sup> with one or more family mediation training programme(s) accredited by the European Forum.<sup>64</sup> Similarly the International Association of French speaking mediators (Association Internationale Francophone des Intervenants auprès des familles séparées – AIFI), based in Quebec, Canada, has been working to put in place specialist training in international family mediation.<sup>65</sup> The UK-based non-governmental organisation Reunite plans to devise a training module for mediators within Contracting States of the Hague Child Abduction Convention, which “would provide the infrastructure for the mediation process and the training of identified specialist family mediators, based on the findings from the [Reunite] pilot project.”<sup>66</sup> The German non-governmental Federal Association for Family Mediators (Bundes-Arbeitsgemeinschaft für Familien-Mediation – BAFM) has been offering multi-day training seminars each year since 2003, where already qualified professional mediators are familiarised with the special legal and cultural aspects of international child abduction proceedings and transfrontier conflicts over custody and contact rights.<sup>67</sup>

The child’s views should be taken into account in accordance with the child’s age and maturity. This can be achieved either by direct involvement of the child in the mediation process or indirectly.<sup>68</sup> Where a child is to be heard in mediation, mediators may require specific training in how to interact with children. The mediator should ensure that the child recognises the importance of his or her opinion, but that the issues are ultimately decided by the parents to relieve the child of the feeling of responsibility for the final decision.<sup>69</sup> Mediators should also be aware of the issue of parental alienation that can arise in high conflict divorce or abduction cases and the impact this can have on the views of the child.

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<sup>60</sup> For example, in France – since 2003 training for mediators in family law matters is regulated; see “Décret du 2 décembre 2003 portant sur la création du diplôme d’État de médiateur familial” and “Arrêté du 12 février 2004 relatif au diplôme d’État de médiateur familial”. In Austria – since 2004 training for mediators in civil law matters is regulated; see “Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator” (Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediat-AV), BGBl. II Nr. 47/2004.

<sup>61</sup> For example, in Austria, the registration of mediators in family law matters has been introduced by the Mediation Act in 2003, see “Bundesgesetz über Mediation in Zivilrechtssachen” (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl. I Nr. 29/2003.

<sup>62</sup> The study on mediation concluded that “[h]armonised training for mediators involved in international family law including in the specific context of the Hague Convention would be greatly beneficial to ensure the quality of mediators involved in this work and to ensure international acceptability of mediation projects”; see Prel. Doc. No 5/2006 on Mediation, *op. cit.*, note 49, para. 7.

<sup>63</sup> Austria, Belgium, England, France, Germany, Ireland, Israel, Italy, Malta, Poland, Portugal, Scotland, Spain and Switzerland.

<sup>64</sup> L. Parkinson, *Family Mediation in Europe – divided or united?* (updated paper given at European Masters in Mediation Seminar), Institut Universitaire Kurt Boesch, Sion, Switzerland, March 2003, at p. 5; see also Prel. Doc. No 5/2006 on Mediation, *op. cit.*, note 49, para. 7.1.

<sup>65</sup> See Prel. Doc. No 5/2006 on Mediation, *op. cit.*, note 49, para 7.2.

<sup>66</sup> *Ibid.*

<sup>67</sup> See < [www.bafm-mediation.de](http://www.bafm-mediation.de) >.

<sup>68</sup> An interesting initiative from Australia has a second mediator talking to the children and relaying their views to the parents and their mediators.

<sup>69</sup> See Prel. Doc. No 5/2006 on Mediation, *op. cit.*, note 49, para. 6.2 referring *inter alia* to a response of the German Federal Ministry of Justice.

## **2.5 Legal framework to give the contact agreement cross-border effect**

- 2.5.1 A legal framework should be provided, which gives effect to agreements on contact reached between the parents in both countries in which the parents live.**
- 2.5.2 An agreement based on mediation which is intended by the parties to be legally binding should be made enforceable in both States concerned. This also applies to agreements achieved through other means of alternative dispute resolution.**

The many advantages of mediated agreements can become irrelevant if there is no supporting legal framework. Such a legal framework would allow for various legal mechanisms to be used to ensure that these agreements are respected, such as provision for registering them with a court, converting them to consent orders, or providing for their recognition and enforceability more generally, usually once they fulfil certain conditions.

Where the 1996 Convention is applicable a contact order achieved in one Contracting State is in principle enforceable in another Contracting State by operation of law. Hence, where the States concerned are Parties to the 1996 Convention it is generally sufficient to transform a mediation agreement into a court order in one Contracting State, since the enforceability in the other Contracting State will be secured. To dispel doubts about the existence of a ground for non-recognition, advance recognition of a measure is possible.<sup>70</sup>

The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance contains special provisions regarding maintenance agreements. The purpose of these provisions is to ensure that there is an adequate legal framework in place to give effect to these agreements in all relevant Contracting States.

At the time of publication, the Hague Conference is continuing its work on cross-border mediation in family law and an important question is whether there is an adequate legal framework for agreements reached between parties.

The enforceability of the mediation agreement should be a key consideration during mediation. The parties should have access to the relevant information concerning enforceability of their agreement in the relevant States. The information may preferably be provided in the mediation process itself, but can also be made accessible by the lawyers that the parties are advised to retain in many mediation schemes.

As attitudes towards agreements can vary widely between States, Central Authorities should exchange information as needed on the procedures, if any, for enforcing agreements, such as registering an agreement with a court.

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<sup>70</sup> See 1996 Convention, Art. 24. See also *infra* section 9.3.

### 3. THE FRAMEWORK FOR INTERNATIONAL LEGAL CO-OPERATION

#### 3.1 *The basic framework*

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

- common rules which define the circumstances in which the courts (or their equivalents) in each legal system may exercise jurisdiction to make or modify binding decisions relating to custody and contact;
- mutual respect for, including the recognition and enforcement of, decisions concerning contact which are made on the common jurisdictional bases.

The need for a basic framework of agreed jurisdictional rules accompanied by rules for the recognition and enforcement of decisions concerning custody and contact has been widely recognised at the international and regional levels.<sup>71</sup> The 1980 Convention does not provide such a framework, although it is implicit in the Convention that the authorities of the State of the child's habitual residence should exercise general jurisdiction with respect to matters of custody and contact. However, the 1996 Convention sets out in detail common jurisdictional rules and provisions for recognition and enforcement which are complementary to the provisions of the 1980 Convention. The 1996 Convention framework, which is designed to replace the framework contained in the earlier Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, has also provided the inspiration for a European Community Regulation on parental responsibility.<sup>72</sup>

#### 3.2 *The Hague Convention of 1996*

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

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

<sup>71</sup> See, for example, the First Malta Declaration (*op. cit.*, note 45), paras 5 and 6, and the Second Malta Declaration (*ibid.*) which, in para. 5, states:

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

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

<sup>72</sup> The European Community rules are now embodied in European Community Council Regulation (EC) No 2201/2003, *supra*. note 23.

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

### **3.3 A common approach to jurisdiction**

#### **Common jurisdictional standards –**

- **help to avoid litigation and further conflict between the persons involved in a contact dispute;**
- **ensure that appropriate courts / authorities have the right to make decisions concerning contact when needed in the interests of the child;**
- **set limits to the circumstances in which an existing contact order may be modified;**
- **provide certainty for the parties and discourage forum shopping and abductions.**

It is important that rules relating to jurisdiction are structured in a way which avoids competing jurisdictions or a race by parents to the courts of different countries. These are principal objectives of the 1996 Convention, which gives primary jurisdiction to the courts of the country of the child's habitual residence.<sup>73</sup> Competing litigation concerning contact in two countries results in extra costs, conflicting decisions and a disincentive to agreement.

At the same time it is important to ensure that courts have jurisdiction to take emergency, provisional or interim measures concerning contact where necessary.<sup>74</sup> While the courts of the country where the child habitually resides may have the principal right to make decisions concerning contact,<sup>75</sup> the courts of the country where the child is merely present sometimes need to intervene temporarily. This may be the case for example where the child is temporarily present in a country for the purpose of visiting the non-custodial parent and where emergency measures are found to be needed to protect the child or, by contrast, where the effective exercise of contact in the country where visitation is occurring requires some minor adaptation in the conditions for contact.<sup>76</sup>

Another example is where, following an alleged abduction, the courts in the country to which the child has been taken, or in which the child has been retained, are asked to make an interim contact order in favour of the left-behind parent.<sup>77</sup> Again, where a child has been unlawfully retained following a period of visitation abroad, it is obvious that the courts / authorities of the country where retention has occurred should have jurisdiction to order the return of the child to the country of habitual residence.

Lastly, it may sometimes be necessary for the courts / authorities of a country to which the child is about to travel for the purpose of visiting the contact parent, to have jurisdiction to make a contact order which "mirrors" that made by the courts / authorities of the country

<sup>73</sup> The provisions of the 1996 Convention relating to jurisdiction and their application to contact cases are explained in greater detail in the Final Report 2002, *op. cit.*, note 10, paras 56-63.

<sup>74</sup> See 1996 Convention, Arts 11 and 12.

<sup>75</sup> See 1996 Convention, Art. 5.

<sup>76</sup> See, for example, the Council of Europe Convention on Contact, *op. cit.*, note 22, Art. 15.

<sup>77</sup> See also section 5.1.2 for further discussion of this.



where the child habitually resides.<sup>78</sup> On the other hand, a contact order should not be too easily modified by the authorities of the country in which the child is temporarily present, as when the presence occurs for the purpose of visiting the non-custodial parent. Moreover, a judge in the country where the child normally lives with the custodial parent is less likely to allow visitation abroad if he / she knows that any conditions of contact that are laid down may easily be set aside in the country where visitation is to occur.

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

Such is the concern to ensure respect for contact conditions which have been established by a judge in these circumstances that certain jurisdictional regimes require that the judge who has made the original order should retain jurisdiction either for a set period of time<sup>79</sup> or until both parents and child cease to have a connection with the originating jurisdiction.<sup>80</sup>

The 1996 Convention does not contain such a rule. Thus, in the relocation context, jurisdiction moves from the originating court to the court of the country to which the custodial parent has relocated as soon as the child establishes a habitual residence in that country. The fact that habitual residence, and hence jurisdiction, may change quickly where relocation occurs certainly does not entail that a judge in the new jurisdiction should or would quickly change the conditions of contact set by the judge who authorised relocation. This matter is further addressed in Chapter 8 which deals with relocation and contact.

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<sup>78</sup> See, e.g., *Re P (a child) (minor order)* [2000] 1 FLR 435 (England and Wales). Although mirror orders should not be necessary if a system of recognition and enforcement is in place, they can provide the custodial parent with reassurance that the terms of the contact order will be upheld and make them more likely to agree to the exercise of contact. Mirror orders are discussed further below at section 3.4.3.

<sup>79</sup> See European Community Council Regulation (EC) No 2201/2003, *supra* note 23, which, in Art. 9, preserves the jurisdiction of the child's former habitual residence for a period of three months for the purposes of modifying any decision on access made in that country prior to the move.

<sup>80</sup> In the United States of America, exclusive jurisdiction remains with the child's "home state", even though the child and custodial parent may have moved permanently to another jurisdiction, so long as one of the parties (e.g., the parent exercising contact) remains living there. See the *Uniform Child Custody Jurisdiction and Enforcement Act*, UCCJEA § 201, 9 ULA.

### 3.4 The recognition and enforcement of decisions concerning contact

#### 3.4.1 There is a need for swift recognition and enforcement

- **An essential element of international co-operation is a system which provides for the recognition and enforcement between States of decisions concerning contact, as well as custody decisions, which are made on the agreed or approved jurisdictional grounds.<sup>81</sup>**
- **The procedures for recognition and enforcement should be simple, inexpensive and swift.**

While the 1980 Convention does not, in Article 21, provide a basis for the recognition and enforcement of foreign decisions concerning contact (or custody), this gap may be filled by the detailed provisions contained in Chapter V of the 1996 Convention. Orders relating to contact made by an authority exercising jurisdiction under the Convention are entitled to be recognised by operation of law in all other Contracting States.<sup>82</sup> The grounds for refusing recognition are narrowly drawn,<sup>83</sup> and the recognising State is bound by the findings of fact on which jurisdiction was based in the State of origin.<sup>84</sup> Provision is made for advance determination of whether contact orders made in one State may or may not be recognised in another.<sup>85</sup> Enforcement of contact orders in the State addressed takes place, in accordance with the procedure provided for in the law of that State,<sup>86</sup> as if those measures had been taken by the authorities of that State and to the extent provided by its law.<sup>87</sup> The procedure by which the order is declared enforceable or registered for enforcement must be simple and rapid.<sup>88</sup>

The importance of this matter is further underlined by the existence of many other instruments providing for recognition and enforcement of contact decisions regionally, bilaterally or even unilaterally. The Nordic Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden was one of the first. There is also the Council of Europe Convention of 20 May 1980 on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (the Luxembourg Convention).<sup>89</sup> In the United States of America the UCCJEA provides for inter-state (i.e., within the United States) recognition of custody and contact orders, as well as for the recognition and enforcement of foreign orders where made in factual circumstances which are in substantial conformity with the jurisdictional standards set out in Article 2 of UCCJEA.<sup>90</sup> The European Community Council Regulation No 2201/2003<sup>91</sup> gives a privileged position to decisions concerning contact by providing for their recognition among Member States without

<sup>81</sup> This essential building block is recognised in the First Malta Declaration, *op. cit.*, note 45, para. 6: “Decisions concerning custody or contact made by a competent court or authority in one country should be respected in other countries, subject to fundamental considerations of public policy and taking into account the best interests of the child.” It is referred to again in the Second Malta Declaration (*ibid.*), at para. 5. See also Art. 14(1) of the Council of Europe Convention on Contact, *op. cit.*, note 22.

<sup>82</sup> See 1996 Convention, Art. 23(1).

<sup>83</sup> See 1996 Convention, Art. 23(2).

<sup>84</sup> See 1996 Convention, Art. 25.

<sup>85</sup> See 1996 Convention, Art. 24.

<sup>86</sup> See 1996 Convention, Art. 26(1).

<sup>87</sup> See 1996 Convention, Art. 28.

<sup>88</sup> See 1996 Convention, Art. 26(2).

<sup>89</sup> Luxembourg, 20 May 1980.

<sup>90</sup> UCCJEA, §105(b), 9 U.L.A. at 662. Also, in Canada the Custody Jurisdiction and Enforcement Act enables courts to recognize and enforce extra-provincial custody and access orders, in all but one case, without any need for reciprocity.

<sup>91</sup> See *supra* note 23.

any special procedure being required,<sup>92</sup> without the need for a declaration of enforceability and without any possibility of opposing recognition provided there has been appropriate certification by the judge in the State of origin.<sup>93</sup>

The absence of any provision on the recognition of decisions concerning contact has obvious disadvantages for parents and children. It may lead to re-litigation of contact issues with consequent delays and costs. It operates as a disincentive to a judge who is considering whether to allow the relocation of a child together with the primary carer,<sup>94</sup> or indeed to allow visitation abroad with a non-custodial parent.

#### **3.4.2 Advance recognition can provide a guarantee that contact orders will be complied with.**

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

The need for the possibility of obtaining advance recognition arises especially in cases where the child has not yet entered the requested State but will do so in the near future. This can be the case either where the child is to travel for a limited period of visitation to another country or where a child is to be relocated abroad.

A system of advance recognition can provide the guarantee that contact conditions which are set by the court exercising primary jurisdiction will be enforceable from the moment the child arrives in another country for the purposes of visitation or relocation.

Where the 1996 Convention is applicable, a contact order will generally be recognised by operation of law in all other Contracting States. The grounds on which a refusal of recognition may be based are limited and exhaustively enumerated in Article 23, paragraph 2 of the 1996 Convention.<sup>95</sup>

Nonetheless, advance recognition can be requested under Article 24 of the 1996 Convention. This option may and should be used to dispel doubts about the existence of a ground for non-recognition.

In the interest of preventing a situation where child abduction may occur, courts that have to decide upon matters of relocation of a child abroad or upon a temporary travel abroad should always consider whether the relevant contact orders are recognisable and enforceable in that country. The parent applying for relocation or permission to travel can be requested to take the appropriate measures to secure recognition.

An alternative to advance recognition is the obtaining of a “mirror” order.

<sup>92</sup> See European Community Council Regulation (EC) No 2201/2003, *supra* note 23, Art. 21, para. 1.

<sup>93</sup> *Ibid.*, Art. 41.

<sup>94</sup> See *infra*, Chapter 8.

<sup>95</sup> See P. Lagarde, “Explanatory Report on the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children”, *Proceedings of the Eighteenth Session, Tome II, Protection of children*, The Hague, SDU, 1998, at p. 585. Available on the Hague Conference website, see *infra*, pp. 53-56.

### 3.4.3 The obtaining of a mirror order can also be used to ensure the recognition and enforceability of contact arrangements.

In cases where there are doubts about the recognition and enforceability of the contact order abroad and where advance recognition is not possible, security and the same result can be achieved through a “mirror” order made in the country to which the child is to travel.<sup>96</sup> Such a mirror order can increase the likelihood that the custodial parent will be prepared to allow contact abroad and that enforcement measures that would otherwise be necessary can be dispensed with.

It may be appropriate for the court to stipulate as a condition that an order be obtained in that other country which “mirrors” the terms and conditions of the original order.<sup>97</sup>

In such cases, direct judicial communication between the courts of the country in which the child has his or her habitual residence and the courts of the country in which contact is to take place and be very helpful and therefore appears useful.<sup>98</sup>

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<sup>96</sup> See *infra*, Chapter 8.

<sup>97</sup> For an example of the use of a mirror order in guaranteeing that the “custodial” parent will respect the access rights granted to the “non-custodial” parent, see *Gumbrell v. Jones* [2001] NZFLR 593 (New Zealand Family Court (Papakura), 2001) [INCADAT cite: HC/E/NZ 446]. In that case, the English High Court granted the mother a residence order in respect of two children, with leave to remove the children from the UK permanently to New Zealand, subject to a number of undertakings designed mainly to ensure respect for the father’s access rights. The mother also undertook to obtain orders in New Zealand which would mirror the orders of the English court. The mother did not obtain the mirror orders in New Zealand, but, on the application of the father, the New Zealand court made an access order in terms which gave effect to the English order.

<sup>98</sup> For more information on judicial communications, see P. Lortie, “Report on Judicial Communications in Relation to International Child Protection”, Prel. Doc. No 8 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006) (available on the Hague Conference website, see *infra*, pp. 53-56).

## 4. INTER-STATE ADMINISTRATIVE CO-OPERATION

### 4.1 *The need for permanent structures for international co-operation*

- **A permanent structure for inter-State co-operation at the administrative level is needed to give effective protection to contact rights across borders.**

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

States cannot by unilateral action alone effectively protect contact rights internationally.<sup>99</sup> Co-operative structures are needed to enable applications to be processed and, if these are to form the basis of a rule of law between the countries concerned, providing predictability and stability for families and children, they need to be established on a permanent basis, and within an agreed international framework.

### 4.2 *The Central Authority model*

- **The administrative authorities which act as a focal point for cross-border co-operation need to have the legal capacity and mandate to enable them to carry out their functions effectively.**

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

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

By contrast, the absence of a coherent system of administrative co-operation has been identified as a serious deficiency in States which are not Parties to the Hague Conventions or to other instruments which provide similar structures.<sup>100</sup>

<sup>99</sup> This is not to say that unilateral measures are of no value and States can ensure that they have legislation that provides recognition and enforcement of contact rights in their jurisdiction. For example, both Canada and the United States have done this through their domestic child custody enforcement legislation, the Custody Jurisdiction and Enforcement Act and the UCCJEA, respectively.

<sup>100</sup> Both of the Malta Declarations (see *supra*, note 45) draw attention to this. The First Declaration, in para. 2, states as follows: “Efficient and properly resourced authorities (Central Authorities) should be established in each State to co-operate amongst one another in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. Such co-operation should include at least:

- assistance in locating a child;
- exchange of information relevant to the protection of the child;
- assistance to foreign applicants in obtaining access to local services (including legal services) concerned with child protection.”

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

No more needs to be said here about the establishment of a Central Authority because this matter is fully covered in Part I of the Guide to Good Practice under the 1980 Convention – Central Authority Practice.<sup>101</sup> However, it is important to restate here some of the specific functions which Central Authorities perform in the context of transfrontier contact disputes.

### **4.3 Specific functions of Central Authorities in the context of transfrontier contact under the 1980 and 1996 Conventions**

- 4.3.1 In the context of transfrontier contact the Central Authority should, as far as possible, act as a focal point for the exchange of information between States about the laws and procedures applicable and the services available in the context of specific cases.**<sup>102</sup>
- 4.3.2 The Central Authority should also act as the centre for channelling information about the progress of specific cases.**<sup>103</sup>
- 4.3.3 The Central Authority should be the central point of access for the provision of certain services to help give effect to contact rights by taking appropriate measures –**
- **to assist in locating a child;**<sup>104</sup>
  - **to prevent further harm to a child through provisional measures;**<sup>105</sup>
  - **to bring about an amicable resolution of issues;**<sup>106</sup>
  - **to exchange information about the background of the child;**<sup>107</sup>
  - **to eliminate obstacles to the functioning of the Convention.**<sup>108</sup>

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

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

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

See also the Conclusions and Recommendations of the Judicial Seminar on the role of the Hague Child Protection Conventions in the practical implementation of the UNCRC and the African Charter on the Rights and Welfare of the Child, which took place in The Hague from 3–6 September 2006 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>101</sup> Guide to Good Practice – Part I, *op. cit.*, note 15, Chapter 2.

<sup>102</sup> See 1980 Convention, Art. 7 *e*) and 1996 Convention, Art. 30(2).

<sup>103</sup> See 1980 Convention, Art. 7 *i*).

<sup>104</sup> See 1980 Convention, Art. 7 *a*) and 1996 Convention, Art. 31 *e*).

<sup>105</sup> See 1980 Convention, Art. 7 *b*).

<sup>106</sup> See 1980 Convention, Art. 7 *c*) and 1996 Convention, Art. 31 *b*).

- 4.3.4 The Central Authority should respond to requests from other Central Authorities or competent authorities for assistance in implementing access rights or decisions in respect of access rights.<sup>109</sup>**
- 4.3.5 The Central Authority may also be requested to provide a report in respect of a child who is the subject of a contact dispute.<sup>110</sup>**
- 4.3.6 The Central Authority should act as the focal point for removing obstacles to the exercise of contact rights.<sup>111</sup>**
- 4.3.7 The Central Authority should also be the focal point for assisting in the implementation of decisions concerning contact rights.<sup>112</sup>**

It is recognised that certain Central Authorities lack sufficient authority to take some of these measures, such as seeking provisional measures or provide services to bring about an amicable resolution. In these instances, it should be prepared to offer assistance to the applicant, for example, in obtaining private legal counsel or mediation services.

The long list of functions that a Central Authority may perform in supporting contact rights is drawn from the 1980 and the 1996 Conventions which overlap in some respects and supplement each other in other respects. It might appear from the broad scope of services set out here that foreign applicants are well served particularly under the 1980 Convention. However, the reality is different and the situation as described in the Final Report 2002 remains broadly accurate:

“20. As the Pérez-Vera Report points out, the precise ways in which the Central Authorities are required to co-operate under Article 21 (with the exception of removing obstacles as far as possible), in securing the exercise of access rights is “left up to the co-operation among the Central Authorities”, and the specific measures which Central Authorities are able to take “will depend on the circumstances of each case and on the capacity to act enjoyed by each Central Authority”.<sup>113</sup> The requirements of co-operation are thus very broadly defined leaving much to the discretion of Central Authorities, whose powers are often limited under their national laws. The responses to the Questionnaire confirm that this is an area in which practices vary widely. The issue of resources also arises for many Central Authorities. Although access / contact cases may be smaller in number than abduction cases the Central Authority resources required to deal with them can be much greater, bearing in mind also that in the absence of agreement between parents the dispute may be long running.

21. With respect to the provision of other supports, the picture again is a varied one. Most Central Authorities will provide general information to the applicant, though this clearly varies in the amount of detail provided. For example, Manitoba, Canada, offers a free public information booklet describing all aspects of family law services available.<sup>114</sup> Many Central Authorities use

<sup>107</sup> See 1980 Convention, Art. 7 d) and 1996 Convention, Art. 34(1).

<sup>108</sup> See 1980 Convention, Art. 7 i).

<sup>109</sup> See 1996 Convention, Art. 35(1). See also Art. 32.

<sup>110</sup> Under the 1996 Convention, the Central Authority of a State in which the child has his / her habitual residence may, on a request with supporting reasons, provide a report on the situation of the child.

<sup>111</sup> See 1980 Convention, Art. 21. And see *infra*, section 5.4.1.

<sup>112</sup> See 1996 Convention, Art. 35(1).

<sup>113</sup> See E. Pérez-Vera, *op. cit.*, note 3, para. 127.

<sup>114</sup> *Family Law in Manitoba* (2002). This public information booklet has recently been updated: *Family Law in Manitoba* (2008).

websites to provide relevant information.<sup>115</sup> With regard to practical facilities to assist in organising access, some countries offer support from social or youth / child welfare services, *e.g.*, where supervision of access is required or measures are needed to accustom a child to contact after a long period of separation. Some Central Authorities will contact the International Social Services for assistance. In the United States, in some states, there exist supervised visitation centres for cases involving domestic violence. The extent to which Central Authorities will themselves become involved in arranging or funding supporting services, is limited. An exceptional example is Australia<sup>116</sup> where the Central Authority has in certain difficult cases arranged and funded supervised access, arranged and funded telephone access and acted as a post box for letters where the child's address cannot be disclosed. This is by no means a comprehensive picture, but it does illustrate the patchwork nature of the information and services made available to foreign applicants.”

Given the flexibility in the 1980 Convention, the varying interpretations particularly of Article 21, and the varied range of services actually provided by different Central Authorities in contact cases,<sup>117</sup> it is not easy to prescribe good practice other than by drawing attention to the more active approach to the provision of services by certain Central Authorities. The following general principle suggests a proactive role on the part of Central Authorities.

#### **4.4 Proactive approach towards the provision of Central Authority services**

**4.4.1 It is the role of the Central Authority to assist in removing barriers to contact through provision of information and advice, by helping to promote effective access to local procedures, as well as by providing specific services.**

**4.4.2 All Central Authorities should, as far as possible, adopt a progressive approach to their responsibilities in this area.**

**4.4.3 Contracting States should consider in the allocation of resources to Central Authorities the positive obligation which they have to provide a framework which supports rights of contact.**

Applicants seeking to uphold contact rights abroad face formidable barriers arising from their unfamiliarity with the legal system and culture concerned as well as from language differences. More specific barriers sometimes exist. For example, a contact parent may experience difficulties with regard to visa requirements in the country in which contact is to be exercised, or there may be criminal proceedings pending against a parent in the country

<sup>115</sup> The website of the Hague Conference provides links to the websites of the majority of Central Authorities designated under the 1980 Convention, available at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” and “Links to related websites”.

<sup>116</sup> The sources consulted on the Australian approach to Art. 21 include J. Degeling, “Access Provisions and the Hague Convention. An Australian Viewpoint”, a paper presented at a Conference on International Child Abduction in Edinburgh (Scotland), 18 June 2002, organised by the Law Society of Scotland and the Scottish Executive; M. Green, “Hague Convention Access Applications Regarding Children Resident in Australia”, a paper prepared for the 1999 Biennial Conference for State and Commonwealth Central Authorities, 27-28 October 1999; and by the same author, “The Role of Australian Central Authorities in Hague Access Applications. An Update”, 2001 Biennial Conference for State and Commonwealth Central Authorities, 6–7 December 2001.

<sup>117</sup> For example, in England and Wales contact is a matter for their domestic legislation, the Children Act 1989, and is not Convention territory, so some of the roles ascribed to Central Authorities here instead fall within the family justice system and the scope of the domestic child protection and advocacy agency CAF/CASS.



where contact is to be exercised.<sup>118</sup> These problems are not uncommon in a post-abduction situation. Where the return of a child has been ordered under the 1980 Convention the abducting parent (who in the majority of the cases is a primary carer) will often need to gain access to the courts in the country to which the child is returned to have the long-term issues of custody, contact (and perhaps relocation) determined. That parent will also wish, if not retaining custody, to have contact with the child.

Central Authorities may, and some do, provide assistance to contact parents in circumstances of this sort, by for example helping the parent to make application for any necessary visa, or by helping to ensure that pending civil proceedings do not frustrate the exercise of contact. They can also provide referrals to or information about appropriate community or State resources that could assist parents.

#### **4.5 Appropriate measures to initiate or facilitate the institution of proceedings**

##### **4.5.1 The Central Authority has the responsibility under the 1980 Convention to take all appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings either directly or through any intermediary.**

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

The obligation is repeated, but with more discretionary language, in Article 21 which uses the words “... may initiate ...”. In practice, this is another area in which Central Authorities differ widely in the actions that they are prepared to take. More will be said in Chapter 5 about the general principle of effective access to a judicial or administrative body for a determination concerning access rights. At this point, it is only the role of the Central Authority in instituting or facilitating the institution of proceedings which is in issue.

Some Contracting States to the 1980 Convention have vested their Central Authorities with the power to institute contact proceedings on behalf of a foreign applicant (e.g., Australia, the Netherlands and New Zealand). Others only help to make arrangements for the provision of legal representation (e.g., England and Wales,<sup>119</sup> the United States of America, most Canadian provinces and Israel). The powers of some other Central Authorities fall somewhere in between (e.g., Germany<sup>120</sup>).

<sup>118</sup> Problems can sometimes arise where criminal proceedings are instituted against a parent who abducted his or her child to another country. From the responses to the 2006 Questionnaire, it was noted that criminal proceedings are commonly, but not necessarily viewed as having a negative effect even if they are deterrent, see Report on the Fifth Meeting of the October-November 2006 Special Commission, *op. cit.*, note 59, p 56. Criminal proceedings pending in the child’s country of pre-abduction residence may – in the worst case – make the court dismiss the application for return of the child. That is more likely where the child was abducted by the primary carer and the return order would result in the separation of primary carer and child because the parent would be forced to make the choice between not returning with the child or upon return being placed in jail and this separation – due to the age of the child or other circumstances – would constitute a grave risk of physical or psychological harm in the sense of Art. 13 b) of the 1980 Convention. This problem has sometimes been resolved by suspending (the enforcement of) the return order until the charges against the abducting parent are withdrawn. In fact criminal mechanisms may be necessary in some States in order to obtain the assistance of police authorities in locating the child; and once in place it may be beyond the power of the parent or the Central Authority to obtain withdrawal of the charges.

<sup>119</sup> See in particular *Re T and others (Minors) (Hague Convention: Access)* [1993] 2 FLR 617 [INCADAT cite: HC/E/UKe 111].

<sup>120</sup> Where the Central Authority, upon obtaining signed authorization from the foreign applicant and if he or she is entitled to legal aid, can draft the application and file it together with an application for legal aid and the application to appoint an attorney for the applicant under the legal aid scheme.

It has been suggested that it would be good practice for all Central Authorities, where appropriate, either themselves or through an authorised intermediary to be responsible for instituting proceedings.<sup>121</sup> However, while this may be of great assistance to foreign applicants, it may be unwise to insist that all States should adopt the same model for ensuring effective access to justice. The same may be said of procedures for securing the return of a child following abduction or unlawful retention, where some States have given Central Authorities the responsibility to act on behalf of applicants<sup>122</sup> and others have preferred other methods, including in some cases the provision of free legal assistance,<sup>123</sup> to provide the assistance that foreign applicants need.

#### **4.6 Scope of contact cases in which Central Authorities should offer services**

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

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

Some courts have taken the view that Article 21 of the 1980 Convention applies only to established contact rights and that it does not apply where a court is asked for the first time to determine contact rights. This limited view of the scope of Article 21 is not acceptable in the light of the overriding objective of giving effect to the child's right to maintain contact with both parents. The duty to respect the right of the child arises whether or not a court has already made a contact order.<sup>124</sup> In a similar vein, in some countries the view has been taken that Article 21 does not cover interim contact applications made pending a decision on return. Again this is inconsistent with the underlying principle that contact should be maintained in all circumstances where the child is not at risk. Moreover, a failure to restore contact to a left-behind parent during the course of what may sometimes be protracted return proceedings carries the risk of further harm to the child and alienation from the left-behind parent.

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

<sup>121</sup> See N. Lowe and K. Horosova, *op. cit.*, note 25, para. 3.5.

<sup>122</sup> For example, the Netherlands and Australia.

<sup>123</sup> For example, the United Kingdom and Ireland.

<sup>124</sup> Under the European Convention on Human Rights, the right to family life protected in Art. 8 encompasses a right to contact, including where there is no court order. See *supra* note 37.

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

#### **4.7 Detailed information concerning services provided**

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

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

The Special Commission meeting of November 2006 recognised the value of having information concerning national laws and procedures readily accessible for all States and recommended the development of country profiles for this purpose.<sup>125</sup> At the time of publication, work is proceeding on the development of such a country profile.

#### **4.8 Expeditious, responsive and transparent procedure**

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

<sup>125</sup> See the “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006)”, adopted by the Special Commission, November 2006, para. 1.1.11 (available on the Hague Conference website, see *infra*, pp. 53-56).

The Guide to Good Practice, Part I – Central Authority Practice, describes in some detail the procedures to be followed in relation to applications under Article 21. For convenience this is set out in the Appendix.<sup>126</sup>

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<sup>126</sup> In relation to speed, it should be noted that there is a difference between the speed with which a return application and a contact application can be resolved and the same time limits do not necessarily apply. See section 5.2 for further discussion of this issue.

## 5. THE PROCESSING OF INTERNATIONAL APPLICATIONS CONCERNING CONTACT BY COURTS OR OTHER AUTHORITIES

There have been widely differing interpretations of the obligations which arise from Article 21 of the 1980 Convention in respect of the processing of applications concerning the exercise of transfrontier contact rights. These differences have been described in the Final Report 2002.<sup>127</sup> At one end of the spectrum are Contracting States which regard Article 21 as laying down nothing more than an obligation on Central Authorities to provide some minimal assistance in accessing the legal system by, for example, helping the applicant to find a lawyer.<sup>128</sup> Typically in such systems Article 21 is not viewed as establishing a distinct form of proceeding or as giving rise to any special procedural requirements or to any special privileges with regard to legal aid. Instead the applicant has available the normal procedures which are available in purely domestic cases<sup>129</sup> and may or may not be entitled to some form of legal aid.<sup>130</sup> At the other end of the spectrum are States which regard Article 21 as creating a much stronger obligation to provide the applicant in a transfrontier case with assistance in accessing the legal system. In some of those States the Central Authority may be responsible for initiating proceedings on behalf of the applicant,<sup>131</sup> the procedure may also in some respects differ from that applying to domestic cases, and sometimes special provision is made with regard to legal aid. In the middle of the spectrum are jurisdictions such as Scotland where Article 21 is regarded as providing an expedited procedure but only in cases of urgency.<sup>132</sup>

Ensuring that the processing of international applications concerning contact can be speedily and effectively carried out can also provide an incentive to parents to utilise these procedures rather than undertake any unilateral action or initiate a return application under the 1980 Convention when their goal is in fact to ensure the maintenance of contact with the child.

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

### 5.1 Effective access to procedures

#### 5.1.1 Persons seeking to establish or to exercise transfrontier contact rights should have effective access to the procedures which exist for that purpose.

<sup>127</sup> *Op. cit.*, note 10, especially paras 22-31.

<sup>128</sup> *E.g.*, England and Wales, *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam. 216 [INCADAT cite: HC/E/UKe 110]. However, this narrow approach may be revisited in a future case, per L.J. Thorpe in *Hunter v. Morrow* [2005] 2 FLR 1119 [INCADAT cite: HC/E/UKe 809]. This view was also supported by Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 All ER 783 [INCADAT cite: HC/E/UKe 880].

<sup>129</sup> *E.g.*, the United States of America, where the approach has led Federal Courts to disclaim jurisdiction. See *Bromley v. Bromley* 30 F.Supp. 2d 857 (E.D. Pa. 1998) [INCADAT cite: HC/E/USf 223]. *Teijeiro Fernandez v. Yeager* 121 F.Supp 2d 1118 (W.D. Mich. 2000).

<sup>130</sup> It must be noted that this is the main difficulty with this approach. While it is generally possible for an applicant to utilise the domestic procedures, the lack of public funding or availability of a specialist panel lawyer can have harsh consequences for a foreign applicant for contact when contrasted with an applicant for a return order.

<sup>131</sup> *E.g.*, Australia, New Zealand.

<sup>132</sup> See *Donofrio v. Burrell* 2000 SLT 1051, 2000 SCLR 465, 1999 Fam. LR. 141 [INCADAT cite: HC/E/Uks 349]. See also Final Report 2002, *op. cit.*, note 10, para. 27.

### **5.1.2 In the case of an applicant from abroad, effective access to procedures implies –**

- **the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;**
- **the provision of appropriate assistance in instituting proceedings;**
- **that lack of adequate means should not be a barrier;**
- **that there is an opportunity to raise issues of contact at all relevant times.**

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

In those States which make provision for free legal aid and advice in domestic contact cases,<sup>133</sup> discrimination against foreign applicants should be avoided. Indeed, the special difficulties confronted by overseas applicants should be taken into account in the administration of such schemes and Central Authorities should assist applicants in accessing such schemes. For States which do not provide free legal aid and advice, other mechanisms for making procedures accessible should be made available, e.g., through the adoption of schemes of pro bono representation,<sup>134</sup> through the active involvement of the Central Authority in the proceedings,<sup>135</sup> or by providing simplified procedures.

In a situation where a parent is pursuing a return application following an abduction, it is important that he or she should be able to obtain interim contact orders. It is interesting to note that section 38, paragraph 2 of the German International Family Law Procedure Act<sup>136</sup> stipulates that in return proceedings under the 1980 Convention the court shall at every stage of the proceedings examine whether the right of personal access to the child can be ensured.

The exercise of contact between the left behind parent and the child, which in abduction cases often only occurs after a lengthy interruption in contact, can have de-escalating effects on the proceedings and can help to promote an amicable settlement between the parties, provided this contact is established with care.

## **5.2 Speed**

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

<sup>133</sup> See Final Report 2002, *op. cit.*, note 10, para. 35, where it is also pointed out that, unlike the situation with applicants for the return of a child, countries providing free legal aid generally apply a means test to applicants in contact cases.

<sup>134</sup> See, e.g., practices in the United States of America. However, identifying private attorneys willing to assist can be difficult and time consuming, especially in cases which involve modification of contact conditions. *Ibid.*, at para. 36.

<sup>135</sup> See *supra* section 4.5.

<sup>136</sup> *Internationales Familienrechtsverfahrensgesetz – IntFamRVG.*

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

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

The adverse consequence for a child of undue delay by State authorities in processing contact applications are potentially so serious that in some systems they may constitute a violation of the fundamental rights of the individuals concerned and of the family. The Final Report 2002<sup>137</sup> referred to the developing jurisprudence of the European Court of Human Rights:

“It is relevant to note that the European Court of Human Rights has taken the view that custody cases generally should be dealt with speedily.<sup>138</sup> Some delays can be tolerated provided that the overall duration of proceedings cannot be deemed excessive.<sup>139</sup> Article 6, paragraph 1 of the European Convention on Human Rights, which entitles everyone ‘in the determination of his civil rights’, to a hearing ‘within a reasonable time’ by a tribunal established by law, has been used as a basis for condemning delays in national access procedures. Whether the length of the procedures is reasonable is considered in the light of a number of criteria, in particular, the complexity of the case, the conduct of the applicant and that of the relevant authorities. Interestingly, the court has expressed the view that the requirements of Article 6, paragraph 1 of the European Convention apply to the totality of the proceedings including the enforcement stage, and that the responsibility for ensuring compliance with the requirements of Article 6, paragraph 1, rest ultimately with the courts.<sup>140</sup>”

Further decisions have reinforced this jurisprudence by making it clear that certain stereotypical delaying tactics on the part of the authorities, including for example excessive demands for information, are not acceptable, and that even lack of co-operation by the custodial parent does not dispense with the responsibility on the authorities to take all measures capable of restoring family ties.<sup>141</sup>

Although the requirement of Article 11 of the 1980 Convention that authorities shall act “expeditiously” only applies to proceedings for the return of a child, the Article 2 requirement of the 1980 Convention to “use the most expeditious procedures available” also applies to ensuring that rights of access under the law of one Contracting State are effectively respected in other Contracting States. There remains, however, some doubt as to the effects of this provision, particularly in those States which do not regard Article 21 as establishing a separate procedure and in which applications concerning transfrontier contact are processed through the normal domestic procedures. It has been suggested that expeditiously in the

<sup>137</sup> *Op. cit.*, note 10, at para. 106.

<sup>138</sup> See *Hokkanen v. Finland*, Judgment of 23 September 1994, Series A No 299-A.

<sup>139</sup> See *Pretto and Others v. Italy*, Judgment of 8 December 1983, Series A No 71.

<sup>140</sup> See *Nuutinen v. Finland*, Judgment of 27 June 2000.

<sup>141</sup> *Reigado Ramos v. Portugal*, 22 November 2005, Applic. No 73229/01.

context of access applications should mean a period of between three and six months.<sup>142</sup>

Statistical surveys of applications under the 1980 Convention<sup>143</sup> make it clear that access applications take considerably longer to resolve than return applications. In 2003, 18% of return applications that went to court were decided in less than 6 weeks, whereas for access applications the proportion was just 4%. The majority of applications for access under the 1980 Convention took more than 6 months to be resolved.<sup>144</sup> It should be added that in some States appeals are a particular occasion for delay.

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

Nevertheless, as a matter of principle, there may be good reasons for treating an international case even more expeditiously in particular circumstances.<sup>145</sup> Because of the additional distances and costs that may be involved in exercising contact across frontiers, the absence of speedy recourse to a tribunal may sometimes result in serious injustice and cost to the contact parent. An example is a case where a parent, on the basis of an existing contact arrangement or decision, travels a considerable distance from one country to another to visit his young child and, on arrival, is told by the custodial parent that the child for some reason is not available. It may be some months or even a year before another visit can take place so that the situation is one of considerable urgency. Hence, the general requirement of speed, which applies in all cases (domestic and international) where a parent-child relationship is disrupted, needs to be augmented by the special principle set out above in paragraph 5.2.3.

### **5.3 Concentration of jurisdiction**

- **Consideration should be given to the advantages of concentrating jurisdiction in cross-frontier contact cases, or certain categories of such cases, among a limited number of courts or judges. In countries where jurisdiction has already been concentrated in this way for return proceedings under the 1980 Convention, consideration should be given to using the same system in transfrontier contact cases.**
- **Where it is not possible or it is inappropriate to concentrate jurisdiction, other measures should be considered to ensure that judges with the necessary specialism hear international contact cases.**

<sup>142</sup> See N. Lowe and K. Horosova, *op. cit.*, note 25, para 5.4.1.

<sup>143</sup> N. Lowe, E. Atkinson, K. Horosova, S. Patterson, *op. cit.*, note 44.

<sup>144</sup> 66% of those cases which were judicially resolved, and 71% of those cases where a voluntary settlement outside court was reached.

<sup>145</sup> This is not intended to suggest that international contact cases should always be accorded priority over domestic contact cases, but rather that there are sometimes special cases where contact rights might be seriously undermined.



The advantages of concentrating jurisdiction in abduction cases have been well canvassed,<sup>146</sup> and in several jurisdictions such concentration has occurred.<sup>147</sup> The result is that judicial expertise and experience develops and sometimes also a parallel concentration of expertise develops among legal practitioners. Specialisation leads to increased expertise and therefore a better application of the Conventions, and results for children. However, it is recognised that contact cases are not unique in the same way as “return” cases. The general principles applied are not, as in return cases, *sui generis* but are the general principles which will be familiar to judges dealing with domestic custody and contact issues. Contact issues are more likely to be linked to other family law issues such as custody or maintenance which it may be necessary to determine together. Also where ongoing co-operation between the court and child welfare or child protection authorities is needed, concentration of jurisdiction in the courts may require parallel adjustments in the organisation of such court-related services.<sup>148</sup>

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

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

#### 5.4 Case management

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

The above general principle is one first endorsed at the Common Law Judicial Conference on International Parental Child Abduction held in Washington, DC<sup>149</sup> in respect of “return” cases. The need for firm case management of international family cases generally has been re-iterated at several international judicial conferences.

<sup>146</sup> See Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *op. cit.*, note 8, at para. 3.1.

<sup>147</sup> Details are given in the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing, 2003 (available on the Hague Conference website, see *infra*, pp. 53-56), at pp. 29-30. Recent movements in this direction include, Law No 369/2004 regarding the implementation of the Convention on the Civil Aspects of International Child Abduction in Romania which provides that all legal disputes generated by the application of the Hague Convention are concentrated in only one court: the Tribunal of Bucharest and appeals against the rulings of the Bucharest Tribunal are judged by the Bucharest Court of Appeal. In Austria in 2005 the competence for cases concerning the return of a child is concentrated in the district courts in the city of the court of appeal, although this specifically does not include application for access. Since July 2006 in Sweden, the Stockholm City Court is the only authorized court to hear return applications and only family judges can hear cases regarding child abduction. In Switzerland, Art. 7 of the Federal Law on the international abduction of children and the Hague Conventions on the protection of children and adults, passed in 2007, provides that competence to hear applications for the return of abducted children is placed solely on the superior court of the canton where the child is residing when the application is made.

<sup>148</sup> The problem of specialised courts dealing with authorities who are not similarly specialised has been noted in Germany and in one German state the Youth Welfare Office has appointed a social worker who keeps up to date on these international issues and informs other Youth Welfare Office colleagues and, where territorial competence allows, takes over international cases from other case workers.

<sup>149</sup> Washington, DC, 17–21 September 2000.

## 6. ORDERS RELATING TO CONTACT

### 6.1 Safeguards and guarantees

- **Courts should have at their disposal a broad range of measures which help to safeguard and guarantee stipulated contact arrangements.<sup>150</sup>**

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

### 6.2 Unlawful retention

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

Good practices surrounding applications for return orders under the 1980 Convention are set out in earlier parts of the Guide to Good Practice.<sup>151</sup>

### 6.3 Examples of guarantees and safeguards

- **Examples of other guarantees and safeguards to ensure respect for the terms and conditions of contact are –**
  - **the surrender of passport or travel documents,**
  - **requiring that the requesting parent report regularly to the police or some other authority during a period of contact,**
  - **the deposit of a monetary bond or surety,**
  - **supervision of contact by a professional or a family member,**
  - **various other restrictions attached to contact, e.g., forbidding overnight visits or extended visits, restricting the locations where visitation may occur, etc.,**

<sup>150</sup> See First Malta Declaration, *supra* note 45, at para. 4.

<sup>151</sup> See Part I – Central Authority Practice, and Part II – Implementing Measures (available on the Hague Conference website, see *infra*, pp. 53-56).

- **requiring that the requesting parent provide the custodial parent with a detailed itinerary and contact details, etc.,**
- **requesting that foreign consulates / embassies should not issue new passports / travel documents for the child,**
- **requiring the swearing of a religious oath,**
- **requiring that a mirror order should be made in the country where contact is to be exercised.**

One of the objectives of the Council of Europe Convention on Contact<sup>152</sup> is to establish appropriate safeguards and guarantees for both national and international cases to ensure the proper exercise of contact and to ensure the return of the child at the end of a period of contact.<sup>153</sup> A non-exhaustive list of safeguards and guarantees is set out in Article 10, paragraph 2, and States are obliged to provide under their laws for at least three categories of safeguards and guarantees. The safeguards to ensure that a contact order is carried into effect include supervised contact, the obligation of a person (either the parent seeking contact or the person with whom the child lives, or both) to provide for travelling and accommodation expenses for the child, the deposit of a security to ensure that contact is not frustrated, or the imposition of a fine.<sup>154</sup> Safeguards to ensure that the child is not improperly removed or retained when contact occurs include the surrender of passports or identity documents, the provision of financial guarantees, and charges on property.<sup>155</sup> Other safeguards or guarantees mentioned are undertakings (*i.e.*, specific promises or assurances given to a court by a litigant), a requirement that the person having contact report regularly to a competent body, the issuing of a certificate in the country in which contact is to take place recognising in advance the custody or residence order in favour of the parent with whom the child usually lives, an advance declaration of enforceability of the contact order in that State, and restrictions as to the place where contact is to be exercised.

#### **6.4 Taking account of traditions of the parties**

- **The guarantees and safeguards at the disposal of the court should include ones which are appropriate and may be particularly effective within the cultural, religious and legal traditions of the parties.**<sup>156</sup>

#### **6.5 Proportionality**

- **Where safeguards or guarantees are applied which place limits or restraints on the exercise of contact, these should be proportionate to the risks of abuse and no more than are necessary to achieve the protection of the child.**<sup>157</sup>

<sup>152</sup> Discussed above at note 39.

<sup>153</sup> Art. 1 *b*).

<sup>154</sup> Art. 10(2) *a*).

<sup>155</sup> Art. 10(2) *b*).

<sup>156</sup> See First Malta Declaration, *supra* note 45, at para. 4. See also *Re L (Removal from the Jurisdiction: Holiday)* [2001] 1 FLR 241, in which the mother, her father and her eldest brother were required to enter into solemn declarations under the Koran to guarantee that a child would be returned safely after a period of visitation abroad. A similar requirement may be to oblige a Muslim applicant to swear an oath to return before the Imam in that State and placing a similar requirement on a family member in the Islamic State, such as the grandfather.

<sup>157</sup> See *supra*, at section 2.2.

## **6.6 Specifying the terms and conditions**

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

## **6.7 Modern means of preserving contact**

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

## **6.8 Safeguards may include measures to ensure that the terms and conditions of contact will be enforceable in another country**

In addition to the other safeguards set out in this section, a court making a contact order concerning contact that is to take place abroad can also consider measures that will ensure that the order is enforceable in another country.

The topic of recognition and enforcement of foreign decisions concerning contact has been dealt with in section 4.4.

## **6.9 Financial arrangements and child support**

- In order to facilitate contact courts should have a broad discretion to order financial arrangements tailored to the particular needs and resources of family members.
- The costs involved in organising and exercising transfrontier contact should be capable of being taken into account in the assessment of child support.

Courts often make precise orders concerning the payment of travel and other costs associated with transfrontier contact. The arrangements may include the establishment of a fund or account to be used to meet the travel costs of the child or the contact parent. Where there has been a long period of disruption and professional assistance is needed to restore the relationship between the child and the contact parent, an order which specifies who is to bear the costs which arise may be appropriate. With regard to child support, the costs associated with the exercise of contact should be taken into account in assessing the needs of the child and may also be relevant in assessing the means of the debtor, particularly where the debtor is a contact parent who incurs heavy expenditure in exercising contact.<sup>158</sup>

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<sup>158</sup> Although it is recognized that in some States child support determinations are highly formulaic and consideration of travel costs may not be possible.

## 7. ENFORCEMENT OF CONTACT ORDERS UNDER NATIONAL LAW

### 7.1 *Effective enforcement procedure*

- 7.1.1 Effective mechanisms should be available for enforcing a contact order, including effective coercive measures.**
- 7.1.2 Additional requirements, which are to be fulfilled in order to commence and pursue the enforcement process, should be limited.**
- 7.1.3 Separate challenges allowed against the order of specific enforcement measures and/or decisions on additional formality requirements for enforcement should be limited or avoided altogether.<sup>159</sup>**

The legal framework should allow for expeditious enforcement of (foreign) contact orders. It has to be kept in mind that the longer contact between parent and child is disrupted the more difficult it will be to re-establish it and make it work. Considering the importance of the child's contact with both parents for his or her development, the enforcement of contact orders should be swift.

In many cases, the mere knowledge that a contact order is enforceable and will be enforced in a case of non-compliance and that non-compliance will have consequences will make the parties respect the terms of the order.

In autumn 2006, a comparative legal study<sup>160</sup> on the matter of enforcement of orders made under the 1980 Convention was carried out by the Permanent Bureau. The study has shown that coercive measures used to enforce contact orders differ immensely from country to country. In some countries non-compliance may lead to a reduction or complete refusal of spousal maintenance.<sup>161</sup> It may also result in a modification or withdrawal of custody rights. In many jurisdictions sanctions for non-compliance can even be imposed where a specific time-period referred to by the contact order has already expired.<sup>162</sup>

Threat of consequences for non-compliance strengthens the position of the non-primary carer, who in the exercise of his or her contact rights necessarily relies on the co-operation of the primary carer of the child.

In the interest of a swift enforcement procedure, additional conditions required for enforcing a contact order by use of coercive measures should be limited or avoided altogether – this concerns administrative requirements as well as other necessities like the requirement of an additional court decision or a *formule exécutoire* or another authorisation required for enforcement or additional steps to be taken by a bailiff or other enforcement officer. “Where

<sup>159</sup> See, concerning the parallel problems in connection with enforcement of return orders, A. Schulz, “Enforcement of Orders made under the 1980 Convention – Towards Principles of Good Practice”, Prel. Doc. No 7 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006), para. 2.8 (available on the Hague Conference website, see *infra*, pp. 53-56). A review of the different experiences of enforcement can also be found in N. Lowe and K. Horosova, *op. cit.*, note 25, para. 7.3.

<sup>160</sup> See A. Schulz, “Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study”, Prel. Doc. No 6 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>161</sup> For example the Netherlands, *ibid.*, para. 311.

<sup>162</sup> For example Austria, Chile, Cyprus, Germany, Italy and the Netherlands, *ibid.*, paras 315 *et seq.*

additional formal steps such as an executory engrossment, an authorisation to enforce or similar steps are required it is suggested to limit or exclude the possibility to challenge these steps independently, [...] and to limit the number and levels of legal challenges available against such measures.”<sup>163</sup>

## 7.2 Practical arrangements

- **Practical arrangements, which are necessary for an effective exercise of contact, should be as precise as possible.**

The contact order should fix the practical details of the contact precisely. The terms should be clear and unambiguous. Dates and time of day should be precise. Where travelling is involved, the order should also clarify who has to bear the travel costs. Courts should invite the parties to jointly elaborate the practical arrangements to be incorporated into the contact order or at least consider submissions of the parties.

The more precise the terms of the order are the easier the enforcement will be. Keeping in mind the possible necessity of a translation of the contact order into another language the wording should be distinct and non-ambiguous.

## 7.3 Promoting voluntary compliance

- **Central Authorities and courts should encourage the parties at any stage, including the enforcement stage, to consider the possibility of mediation or other ways to find an amicable resolution.**
- **The wishes and feelings of the child should be taken into account according to his or her age and maturity.**

Due to the recurring and ongoing nature of contact, voluntary agreement and amicable settlement – if necessary facilitated by the appropriate means such as mediation – are very important. Courts and authorities involved should provide all assistance possible with a view to achieving such amicable settlement.

In cases where an order for contact on several successive occasions has been issued, every possibility for a voluntary continuation of the contacts should be thoroughly examined once a first contact has been enforced, since the repeated enforcement of a contact order becomes ever more stressful for the child as well as for the parents.

It is important to bear in mind that within the mediation process there is a need for safeguards to ensure that the weaker party is not consenting to an order because of fear of the other party, because of intimidation by the other party or even because of exhaustion from lengthy highly conflictual proceedings. Highly experienced mediators are a safeguard against these risks.

In the process of establishing the terms of the contact order, co-operation of the parents as to the practical arrangements of the contact should be encouraged and the parents' submissions should be considered as well as the wishes and feelings of the child concerned, according to his or her age and maturity.

<sup>163</sup> A. Schulz, *op. cit.*, note 159, para. 2.8. For a discussion of parallel problems concerning enforcement of return orders, see also paras 1.5-1.6 of the same document.

Also, at the stage of enforcement of the contact order, the court and any authority involved should encourage amicable settlement of disputes arising in connection with the exercise of contact.

Children should be represented in mediation proceedings. This ensures that having the decision made outside a court does not detract from the importance of considering the best interests of the child.<sup>164</sup>

In addition, both children and their parents can be assisted in their decision-making by proper access to counselling. Sometimes a parent has abducted a child or refused to allow contact because they are desperate and access to counselling or a child representative may encourage them to reconsider their position.

The comparative legal study on the matter of enforcement of orders made under the 1980 Convention has shown that some countries regularly include a mediation phase in the enforcement process of contact orders.<sup>165</sup>

#### **7.4 Co-operation of bodies and professionals involved**

- **Bodies and professionals involved in the enforcement of a contact order should closely co-operate.**
- **Great emphasis should be placed on the facilitation of cross-border co-operation in this matter.**

The enforcement of contact rights in a cross-border family situation may involve many actors, such as the Central Authority, judges, bailiffs, social workers or other professionals – depending on the jurisdictions concerned and the enforcement measures chosen.<sup>166</sup> In the interest of an adequate solution to problems with the execution of contact, the exchange of relevant information between the professionals / bodies involved should be swift and effective.

Detailed information concerning the special circumstances of the case should be available easily to allow a sensitive dealing with the case, where necessary. Especially in cases where an abduction of the child has occurred before, was threatened or feared by one of the parents, the actors involved in the enforcement of a contact order should have access to background information in addition to the plain facts included in the actual contact order itself.

Safeguards, such as the surrender of passport or travel documents (mentioned above in section 5.3) should be taken into consideration to avoid the risk of abduction.

In cross-border contact cases the multinational, multicultural and multilingual backgrounds have to be taken into account and relevant information concerning sensitive matters should be made available to the bodies / professionals involved.

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<sup>164</sup> See also section 2.4.5 for further discussion of the involvement of children in mediation.

<sup>165</sup> For example Finland, see A. Schulz, *op. cit.*, note 160, para. 310.

<sup>166</sup> *Ibid.*

## 7.5 Training and education

- **The professionals involved in enforcement of contact orders in cross-border contact cases should receive appropriate training, especially in regard to the aims and mechanisms of the applicable Hague Conventions and other international instruments.**
- **It is recommended that practice guidelines, manuals, checklists and / or other documents which can be of assistance to the different professionals involved in the enforcement of contact orders in cross-border cases be developed.**

Appropriate training for professionals involved in the enforcement of contact orders in cross-border contact cases should impart knowledge of the aims and mechanisms of the applicable Hague Conventions and other international instruments as well as call attention to the sensitivity of post-abduction situations and situations where an imminent abduction is feared. Such training should also provide information about the particular difficulties of cross-border contacts which, for example, have to do with the mistrust and anxieties of parents in both countries and the dangers of misunderstandings arising from cultural differences for parents and for professionals. It is also important that training for professionals includes familiarising them with the relevant domestic law.<sup>167</sup>

Practice guidelines, manuals, checklists and / or other documents would be very helpful to assist the different professionals involved in the enforcement of contact orders in cross-border cases.

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<sup>167</sup> See also section 2.4.5 relating to training for mediators.



## 8. RELOCATION AND CONTACT

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

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

- the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child. This will depend on how parental responsibilities are attributed, and how they may be exercised, within particular States;
- the factors to be taken into account by a court in determining whether relocation should be permitted; and
- the approach taken by the court to guaranteeing and securing the contact rights of the “left-behind” parent.

### 8.1 Decisions on relocation

While strictly it is only the third of these matters that is relevant here, the degree to which contact rights may be preserved should always be a relevant factor for a court in deciding whether or not to permit relocation. This is not the place to discuss the other factors which should be taken into account. However, it is appropriate to recall the obvious links between the problems of abduction and relocation and, in particular, paragraph 7.3 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission:

“Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention.”<sup>168</sup>

### 8.2 Respect for terms and conditions

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

The court making the order should ensure that it clearly details the terms and conditions of a contact order made in the context of relocation.<sup>169</sup> In addition, if a parent were allowed to move on the strict condition that certain contact would take place, it would be helpful if the order indicated this.

<sup>168</sup> *Op. cit.*, note 8. See also para. 9 of the conclusions adopted at the Common Law Judicial Conference on International Parental Child Abduction, Washington, DC, 17–21 September 2000.

<sup>169</sup> See also section 6.6.

There are two reasons for the principle that the terms and conditions of such a contact order be respected. First, the court deciding upon relocation will have been in the best position to determine the best interests of the child with regard to continuing contact with the “left-behind” parent. Respect should be shown to the findings and recommendations with respect to the child’s best interests by the court that allowed relocation to take place. Second, the knowledge that a contact order will not be respected will have a negative impact on the judge who is considering whether to permit relocation. The following are ways in which the above general principle may be given effect.

### **8.3 Advance recognition**

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

The mechanism for advance recognition provided in the 1996 Convention has already been referred to in section 4.4.2 above. The importance of a system of advance recognition within an overall structure designed to prevent abductions from taking place is referred to in the Guide to Good Practice on Preventive Measures.<sup>170</sup>

### **8.4 Mirror orders and direct judicial communications**

- **Where advance recognition is not possible, an application should be possible in the country of relocation for an order which “mirrors” the contact arrangements ordered by the judge deciding upon relocation.<sup>171</sup>**
- **This implies that it should be possible to exercise jurisdiction to make a “mirror” order before the child has entered the country.**
- **In these circumstances, it should also be considered whether the obtaining of a mirror order should be made a condition of relocation. This is an area in which direct judicial communication may play an important role.**

### **8.5 Applications to vary contact conditions and the 1996 Convention**

Another concern is the effect of a change in jurisdiction, which may come about relatively quickly after relocation. Under the 1996 Convention, primary jurisdiction resides in the court of the country of relocation as soon as the child becomes habitually resident there. The concern is that the parent who has applied for and been given permission to relocate may take advantage of the change in jurisdiction and apply to modify, limit or even terminate the contact rights of the left-behind parent. The following are guidelines, which should help to avoid this risk.<sup>172</sup>

<sup>170</sup> See *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures*, Jordan Publishing, 2005, at para. 2.3 (available on the Hague Conference website, see *infra*, pp. 53-56).

<sup>171</sup> See also *supra* section 4.4.3.

<sup>172</sup> It is worth noting that the jurisdictional rules in Art. 9 of European Community Council Regulation (EC) No 2201/2003, *supra* note 23, tackle this situation by providing that if a contact decision is given prior to a relocation, the court that gave this decision retains jurisdiction to modify the contact order for a period of three months, even if the child is now habitually resident in the new State as long as the access parent is still habitually resident in that State, see also *supra* section 3.3.

**8.5.1 The court of the Contracting State to which a child is relocated should allow review and variation of contact orders of another Contracting State only in the circumstances in which it would allow such review or variation of its own domestic orders.**

This principle sets the minimum standard that should be adhered to. A court considering the modification of a contact order should accord a foreign contact order no less respect than it would give to domestic orders. However, some judges would take the view that an even stricter approach should be followed and that the variation of a foreign custody order should be discouraged unless it is demonstrably necessary.

**8.5.2 The order should continue to enjoy this status even after the child's habitual residence has changed and until such time as the courts in the country of the child's new habitual residence order otherwise.**

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

**8.5.4 The court should in particular –**

- **consider whether it may be appropriate to make a request, in accordance with Article 9 of the 1996 Convention, that the court which decided upon the relocation should assume jurisdiction in the matter;**
- **consider whether adjournment of proceedings is appropriate in accordance with Article 35, paragraph 3, of the 1996 Convention; and**
- **where appropriate, give due weight to a finding made by the court permitting relocation concerning the suitability of the “left-behind” parent to exercise access and the conditions under which access should be exercised, in accordance with the procedure set out in Article 35, paragraph 2, of the 1996 Convention. However, it should not be necessary to reconsider these issues where contact arrangements have recently been made by the courts of the State of the child's former habitual residence in the context of relocation.**

When a contact order is made in the context of relocation (by a court in the country where the child is habitually resident), that order is entitled, under Article 23, paragraph 1 of the 1996 Convention, to be recognised by operation of law in the State where relocation is to occur, provided that both States are Contracting States. It is entitled to be enforced in that State, according to Article 28, as if it had been made in that State, with the necessary implications regarding the permissibility of review and variation of such an order.

In the event that it is felt necessary to take action to review or vary the contact order, consideration should be given to using the various mechanisms provided in the 1996 Convention for utilising the experience of the authorities in the State of the former habitual residence of the child. This can be done through the transfer of jurisdiction provision found in

Article 9 of the 1996 Convention, or through co-operation provisions found in Article 35.

Such mechanisms may also prove useful in situations where a contact order was not made in the context of a proposed relocation, but a relocation did occur shortly after the order was made.

**8.5.5 Even in situations where the 1996 Convention does not apply, consideration should be given to the importance of recognising recently made contact orders from foreign jurisdictions, and caution should be exercised before disturbing their essential elements.**

## 9. ACCESS / CONTACT RIGHTS AND RIGHTS OF CUSTODY

### 9.1 *The meaning of rights of “Contact” and “Access”*

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

“Article 5

For the purposes of this Convention –

- a) ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
- b) ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”

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

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

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

### 9.2 *“Custodial parent” and “contact parent”*

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

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

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

judicial opinion as to whether an access right, combined with the right of veto, may be regarded for Convention purposes as a custody right.

Except where the context otherwise indicates, the term “custodial parent” has been used in this Guide in a non-technical sense as referring to the parent with whom the child has his or her usual or habitual residence, and the term “contact parent” as referring to the parent holding or claiming rights of contact in respect of a child.

### 9.3 Veto on removal – A custody right under the 1980 Convention?

**The preponderance of the case law<sup>173</sup> supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention.<sup>174</sup>**

As a result a left behind “access” parent may nevertheless, because of the right of veto, be able to employ the 1980 Convention to bring about the return of the child to the country of his or her habitual residence. This view is said to be justified by the wording of Article 5 *b*) of the Convention, and is based on a concern that a failure to prohibit the unilateral removal of a child in these circumstances would seriously weaken the Convention. The opposing view,<sup>175</sup> which does not command widespread support, is that this constitutes an improper use of the return order, which was not intended as a mechanism for supporting access rights.

<sup>173</sup> See, for example, *C. v. C.* [1989] 2 All E.R. 465 (English Court of Appeal, 1988) [INCADAT cite: HC/E/UKe 34]; *Re D (A Child)(Abduction: Rights of Custody)* [2007] 1 All ER 783 [INCADAT cite: HC/E/UKe 880]; *Foxman v. Foxman*, c.a. 5271/92 (High Court of Israel, 1992); several US cases prior to the decision in *Croll v. Croll*, including for example, *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S. 2d 429 (Family Court of New York, 1991) [INCADAT cite: HC/E/USs 208]. See also *Ministère Public c. MB* Cour d’appel d’Aix-en-Provence, 23 March 1989, 79 Rev. crit. 1990, 529, note Y. Lequette (France) [INCADAT cite: HC/E/FR 62]; *DG v. EG* Judicial Register, CA 5532/93 (Supreme Court, Israel); *Director General, Department of Families, Youth and Community Care v. Hobbs* (unreported, Fam CA, 2059/1999), 24 September 1999 (Australia) [INCADAT cite: HC/E/AU 294]. The broad approach was also followed by the delegates at the Second Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (18-23 January 1993). The Report of that meeting is available on the Hague Conference website (see *infra*, pp. 53–56).

<sup>174</sup> This trend is confirmed by a number of decisions in which the veto arose not by order of a court but by operation of law. See, for example, 2 BvR 1126/97, *Bundesverfassungsgericht*, 18 July 1997 (Germany) [INCADAT cite: HC/E/DE 338]; *Secretary for Justice v. Abrahams, ex parte Brown*, Family Court at Taupo, 15 August 2001 (New Zealand) [INCADAT cite: HC/E/NZ 492]; TR 132/1999, *Tribunal civil de l’Arrondissement de la Sarine*, 17 May 1999 (Switzerland) [INCADAT cite: HC/E/CH 442]; *DG v. EG*, Judicial Register, CA 5532/93 (Supreme Court, Israel); *Thorne v. Dryden Hall* (1997) 28 RFL (4<sup>th</sup>) 297 (British Columbia Court of Appeal) [INCADAT cite: HC/E/CA 12]; *Furnes v. Reeves* 362 F3d102 (11<sup>th</sup> Cir 2004) (USA) [INCADAT cite: HC/E/USf 578]. For a contrary view, see *Fawcett v. McRoberts* 326 F3d 491 (4<sup>th</sup> Cr. 2003) (USA) [INCADAT cite: HC/E/USf 494].

<sup>175</sup> See *Croll v. Croll* 229 F3d 133 (2d Cir. 2000) (United States Court of Appeals for the Second Circuit, 2000) [INCADAT cite: HC/E/USf 313] disapproved as “contrary to the weight of authority in *Sonderup v. Tondelli* SA 2000 No CCT 53/00, a decision of the Constitutional Court of South Africa.” The negative position also finds some support in the French decision in *Ministère Public v. Mme. Y.* (19 March 1992) T.G.I. de Périgueux, D. 1992, at p. 315 and in the Canadian Supreme Court decisions in *Thomson v. Thomson* [1994] 119 D.L.R. (4<sup>th</sup>) 253 [INCADAT cite: HC/E/CA 11] and *D.S. v. V.W.* [1996] 134 D.L.R. (4<sup>th</sup>) 481 [INCADAT cite: HC/E/CA 17] where the Canadian Supreme Court indicated that, while custody rights may arise from a *ne exeat* order made in interim or pending proceedings, it would be redundant to interfere with the freedom that a custodial parent enjoys with a final custody order, even one containing a restriction on removal. For a detailed analysis of these two cases, see M. Bailey, “Rights of Custody under the Hague Convention”, 11 B.Y.U.J. Pub. L. 33, 42-50 (1997). For doubts as to whether the Convention cases support the approach in *Croll v. Croll*, see L. Silberman, “Patching up the Abduction Convention: A call for a new international protocol and a suggestion for amendments to ICARA”, June 2002, *Texas International Law Journal*. See also *Fawcett v. McRoberts* 326 F3d 491 (4<sup>th</sup> Cir. 2003) and *Gonzalez v. Gutierrez* 311 F3d 942 (9<sup>th</sup> Cir. 2002) [INCADAT cite: HC/E/USf 493], both US cases following *Croll v. Croll*.

## 9.4 Approach to interpretation

**Concepts such as access rights and rights of custody should be interpreted having regard to the autonomous nature of the 1980 Convention and in the light of its objectives.**

A further complication arises from the fact that the courts in the two countries concerned may arrive at differing views on whether access rights or rights of custody are in question. This may happen when the court which is deciding upon a return application uses the Article 15 mechanism to request a decision or determination from the authorities of the State of the child's habitual residence that the removal or retention was wrongful within the meaning of Article 3 of the 1980 Convention (*i.e.*, that it was in breach of rights of custody attributed under the law of the State of the child's habitual residence). It has been held that the court deciding upon the return application is not bound by such decision or determination, but must determine for itself whether the rights attributed to the applicant parent do or do not constitute "custody rights" within the autonomous Convention meaning of that concept.<sup>176</sup>

## 9.5 Rights of custody include rights of access / contact

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

There are occasions on which a parent with custody rights may wish to exercise rights of access / contact and make application for that purpose under Article 21 of the 1980 Convention. For example, a parent with custody rights whose application for the return of a child is refused under Article 13 *b*) of the 1980 Convention may wish to apply for access / contact to the child.<sup>177</sup> Or a parent with joint custody, with whom the child does not normally reside, may need a detailed contact order. A situation may even arise where a custodial parent seeks access / contact in respect of a child during a lengthy period of visitation with the access / contact parent.

<sup>176</sup> See *Fawcett v. McRoberts*, above, where the US court disagreed with the Scottish authorities and decided that Scots legislation which gives the contact parent the right to withhold consent to removal of the child from the UK does not give rise to rights of custody under the Convention. However, in the recent case of *Re D (a child) (abduction: foreign custody rights)* [2006] UKHL5 [INCADAT cite HC/E/UKe 880] the House of Lords criticised the lower courts for not accepting an Art. 15 declaration issued by the courts in Romania.

<sup>177</sup> See, *e.g.*, *Director General, NSW Department of Community Service v. O.*, 17 March 2000, Family Court of Australia, Justice Lawrie, unreported, referred to in the Final Report 2002, *op. cit.*, note 10, para. 40. This situation should not arise if it is accepted that Art. 21 may be used to establish, and not merely recognise and enforce, access / contact rights.

## **9.6 Rights of access not confined to those already established by court order**

**The right to apply under Article 21 of the 1980 Convention to make arrangements for recognising or securing the effective exercise of “rights of access” should not be limited to cases where there is an existing court order recognising or establishing rights of access, but should include cases where the applicant relies on access rights which arise by operation of law or has status to seek the establishment of such rights.<sup>178</sup>**

For further explanation of this principle, see above under section 4.6.

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<sup>178</sup> An example here could be unmarried fathers, such as found in Ireland in section 11 of the Guardianship of Infants Act 1964 (as amended by section 13 of the Status of Children Act 1987). Also under the European Convention on Human Rights, the right to family life protected in Art. 8 encompasses a right to contact, including where there is no court order. See *supra* note 33.





**APPENDIX**

**EXTRACT FROM THE *GUIDE TO GOOD PRACTICE UNDER  
THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE  
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION***

***PART I – CENTRAL AUTHORITY PRACTICE***

**EXTRACT FROM THE *GUIDE TO GOOD PRACTICE  
UNDER THE HAGUE CONVENTION OF  
25 OCTOBER 1980 ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION***

**PART I – CENTRAL AUTHORITY PRACTICE**

**CHAPTER V – ACCESS APPLICATIONS**

**A. ROLE OF REQUESTING CENTRAL AUTHORITY**

**5.1 Obtain information about procedures in the requested country**

The guidelines at Chapter 3.1 are relevant for step 5.1.

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

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

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

**5.3 Check that the application satisfies Convention requirements**

This is explained in Chapter 5.21.

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

**5.4 Provide information about relevant laws**

**5.5 Ensure all essential supporting documents are included**

See Checklist at Appendix 3.7.

**5.6 Provide a translation of the application and all essential documents**

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

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

**5.9 Urgent applications**

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

Access applications may become urgent in situations where –

- a child is supposed to travel abroad alone for an access visit and the custodial parent refuses, or will refuse to honour the arrangements;
- the access parent has travelled or intends to travel to visit the child and the custodial parent has indicated the child will not be available for the visit;
- a child has been located after a long period of searching, and the access parent is anxious to re-establish contact.

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

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

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

**5.12 Be reasonable about requests for follow-up information**

**5.13 Monitor progress of the application**

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

**5.14 Assistance available in the requesting country**

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

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

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

- advising the custodial parent to obtain a written programme or itinerary for the access visit, with names, addresses and telephone numbers of people and places to be visited. If the child is not returned, and the parent and child go into hiding, the programme details may assist to locate the child;
- obtaining a copy of this programme or itinerary;
- ensuring that the parent and child have the telephone numbers of support services, should any problems arise during the visit.

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

Where conditions or safeguards have been attached to the exercise of access or contact, take whatever steps are possible to ensure that the conditions are observed.

It is necessary to ensure that the access parent understands that a failure to observe any agreed conditions may result in the court or custodial parent refusing future visits.

## **B. ROLE OF REQUESTED CENTRAL AUTHORITY**

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

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

**5.17 Establish timeframes for dealing with applications**

**5.18 Applications may be received by mail, fax or email**

**5.19 Register the receipt of the application on an internal register**

**5.20 Acknowledge receipt of the application**

**5.21 Ensure Convention requirements are satisfied**

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

The basic, commonly agreed requirements to be satisfied are –

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

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

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

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

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

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

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

**5.25 If the child is not located, return the application**

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

### **5.27 Access to legal aid and advice, or legal representation**

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

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

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

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

### **5.28 Provide follow-up information**

The comments at Chapter 4.14 are relevant for step 5.28.

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

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

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

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

### **5.32 Monitor progress of the application**

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

- they may drag on for long periods;
- there may be little or no progress over that time;
- the custodial parent can easily undermine planned access arrangements (even court ordered arrangements);
- undermining arrangements or breaching court orders is especially problematic when the access parent from abroad is visiting the child's country and only has a limited time there;
- the custodial parent can exhaust the access parent's emotional, physical and financial resources by constant failure to observe agreed arrangements.

**5.33 Assistance with implementing or enforcing access orders**

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

- support from social or youth/child welfare services, for example, where supervision of access is required;
- support from social or youth/child welfare services when measures are needed to accustom a child to contact after a long period of separation;
- contacting the International Social Service (ISS) for assistance;
- use of supervised visitation centres;
- arranging and funding supervised access in certain difficult cases;
- arranging and funding telephone access;
- acting as a post box for letters where the child's address cannot be disclosed.

## INFORMATION AND DOCUMENTS AVAILABLE ON THE HAGUE CONFERENCE WEBSITE

The Hague Conference on Private International Law: < [www.hcch.net](http://www.hcch.net) >.

### **The Child Abduction Section**

The Child Abduction Section of the Hague Conference website: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section”.

### **INCADAT**

The International Child Abduction Database (INCADAT): < [www.incadat.com](http://www.incadat.com) >.

### **The Text of the Conventions**

The text of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: < [www.hcch.net](http://www.hcch.net) > under “Conventions”, then “Convention No 28”.

The text of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children: < [www.hcch.net](http://www.hcch.net) > under “Conventions”, then “Convention No 34”.

### **The Explanatory Reports**

E. Pérez-Vera, “Explanatory Report on the Convention on the Civil Aspects of International Child Abduction”: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section”, “Explanatory documents” then “Explanatory Report”.

P. Lagarde, “Explanatory Report on the 1996 Hague Child Protection Convention”: < [www.hcch.net](http://www.hcch.net) > under “Publications”, then “Explanatory Reports”.

### **Special Commission**

All documents relating to Special Commission Meetings to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the Practical Implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* can be found at: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.



The documents available include the following:

## Conclusions and Recommendations

- “Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)”, drawn up by the Permanent Bureau.
- “Report and Conclusions of the Special Commission concerning the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (27 September – 1 October 2002)”, drawn up by the Permanent Bureau, March 2003.
- “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)”, adopted by the Special Commission, November 2006.

## Reports

- “Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)”, drawn up by the Permanent Bureau, March 2007.

## Preliminary Documents

- W. Duncan, “Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. A Preliminary Report”, Prel. Doc. No 4 of February 2001 for the attention of the Special Commission of March 2001.
- W. Duncan, “Consultation Paper on Transfrontier Access / Contact”, Prel. Doc. No 1 of January 2002 for the attention of the Special Commission of September / October 2002.
- W. Duncan, “Transfrontier Access / Contact and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – Final Report”, Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002.
- W. Duncan, “Transfrontier Access / Contact – General Principles and Good

Practice”, Prel. Doc. No 4 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

- N. Lowe, E. Atkinson, K. Horosova, S. Patterson, “A statistical analysis of applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*”, Prel. Doc. No 3, Part I, of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006).
- P. Lortie, “Report on Judicial Communications in Relation to International Child Protection”, Prel. Doc. No 8 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006).
- A. Schulz, “Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study”, Prel. Doc. No 6 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006).
- A. Schulz, “Enforcement of Orders made under the 1980 Convention – Towards Principles of Good Practice”, Prel. Doc. No 7 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006).
- S. Vigers, “Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children, especially in the context of the Hague Convention of 1980”, Prel. Doc. No 5 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (30 October – 9 November 2006).

## **Guides to Good Practice**

The following parts of the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* can be found at: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “Guides to Good Practice”:

- *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*, Jordan Publishing, 2003.
- *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing, 2003.

- *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures*, Jordan Publishing, 2005.

## **Questionnaires and Responses**

Questionnaires circulated by the Permanent Bureau concerning the implementation and operation of the two Conventions and responses received from States can be found at: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “Questionnaires and Responses”.

## **The Judges’ Newsletter on International Child Protection**

All the volumes of the Judges’ Newsletter can be found at: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “The Judges’ Newsletter on International Child Protection”.

## **Judicial Seminars on the International Protection of Children**

Conclusions and Recommendations from Judicial Seminars on the International Protection of Children organised by the Permanent Bureau of the Hague Conference on Private International Law can be found at: < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “Judicial Seminars on the International Protection of Children”.

Such seminars include:

- The “Malta process”:
  - Second Judicial Conference on Cross-Frontier Family Law Issues, St. Julian's, Malta, 19–22 March 2006.
  - Judicial Conference on Cross-frontier Family Law issues involving certain “Hague Convention” and “non-Hague Convention” States from the Islamic world, St. Julian’s, Malta, 14–17 March 2004.
- Judicial Seminar on the role of the Hague Child Protection Conventions in the practical implementation of the UNCRC and the African Charter on the Rights and Welfare of the Child, which took place in The Hague from 3–6 September 2006.