CONFLICT OF LAWS CONVENTIONS AND THEIR RECEPTION

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STATISTICAL QUESTIONS

Which Hague Conventions have been ratified by your country?

ARGENTINA

Convention on Civil Procedures (1954)[1]

Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions (1956)[2]

Convention Abolishing the Requirement of Legalisation for Foreign Public Document (1961)[3]

Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)[4]

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)[5]

Convention on Law Applicable to Agency (1978)[6]

Convention on the Civil Aspects of International Child Abduction (1980).[7]

Convention on Law Applicable to Contracts for International Sales of Goods (1986)[8]

[1] Approved by Law 23.502 . Official Gazette 15/10/1987
[2] Approved by Law 24.409. Oficial Gazette 28/12/1994. It has not entried into force yet.
[3] Approved by Law 23.458. Official Gazette 21/04/1987
[4] Approved by Law 25.097. Oficial Gazette 24/05/1999
[5] Approved by Law 23.480. Oficial Gazette 23/04/1987
[6] Approved by Law 23.964. Official Gazette 19/09/1991
[7] Approved by Law 23.857. Oficial Gazette 31/10/1990
[8] Approved by Law 23.916. Official Gazette 22/04/1991

CANADA

Convention on the Civil Aspects of International Child Abduction (1980).

Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)

Convention on the Law Applicable to Trusts and on Their Recognition (1985)

CROATIA

Convention of 1 March 1954 on Civil Procedure;[9]

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions;[10]

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;[11]

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;[12]

Convention of 4 May 1971 on the Law Applicable to Traffic Accidents;[13]

Convention of 2 October 1973 on the Law Applicable to Products Liability;[14]

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;[15] and

[9] Offical Gazette FPRY: Conventions and Other International Agreements 5/1954; Official Gazzette RC: International Treaties 4/1994.

[10] Offical Gazette FPRY: Conventions and Other International Agreements 10/1962; Official Gazzette RC: International Treaties 4/1994.

[11] Offical Gazette FPRY: Conventions and Other International Agreements 10/1962; Official Gazzette RC: International Treaties 4/1994.

[12] Official Gazzette RC: International Treaties 10/2005.

[13] Offical Gazette SFRY: Conventions and Other International Agreements 26/1976; Official Gazzette RC: International Treaties 4/1994.

[14] Offical Gazette SFRY: Conventions and Other International Agreements 8/1977.

[15] Offical Gazette SFRY: International Treaties 7/1991; Official Gazzette RC: International Treaties 4/1994.

Convention of 25 October 1980 on International Access to Justice.[16]

CZECH REPUBLIC

Convention of 1 March 1954 on civil procedure ;

Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;

Convention of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters;

Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

Convention of 4 May 1971 on the Law Applicable to Traffic Accidents;

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;

Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons;

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations;

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

Convention of 25 October 1980 on International Access to Justice;

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption; and

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.

[16] Offical Gazette SFRY: International Treaties 4/1988; Official Gazzette RC: International Treaties 4/1994.

GERMANY

Convention on Civil Procedure (adopted 1 March 1954, entered into force 12 April 1957)[17],

Convention on the Law Applicable to Maintenance Obligations towards Children (adopted 24 October 1956, entered into force 1 January 1962)[18],

Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children (adopted 15. April 1958, entered into force 1 January 1962)[19],

Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (adopted 5 October 1961, entered into force 4 February 1969)[20],

Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (adopted 5 October 1961, entered into force 5 January 1964)[21],

Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (adopted 5 October 1961, entered into force 24 January 1965)[22],

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (adopted 15 November 1965, entered into force 10 February 1969)[23],

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (adopted 18 March 1970, entered into force 7 October 1972)[24],

Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (adopted 2 October 1973, entered into force 1 August 1976)[25],

Convention on the Law Applicable to Maintenance Obligations (adopted 2 October 1973, entered into force 1 October 1977)[26],

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17 Federal Gazette 1958 II p. 576.
18 Federal Gazette 1961 II p. 1012.
19 Federal Gazette 1961 II p. 1005.
20 Federal Gazette 1971 II p. 219.
21 Federal Gazette 1965 II p. 1144.
22 Federal Gazette 1965 II p. 875.
23 Federal Gazette 1977 II p. 1452.
24 Federal Gazette 1977 II p. 1452, 1472.
25 Federal Gazette 1986 II p. 826.
26 Federal Gazette 1986 II p. 837.

Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 17 December 1983)[27],

Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (adopted 29 May 1993, entered into force 1 May 1995)[28],

Convention on the International Protection of Adults (adopted 13 January 2000)[29].

GREECE

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Document.

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions.

Convention of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations

Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

JAPAN

Convention of 1 March 1954 on civil procedure;

Convention of 24 October 1956 on the law applicable to maintenance obligations towards children;

[27] Federal Gazette 1190 II p. 206.
[28] Federal Gazette 2001 II p. 1034.
[29] Federal Gazette 2007 II p. 323.

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions;

Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents;

Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; and

Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

MEXICO

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;

Convention of 15 November 1965 on the Service Abroad of Judicial and extrajudicial documents in civil or commercial matters Extrajudicial Documents in Civil or Commercial Matters;

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption; and

Convention of 30 June 2005on Choice of Court Agreements.

NEW ZEALAND

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; and

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption;

NORWAY

Convention of 1 March 1954 on Civil Procedure;

Convention of 15 June 1955 on the Law Applicable to International Sales of Goods;

Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children;

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions;

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents;

Convention of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters;

Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters;

Convention of 2 October 1973 on the Law Applicable to Products Liability

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations;

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption;

POLAND

Convention of 12 June 1902 relating to the Settlement of Guardianship of Minors

Convention of 17 July 1905 relating to Civil Procedure

Convention of 17 July 1905 relating to Deprivation of Civil Rights and similar Measures of Protection

Convention of 1 March 1954 on Civil Procedure

Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants

Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions

Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

Convention of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters

Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

Convention of 4 May 1971 on the Law Applicable to Traffic Accidents

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations

Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Convention of 25 October 1980 on International Access to Justice

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption.

QUÉBEC

Convention of 15 November 1965 on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption

It needs to be mentioned that since the Constitution of Canada states that private law, with few exceptions, is a matter under the legislative authority

of the provinces, there are some conventions with a federal clause to which Canada is a party, which are not applicable in Québec. (i.e. Convention on the Law Applicable to Trusts and on Their Recognition (1985)).

TAIWAN

None.

TUNISIA

None.

USA

Convention Abolishing the Requirement of Legalization for Foreign Public Documents[30]

Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters[31]

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[32]

Convention on the Civil Aspects of International Child Abduction[33]

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

VENEZUELA

Convention on the taking of evidence abroad in Civil or Commercial matters (Accession giving rise to an acceptance procedure: 01/11/1993)

Convention on the service abroad of judicial and extra judicial documents in Civil or Commercial matters (Accession: 10/29/1993)

[30] 527 U.N.T.S. 189; T.I.A.S. 10072. The Convention entered into force in the United States on October 15, 1981.

[31] 20 U.S.T. 1361; 658 U.N.T.S. 163, T.I.A.S. No. 6638.

[32] 23 U.S.T. 2555; T.I.A.S. 7444; 847 UNTS 231.

[33] TIAS 11670. Ratified by the Senate in 1986. 132 Cong. Rec. S15, 773-74 (October 9, 1986).

Convention on the Civil aspects of international child abduction (Ratified: 16/10/1996)

Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (Ratified: 01/10/1997)

Convention abolishing the requirement of legalization for the foreign public documents (Accession: 1/08/1998)

WHICH CIDIP CONVENTIONS HAVE BEEN RATIFIED BY YOUR COUNTRY?

ARGENTINA

Inter-American Convention on conflict of laws concerning bills of exchange, promissory notes and invoices (1975)

Inter-American Convention on International Commercial Arbitration (1975).

Inter-American Convention on Rogatory Letters (1975)

Inter-American Convention on the Taking of Evidence Abroad (1975)

Inter-American Convention on the Legal Regime of Powers of Attorney to be used Abroad (1975)

Inter-American Convention on Conflicts of Laws Concerning Commercial Companies (1979)

Inter-American Convention on Proof of and Information on Foreign Law (1979)

Inter-American Convention on General Rules of Private International Law (1979)

Additional Protocol to the Inter-American Convention on Rogatory Letters (1979)

Inter-American Convention on Execution of Preventive Measures (1979)

Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979)

Addition Protocol to the Inter-American Convention on the Taking of Evidence Abroad (1984)

Inter-American Convention on International Return of Children (1989)

Inter-American Convention on Support Obligations (1989)

Inter-American Convention on International Traffic of Minors (1994)

CANADA

Canada is not a party of any CIDIP Convention.

CROATIA

Croatia is not a party of any CIDIP Convention.

CZECH REPUBLIC

The Czech Republic does not participate in CIDIP Conventions.

GERMANY

Germany does not participate in CIDIP Conventions.

GREECE

Greece does not participate in CIDIP Conventions.

JAPAN

Japan does not participate in CIDIP Conventions.

MEXICO

Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices (1975)

Inter-American Convention on International Commercial Arbitration (1975)

Inter-American Convention on Letters Rogatory (1975)

Inter-American Convention on taking of evidence abroad (1975)

Inter-American Convention on Legal Regime of Powers of Attorney to be used abroad (1975)

Inter-American Convention on Conflicts of Laws concerning Commercial Companies (1979)

Inter-American Convention on Domicile of Natural Persons in Private International Law (1979)

Inter-American Convention on General Rules of Private International Law (1979)

Inter-American Convention on Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979)

Inter-American Convention on Proof of and Information on Foreign Law (1979)

Inter-American Convention on Additional Protocol to the Inter-American Convention on Letters Rogatory (1979)

Inter-American Convention on Conflict of Laws concerning the Adoption of Minors (1984)

Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (1984)

Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law (1984)

Inter-American Convention on Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (1984)

Inter-American Convention on International Return of Children (1984)

Inter-American Convention on Convention on Support Obligations (1984)

Inter-American Convention on Convention on International Traffic in Minors (1989)

Inter-American Convention on Convention on the Law applicable to International Contracts (1989)

NEW ZEALAND

New Zealand does not participate in CIDIP Conventions.

NORWAY

Norway does not participate in CIDIP Conventions.

POLAND

Poland does not participate in CIDIP Conventions.

QUÉBEC

Québec is not party to any CIDIP Convention

TAIWAN

None.

TUNISIA

Tunisia does not participate in CIDIP conventions.

USA

Inter-American Convention on Letters Rogatory (with Additional Protocol)[34]

Inter-American Convention on International Commercial Arbitration[35]

VENEZUELA

Inter-American Convention on letters rogatory (08/12/1984)

[34] OAS Treaty Text B-36; Senate Treaty Doc. 98-27; 98th Congress, 2d Session.
[35] The Convention entered into force in the United States on October 27, 1990.

Inter-American Convention on conflict of laws concerning bills of exchange, promissory notes and invoices (01/30/1985)

Inter-American Convention on extraterritorial validity of judgments and arbitral awards (01/30/1985)

Inter-American Convention on conflicts of laws concerning checks (01/30/1985)

Inter-American Convention on the taking of evidence abroad (02/22/1985)

Inter-American Convention on international commercial arbitration (03/22/1985)

Inter-American Convention on conflicts of laws concerning commercial companies (03/29/1985)

Inter-American Convention on proof of and information on foreign law (03/29/1985)

Inter-American Convention on the legal regime of powers of attorney to be used abroad (11/06/1985)

Inter-American Convention on general rules of private international law (11/06/1985)

Additional Protocol to the Inter-American Convention on Letters Rogatory (08/27/1991)

Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (05/20/1993)

Inter-American Convention on the law applicable to international contracts (09/22/1995)

Inter-American Convention on the international return of children (05/28/1996)

DID YOUR STATE PARTICIPATE AND SEND DELEGATIONS TO THE DIPLOMATIC CONFERENCES WHERE THESE CONVENTIONS WERE ADOPTED?

ARGENTINA

Argentina has sent delegations to all the Inter-American Conferences and has been an active participant presenting projects which later on became Conventions.

Argentina is also a member of the Hague Conferences and has sent delegations to the diplomatic conferences where conventions were adopted.

CANADA

Canada has been an active participant in the Hague Conference on Private International Law since 1968, and has taken part in CIDIP-V in 1994 and CIDIP-VI in 2002.

CROATIA

Croatia has a long tradition of participating in the work of the Hague Conference, first within the former Yugoslavia as one of the federal republics, and subsequently as an independent State. On 1 October 1995, Croatia became a Member of the Conference with retroactive effect from 12 June 1995.

CZECH REPUBLIC

The Czech Republic traditionally takes part in sessions, expert meetings and at diplomatic conferences where Hague Conventions are adopted.

GERMANY

Germany regularly takes part in the work of the Hague Conferences, having delegations present at the diplomatic conferences where these Conventions were adopted. The German Council for Private International Law (Deutscher Rat für Internationales Privatrecht) regularly gives advice to the German

Federal Ministry of Justice. The development of legislation implementing the Conventions is seen as an important task.

GREECE

Greece has participated in the drafting of the Hague Conventions and has been represented in almost all the respective diplomatic conferences[36].

JAPAN

Regarding the Hague Conference, Japan continues to send delegations since the Fourth Session which was held in 1904. As to the diplomatic conferences where CIDIP Conventions were adopted, no delegations were sent by Japan.

MEXICO

Mexico has sent delegations to all the Inter-American Conferences and has been an active participant presenting projects which became Conventions.

NEW ZEALAND

Although New Zealand was not a member of the Hague Conferences while these Conventions were adopted, and therefore did not send any delegations to such Conferences, it has participated in the review of the Convention on the Civil Aspects of International Child Abduction 1980, the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 and is currently assisting in the development of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

NORWAY

Norway sent delegations to all the Hague diplomatic Conferences where the Conventions signed by Norway were adopted.

[36] Greece had not been represented in the adoption of the text of the Convention on 2 October 1973 on Law applicable to maintance obligations.

POLAND

Poland has participated in the works of the Hague Conferences on Private International Law (the Hague Conference) since the 1920's. Formally, Poland became a member of the Hague Conference – in its capacity as a permanent intergovernmental organisation based on the Statute of 1955 – on May 29, 1984.

Being a European country, Poland is not a party to the Organisation of American States and does not participate in Inter-American Conferences on Private International Law.

QUÉBEC

Québec has participated in the works of the Hague Conference on Private International Law and also participated in conferences where CIDIP Conventions were adopted ever since Canada has been a member of these organisations.

TAIWAN

No, Taiwan has not participated in the Hague´s Conference on International Private Law, neither in CIDIP Conventions.

TUNISIA

No, Tunisia has not participated in the Hague´s Conference on International Private Law, neither in CIDIP Conventions.

USA

USA joined the Hague Conference in 1964, and since that time has become a member of all the major organizations involved in the development of conflict of laws Conventions and in efforts to harmonize or unify the private law applicable in cross-border contexts.

The United States sent a delegation of observers to the Hague Conference's Ninth Session, at which the Apostille Convention was considered, as it was not yet a member of the Conference. It has been an active participant in the

negotiation of the Conventions it has ratified since joining the Conference. The United States has also participated in each of the Inter-American Conferences on Private International Law (CIDIP) sponsored by the Organization of American States.

VENEZUELA

Yes. Venezuela sent delegations to all the conferences.

HOW MANY HAGUE AND CIDIP CONVENTIONS HAVE BEEN SIGNED BUT NOT RATIFIED. PLEASE ENUMERATE THEM.

ARGENTINA

Hague Conventions: Convention on Applicable Law to Succession to the Estates of Deceased Persons (1989)

CIDIP: None

CANADA

None.

CROATIA

None.

CZECH REPUBLIC

The only Convention which was signed but not ratified by former Czechoslovakia is Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. The reasons why the Convention was not ratified are unfortunately unknown.

GERMANY

Convention on the jurisdiction of the selected forum in the case of international sales of goods (concluded 15 April 1958),

Convention on International Access to Justice (adopted 25 October 1980, entered into force 1 May 1988),

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (adopted 19 October 1996, entered into force 1 Jan. 2002).

GREECE

Convention of 15 April 1958 on the law governing transfer of title in international sales of goods

Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods

Convention of 24 October 1956 on the law applicable to maintenance obligations towards children

Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children

Convention of 25 October 1980 on International Access to Justice

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

JAPAN

None.

MEXICO

None.

NEW ZEALAND

None.

NORWAY

The Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children has been signed (24-X-1956) but not ratified.

POLAND

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996)

QUÉBEC

None.

TAIWAN

None.

TUNISIA

None.

USA

Hague:

Convention on the Law Applicable to Trusts and on Their Recognition

Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary

Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

VENEZUELA

Hague: None

CIDIP:

Inter-American Convention on domicile of natural persons in private international law (05/08/1979)

Inter-American Convention on Execution of Preventive Measures (05/08/1979)

Inter-American Convention on conflict of laws concerning the adoption of minors (05/24/1984)

Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (05/24/1984)

Inter-American Convention on personality and capacity of juridical persons in private international law (05/24/1984)

Inter-American Convention on Contracts for Carriage of Goods (07/28/1989)

Inter-American Convention on support obligations (07/15/1989)

Inter-American Convention on International Traffic in Minors. (03/18/1994)

CONFLICTS CONVENTIONS AND DOMESTIC LAW- A SUBSTANTIVE COMPARISON

Is the text of The Hague and CIDIP Conventions similar to norms in your domestic legislation?

Please explain similarities and differences

HAS BEING A PARTY TO ANY OF THE CONVENTIONS HAD AN IMPACT ON DOMESTIC LAW?

ARGENTINA

Argentina does not have an International Private Law Statute or Act. The specific international private law rules are spread all over the national legislation.

However, there have been many attempts to create an International Private Law Code. The last one was presented to Congress for approval in 2003[37]. This project was highly influenced by the Conventions on International Private Law, which Argentina has ratified. An example of this is that the articles relating to the international abduction of children refer expressly to the solutions stated by the Hague Convention on the Civil Aspects of International Abduction of Children. Another example of the influence of the international instruments on the draft is that in the section of Contracts, the Statute adopts the principle of the party autonomy following the Hague Convention on the Law Applicable to Contracts of International Sale of Goods (1986).

The Hague Convention on the Civil Aspects of International Abduction of Children, as well as the Inter-American Convention on International Traffic of Minors, have had an impact on domestic law by introducing the institution of the Central Authorities and shortening the delay for international restitution of abducted children.

Another example of the impact of international conventions on domestic law is, according to many authors, that the ratification of the the Inter-American Convention on General Rules of International Private Law caused the organic derogation of article 13 of the Civil Code. This article considers foreign law to be a fact and therefore establishes the need for the parties´ allegation and proof. The Inter-American Convention on General Rules of International Private Law in its article 2 states that judges will apply foreign law without any requirement. Since international conventions have in Argentina – according to the Constitution - precedence over domestic law, it has been interpreted that the CIDIP Convention amended article 13 of the Civil Code.

[37] See Apendix, WEINBERG de ROCA, Inés, *International Private Law,* Lexis Nexis, 3rd Edition, Buenos Aires, 2004. Note that Professor Inés Weinberg de Roca was an active participant of the commission which elaborated the said project.

International Conventions are implemented – after the process of approval by the Congress- by the publication of the Statute of Approval, including the text of the Convention in question, in the Official Gazette. At that time, the Convention enters into force and becomes part of the legislation.

CANADA

As it will be further explained in this report, the Canadian Constitution states, with a few exceptions, that private law is a matter under the legislative authority of the provinces. Hence, every time Canada becomes a party of an international Convention of international private law, the provinces pass implementing legislation and the Conventions become part of the domestic laws of the provinces. A couple of examples of this are as follows;

Hague Convention on the Civil Aspects of International Child Abduction (1980)

The adoption of the Hague Convention effected a real improvement in the Canadian law, although it has been suggested that the case law was already tending towards the position taken by the Convention, namely, a presumption in favour of returning a child removed from the foreign jurisdiction by one parent against the wishes of the other.

Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

The Convention entered into force in Canada on April 1st 1997 in the five provinces which were the first to enact implementing legislation, i.e. British Columbia, Prince Edward Island, Manitoba, New Brunswick and Saskatchewan. On November 1st 1997, the Convention entered into force for Alberta; on August 1st 1998 for the Yukon; on October 1st 1999 for Nova Scotia; on December 1st 1999 for Ontario; the Northwest Territories on April 1st 2000, Nunavut on September 1st 2001 and Newfoundland on December 1st 2003.[38] [39] With one exception the implementing legislation in each of these provinces and territories follows, albeit with variations, the Uniform Intercountry Adoption (Hague Convention) Act proposed by the

[39] *Activities and Priorities of the Department of Justice in Private International Law*, Report of the Department of Justice Canada to the Uniform Law Conference of Canada, Civil Section (Aug. 2008) (online: www.ulcc.ca/en/poam2/ZDOJ Annual Report on Activities.pdf) at ¶ 182.

Uniform Law Conference of Canada in 1993. This statute declares that when the Convention enters into force in respect of the province, the Convention is law in the enacting jurisdiction; in other words, the terms of the Convention are incorporated into the local law.[40]

Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)

Canada became a party to this Convention by accession, effective 1988. Unlike the other Hague Conventions, it has been implemented in the Common Law Canadian jurisdictions, not by statute but by delegated legislation, namely, the rules of court (also called rules of civil procedure in some provinces). The rules of court are, in effect, regulations made under the statute that governs the existence and operation of the court in question. The Convention's provisions have been given effect in this way in the rules of the courts of every common law jurisdiction of Canada, as well as those of the Federal Courts and the Tax Court of Canada.

One major difference in the implementing rules is that some provinces' rules require compliance with the Convention if the defendant is to be served in a contracting state, and other provinces' rules do not. The latter provinces also permit service in any non-Convention manner, usually personal service that would be a valid method of service within the province. Compliance with the Convention, when serving a person in a contracting state, is mandatory in the rules of the Federal Court, the (federal) Tax Court, New Brunswick, Nova Scotia, and Ontario. The other jurisdictions allow, as an alternative, other methods of service that comply with the province's own rules.

Hague Convention on the Law Applicable to Trusts and on Their Recognition (1985)

This is the only one of the four Hague Conventions to which Canada is a party that has not been implemented in all the common law jurisdictions of Canada, with Ontario, the Northwest Territories, Nunavut and Yukon not yet having passed it into law. Since private international law cases involving trusts are relatively rare in Canada, adoption of the Convention by these jurisdictions may not have been seen as a high priority, although it does provide some certainty in an underdeveloped area of law.

[40] The Model Act with commentary is available online: Uniform Law Conference of Canada, http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1i1. Some statutes, like Ontario's, add provisions with respect to the specific steps to be taken in Ontario in respect of an intercountry adoption: *Intercountry Adoption Act, 1998*, S.O. 1998, c. 29, s. 5 ff.

The implementing legislation in the jurisdictions that have given effect to the Convention follows a Model Act put forward by the Uniform Law Conference.[41] The Model Act expressly excludes cases in which the conflict is between the laws of two or more Canadian jurisdictions.[42] An interesting feature of the Convention, which is reflected in the Model Act, is the right of a State party to make the reservations permitted by the Convention separately for each territorial unit within the State to which the Convention is declared to apply.[43] The three potential reservations relate to the right to give effect, irrespective of the law that governs a trust, to rules of law of a closely connected foreign State that "must be applied even to international situations, irrespective of rules of the conflict of laws" (in other words, laws of immediate application or mandatory rules);[44] the obligation to recognize a trust if it is governed by the law of a non-contracting state;[45] and the obligation to apply the convention to trusts created before the date on which the Convention enters into force for the enacting jurisdiction. Only Alberta has made the first reservation.[46] No province has made the second reservation. Alberta, Manitoba, New Brunswick and Saskatchewan have made the third reservation.[47]

The Model Act also contemplates that enacting jurisdictions may wish to extend the scope of the Convention's provisions beyond the "trusts created voluntarily and evidenced in writing" to which the Convention is expressly restricted.[48] The Act contains an optional provision that extends the Convention to "trusts declared by judicial decisions including constructive trusts and resulting trusts",[49] although such a trust or a several aspect of such a trust need not be recognized or given effect if the court of the enacting jurisdiction "is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect".[50]

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[41] *Uniform International Trusts Act* (1989).

[42] *Ibid.*, s. 2(2).

[43] Reservations are permitted to art.16, 21 and 22, and art. 26 expressly allow a reservation to be expressed on each occasion that a State party makes a declaration under art. 29 that the Convention extends to one of its territorial units.

[44] Art. 16, para. 2.

[45] Art. 21.

[46] *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, s. 1(4).

[47] *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, s. 1(5); *International Trusts Act*, C.C.S.M., c. T165, s. 3; *International Trusts Act*, S.N.B. 1988, c. I-12.3, s. 5; *Trusts Convention Implementation Act*, S.S. 1994, c. T-23.1, s. 4.

[48] Art. 3.

[49] S. 3(1).

[50] S. 3(2).

CROATIA

The most evident example of the impact that the status of the party to the 1961 Hague Convention had on domestic Croatian law concerns the form of the will. The former Yugoslavia took over the exact provision on the applicable laws into its domestic legislation, which is still in force in Croatia, as Article 31 of the Croatian Private International Law Act. This Article adds the lex fori as an additional governing law. The same connecting factor is used for the issue of formal validity of marriage, although Croatia is not a party to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

Certain convergence is present in the field of the sales contracts, where the the later adopted articles 7 and 8 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods provide for the system of chosen law, characteristic performance and escape clause, similarly to the Croatian PIL Act.

Similarities between the Croatian conflicts rules and the Hague Convention rules are few in the field of family law. The reason for that should be sought in the domination of nationality as a connecting factor for these matters in Croatian law, as opposed to habitual residence as adopted in the Hague Conventions.

Certain Hague Conventions rules on the basic institutes of private international law also influenced Croatian domestic norms. Thus, the public policy clause in the Obligations and In Rem Relations in Air Traffic Act in 1998 introduced the phrase “manifestly contrary to the public policy into the Croatian domestic legislation.

Croatian scholars have also shown enthusiasm for copying conflicts rules form the Hague Convention into the Croatian domestic legislation, but not many of these calls were followed by the legislator[51].

CZECH REPUBLIC

Czech Private International Law Act

Czech private international law is regulated primarily by the Act Concerning Private International Law and the Rules of Procedure Relating thereto of

[51] On the issue of similarities and differences between the Hague Convention tules and Craotian norms see more in the Craotian National Report.

1963[52] (hereinafter the Czech Private International Law Act or PILA). The essential basis for this Act was the so-called Vienna Draft of Private International Law of 1913, written by the Austrian professor *Walker*. That Draft created the foundations of private international law in several Central European countries.[53] As Austria, and later Czechoslovakia, independent since 1918, actively participated in the "old" Hague conventions (adopted before 1945), the regulation of private international law corresponds, in principle, to the Hague traditions.

In the mid 1960s when it was passed, the Czech (Czechoslovak) Private International Law Act was considered to be a modern, progressive regulation of private international law worldwide. Moreover, the Czechoslovak PILA, as early as in 1963, drew the rules of conflict of laws and procedural law up in one piece of legislation. This new, modern solution, going beyond the concept of the original Vienna Draft of Private International Law of 1913, proved to be efficient. This means that the Czech Private International Law Act includes not only the conflict of law rules but also rules on international civil procedure. This interconnection can also be found in some Hague conventions, in particular in the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

In general, Czech legislation may be considered as a traditional private international law regulation,[54] essentially corresponding to Hague conventions drafted at the time when the Czechoslovak Private International Law Act was adopted.

Therefore it is obvious that the Czech Private International Law Act cannot contain new progressive solutions proposed by the Hague Conventions agreed upon after the Private International Law Act had been passed in 1963, such as the Hague Convention of 14 March 1978 on the Law Applicable to Agency, whose regulation of the conflict of rules differs from the provisions of Section 10 (2) of the Czech Private International Law Act.

The Hague traditions in Czech law – Czech Private International Law Act of 1963

[52] The Act Concerning Private International Law and the Rules of Procedure Relating Thereto No. 97/1963 Coll. (Collection of Laws), as amended.

[53] *F. Mänhart*, Die Kodifikation des österreichischen Internationalen Privatrechts, Schriften zum Internationalen Recht, Vol. 10 (Berlin, Duncker & Humblot, 1978), 149.

[54] In English see *M. Pauknerová*, Private International Law, Czech Republic, International Encyclopaedia of Laws, Kluwer Law International 2002.

As previously mentioned, Czech law essentially corresponds to the traditional Hague Conventions, having been adopted before the Czech Private International Law Act was passed in 1963. It should be noted in this context that the provisions of the Hague Convention of 15 April 1958 on the law governing transfer of title in international sales of goods, which was not ratified by the Czech Republic[55], were incorporated into the Private International Law Act of 1963 (Section 12 Czech PILA). Section 12 of the Czech PILA relates to the law applicable to movable property regarding the relations between the parties of the contract.

The Czech Private International Law Act of 1963 was only partially amended after the political changes and the return of the Czech Republic to democracy ("Velvet revolution" in 1989) and after the splitting of Czechoslovakia into two states – Czech Republic and Slovakia in 1993.[56] The only major exceptions worth mentioning are those amendments of Private International Law Act passed in connection with the accession of the Czech Republic to the European Union; the amendments implemented EC Directives regulating the conflict of laws rules.

Special provisions of the Private International law Act concerning the recognition and enforcement of certain foreign decisions (see Part II, International procedural law, Division 4, Sections 68a-68c Czech PILA) were also adopted. The provisions of that Division apply to proceedings regarding the recognition and enforcement of foreign decisions, other public documents and judicial settlement (hereinafter referred to as "decisions"), namely in proceedings governed by an EC regulation or by an international treaty officially published in the Collection of International Treaties, to the ratification of which the Parliament has consented and by which the Czech Republic is bound.[57] These provisions relate not only to EC Regulations but also to the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, see Article 26.

[55] The Convention was only ratified by Italy and never entered into force.

[56] See in particular the amendments as to the validity of marriage of Czech citizens which took place abroad, and as to the changed structure of Czech judicial organs, comp. Acts No. 234/1992 Coll., No. 264/1992 Coll., and No. 125/2002 Coll.

[57] For example, the Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses; the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, declared under Ref. No.: 141/2001 Collection of International Treaties.

The Czech Republic ratified this Convention in 2000, before its accession to the European Union. The Private International Law Act amendment introduced the special procedure on declaration of enforceability of foreign decisions, hitherto unknown to Czech law (Section 68a Czech PILA).

RECODIFICATION OF CZECH PRIVATE INTERNATIONAL LAW

Recently, a new Private International Law Act has been prepared within the complex recodification (restatement) of Czech private law.[58] One of crucial questions which is currently under discussion in Czech private international law is the question of establishing fundamental connecting factors in personal, family and succession law. In other words, one of the main issues now is that of the nationality factor versus the habitual residence factor. The new trend concerning the replacement of the traditional connecting factor of nationality by that of habitual residence is a general trend in private international law and, regarding the Czech draft, it affects both conflict rules and rules of jurisdiction. Apparently, after the latest negotiations, it seems that the idea of habitual residence will probably be put through in future Czech legislation. I think that we can feel here the influence not only of the recent European private international law, but also of modern Hague Conventions. In particular, the Hague Convention of 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children is reflected here to a certain extent in the determination of the applicable law in some family matters, especially those dealing with obligations with respect to a child, as well as for the exercise of parental responsibility. The opinion of William Duncan that "the dominance of habitual residence over nationality has been fully realised"[59] has been thus confirmed. It applies not only to the Hague Conventions on international family law, but also to the future Czech private international law where it will probably go even beyond the family law issues. I personally consider this new development to be positive. It would provide uniform or similar solutions in various states and

[58] The new Czech Private International Law Act draft has only recently been published, see (in Czech) <http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/obecna-vychodiska-navrhu-obchodniho-zakoniku.html>.

[59] See *W. Duncan*, Nationality and the protection of children across frontiers, and the example of intercountry adoption, Yearbook of Private International Law, Vol. 8 (2006), 79.

the jurisdiction rules based on a habitual residence can eliminate, at least partially, the forum shopping in these fields. On the other hand, we may expect that such conflict rules' solutions will strengthen the application of lex fori which may be felt as a positive contribution for the legal practice.

THE LATEST AMENDMENT OF THE CZECH CIVIL PROCEDURE CODE

Recently, the amendment of the Czech Civil Procedure Code (Czech CCP)[60] entered into force, which, inter alia, introduces new, special provisions for proceedings on the return of a child having been subjected to international child abduction. It is a reaction to some problems connected with the application of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction (sections 193a – 193e Czech CCP).[61] At the same time, the amendment implements the requirements of EC Regulation No. 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Regulation Brussels II bis) into Czech law. This amendment to the Code of Civil Procedure implemented a specific child-return procedure in international cases. For example, there has been established exclusive jurisdiction of one court in the Czech Republic in order to eliminate jurisdiction problems and entrust the cases – which are rare but complicated - to specialised judges; new regulation stipulates the possibility of a preliminary enforcement of judgments, or a review of an appeal is excluded, etc. The main purpose of this amendment is to provide Czech courts with a special child-return regulation in order to use swift proceedings and to make the proceedings as efficient as possible.

The Czech Office for International Legal Protection of Children

The Czech Office for International Legal Protection of Children (hereinafter "the Office") was established by the Act on Socio-Legal Protection of Children.[62] The Office is an authority in charge of the socio-legal protection of children and, since 1st April 2000, it has officially been one of public authorities providing socio-legal protection. The Office is the only Competent Authority in the Czech Republic authorized to ensure and

[60] Act No. 99/1963 Coll., Civil Procedure Code, as amended (hereinafter Czech CCP).
[61] Act No. 295/2008 Coll., amending the Act No. 99/1963 Coll., Civil Procedure Code.
[62] Act No. 359/1999 Coll., on Socio-Legal Protection of Children.

provide legal protection (mainly in matters concerning the recovery of maintenance) to minor children and in exceptional cases to adult persons in cross-border relations. It ensures direct implementation of several international conventions, among others, the following Hague Conventions:

Hague Convention concerning the recognition and enforcement of decisions relating to maintenance obligations towards children,

Hague Convention on the civil aspects of international child abduction,

Hague Convention on protection of children and co-operation in respect of intercountry adoption, and

Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

The Hague Conventions specify priorities and essential tasks of the Office in three basic areas, namely, the recovery of maintenance from abroad, international child abductions and international child adoptions. The Office has been designated the Central Authority of the Czech Republic under Article 6 of the Hague Convention on international child abduction, the Central Authority of the Czech Republic under Article 6 of the Convention on the protection of children and co-operation in respect of intercountry adoption; furthermore, the Office provides legal aid and counselling in the field of recovery of maintenance from abroad, international child abductions and international child adoptions.

GERMANY

Originally, in status matters and family law the German codification followed the nationality principle. With the change of The Hague approach and reform efforts within the German system there is now also a move towards the principle of habitual residence. Today the main personal connecting factors employed by the German system on conflict of laws are nationality and habitual residence, while domicile is only relevant in the rules on international jurisdiction. This change from a connection in accord with the principle of nationality, to a system based more and more on a connection in accord with the principle of habitual residence, has occurred in family law, mainly for mixed marriages, where there is no common nationality of the spouses (see Art. 14 para. 1 Introductory Act).

German conflict of laws rules also deal with States with a multiple legal system. Here, the approach is similar to that of the Hague Conventions. One first looks to the foreign legal system to determine which law is applicable and subsequently only,inquires as to the closest connection as necessary (Art. 4 para. 3 Introductory Act). In the public policy clause of Art 6 German Introductory Act, the word "manifestly" incompatible with German public policy is used as in the Hague Conventions. German courts tend to refrain from invoking this clause.

During the reform of German Private International Law in 1986, the legislator decided that unnecessary contradictions between the national codification and the existing conventions should be avoided. Moreover, the legislator also wanted to create a comprehensive national statute and incorporate existing German conflicts law. Therefore, some treaties were incorporated into the German codification[63]. The Convention on the Law Applicable to Maintenance Obligations of 1973 was transformed into Art 18 of the German Introductory Act. Thus, as a general rule, the obligation to furnish maintenance is governed by the substantive rules of the law of that country in which the claimant has his habitual residence. The exemptions to this rule, particularly the so-called "cascade" allowing the application of the most favourable law to the maintenance claim, were also introduced into Art 18 of the German Introductory Act which is of universal application. Consequently, the German legislation is completely in line with the Hague Convention of 1973.

The Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 1961 was incorporated as Art 26 into the German Introductory Act. The form of testamentary dispositions, even if made by two or more persons in one document, shall be valid if it complies with one of a list of alternatives, such as the lex loci actus, lex rei sitae, and also the law of the country of which the testator was a citizen. Therefore, the German legislation in this field is also completely consistent with the Hague Convention of 1961.

One has to admit that the incorporation of the Conventions has been accomplished without any translation mistakes or errors in legal technique. However, the fact that these provisions form a part of the national statute creates a continual temptation to look for solutions to general private international law questions in the national codification rather than in the

[63] See *Siehr,* Codification of private international law in the Federal Republic of Germany, Neth. Int. L. Rev. 31 (1984) 92 et seq.

Convention. This has happened, for example, in cases of dual nationality[64]. German private international law states that where one of the dual nationalities is German then it should prevail (Art. 5 para. 1 sent. 2 Introductory Act). The correct solution is, however, that under the Hague Conventions, the closest connection should be determinative and that German nationality is not to assume priority[65].

The legal relationship between parent and child is governed by the law of the country in which the child has his habitual residence (Art. 21 German Introductory Act). This solution for parent child relationships was strongly influenced by the tendency of the Hague Conventions to use the concept of habitual residence in family law and also in status matters[66]. For parentage, habitual residence is alternatively used as a connecting factor, along with others, in order to favour a certain result by giving a choice between more than one single governing law (Art. 20 Introductory Act).

Divergent solutions are mainly being found in areas where the respective Hague Conventions have not been signed and ratified. The law of matrimonial property is governed by the law which governs the effects of marriage in general (Art. 15 para. 1 in conjuncture with Art. 14 Introductory Act). Contrary to the Hague Convention of 1978, which was not signed by Germany, it is not the habitual residence of the spouses, but their common nationality which is the starting point. To a certain extent, party autonomy is recognised not only by the Hague Convention of 1978, but also by the Introductory Act. Spouses may choose the law of the country in which they are located as the law for their matrimonial regime, e.g., for immovables (Art. 15 para. 2 no. 3 Introductory Act).

In the field of legal representation, one finds only case law which follows the principle of the place of use of authorization. The concept of a link between underlying relationship and authority to represent is not followed in German private international law.

However, the consistency of a solution with one of the Hague Conventions is often a strong argument for reform. On the other hand, one has to admit that European Regulations and Directives which are currently existing or in preparation are more influential.

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64 See e.g., Court of Appeal (Kammergericht) Berlin 7 Sept. 2001, FamRZ 2002, 1057.
65 See *Andrae,* Internationales Familienrecht (2nd ed. 2006) § 8 No. 50.
66 See *Siehr* (supra note 6) 406 et seq.

GREECE

Greece is not a party of CIDIP Conventions.

The rules of the Hague Conventions differ in several ways from domestic law.

1. Form of wills

A. Thus, in the form of wills, the Hague Convention, adopts the principle of favor validitatis of wills by establishing a number of applicable laws into this matter so that the will is valid as to its form if it conforms one of these laws. In accordance with Article 11 cc Greek (which indicates the applicable law to the form of legal acts and which also applied to the form of wills before the entry into force of the Hague Convention), "A legal act is valid in terms of its form, if it complies with the law, which governs the content [the applicable law to inheritance reports according to Article 28 cc Greek, is the law of the nationality the deceased had at the time of his death] according to the law of the place where it is performed [lex loci actus] according to the national law of all the parties [which means, in the case of wills, the national law of the testator when he drafted the will]. " To these laws (the law of the place where the testator has prepared the will and the law of the nationality of the testator), which are also contained thereby, the Convention adds the law of the place where the testator had his domicile or habitual residence or for buildings, the law of the place of their location (Article 1).

B. The provisions that prevent some people from using certain types of wills (e.g. the holograph will or testament mystique), because of their age or their inability to read manuscripts, had raised in Greece a problem of qualification. Some argue that these are impediments related to the ability to test while others sustain they relate to the form of wills. Article 5, 1st sentence, of the Convention solves this problem by providing that "For the purposes of the present Convention, any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form”

2. Legalization for Foreign Public Documents

The authenticity of a public act abroad which will have effect in Greek territory is normally provided by certifying the veracity of a whole series of signatures on the document. The Convention is sufficient in its scope, the only use of an apostille provided by and issued by the competent authority of the State which issued the document.

3. Service of documents abroad

A. The Greek Code of Civil Procedure provides in Article 134, that the service abroad of judicial documents to persons who reside or have their headquarters abroad is, in principle, before the prosecutor of the Tribunal where the action will be instituted, or to whom the case is pending, or who has made the judgement that must be served. The prosecutor must send, without delay, the received document to the Foreign Minister, who is obliged to transmit it to its addressee. Article 136 of the Code clarifies that the service is considered done when the document is submitted to the mentioned authority, i.e. the prosecutor, regardless of the time the document is sent to the recipient or the time of its arrival. The service and notification abroad of judicial documents to persons who reside or have their headquarters abroad, can also be done in accordance with the formalities required by the foreign law by the organs that the latter law defines (Article 137 v. proc. civ. Greek). According to Article 143 paragraph 4 of the Code, the service abroad of judicial documents to persons who reside or have their headquarters abroad has to be directed to the lawyer who was appointed according to the law, if such acts involve cases in which the designation was made, even when it comes to decisions or actions that impose a personal activity of the recipient of the service.

B. There is no need here to enumerate the ways of service of judicial documents accepted by the Hague Convention of 15 November 1965 on the service abroad of judicial and extra judicial documents in civil and commercial matters.[67]

C. Just to first mention that the Central Authority under the Convention in Greece is the Ministry of Justice. Secondly, to draw attention to articles

[67] Generally the interpretation of the terms in the Convention "civil and comercial matters" is authonome. However, the Court of Thessaloniki (sentence No. 1312/1991 *Elliniki Dikaiossini 33 (1992)*, p. 1232; sentence No. 3121/1990 *Elliniki Dikaiossini 33,* p. 1228) has said that the law of the forum where the case is presented decides the qualification of civil and commercial of the matter.

15 and 16 of the Convention, which are applied several times by the Greek courts[68], and which are very important because, on one hand, by requiring a real service to the recipient, they are far from the significance -- often fictitious- of Articles 136 and 137 v. proc. CIV. Greek[69]. It is for this reason that the instance is declared inadmissible under article 15 of the Convention, where the service was simply made to the Prosecutor of the Republic and that a certificate (provided by the Convention and) concerning the service was not received[70]; and that, on the other hand, the starting point of the appeal period is the service of the act to the recipient and not the time of notifying the public prosecutor[71]. Finally, it is to be noted that Greece:

-- Has said that the service or official notification will be made only if the document to be served is written or translated into Greek language;

-- Has said that judges of the Hellenic Republic are entitled to decide if all the conditions set by Article 15, paragraph 2, letters (a), (b) and (c) of this Convention are fulfilled, although no certificate recognizing either the service or delivery had been received;

--Has said it is opposed to the methods of service under Article 10, therefore, the Service Abroad of documents by mail and telex no are longer accepted[72].

--Has said it is opposed to the method of service under Article 8, unless the act must be served to resident of the requesting State.

--Has failed to make the declaration under article 16 paragraph 3 of the Convention, namely that the applicant's barred by the defendant resulting from the expiration of the time for appeal is inadmissible if it is formed after the expiry of a period that our country (like any Reporting country) specify in its statement, provided that this period is not less than one year after the judgement.

4. Taking of Evidence Abroad

A. Article 5 C. proc. CIV. Greek, summary contains a provision providing that when a procedural must be carried out abroad, the Greek

[68] See certain cases of Greek jurisprudence in *RHDI* 46 (1993) p. 297-298, in the revue of the Greek Jurisprudence in International Private Law, by V. Kourtis.

[69] Aréopage (Cour de Cassation Greek) No. 423/1993 *Elliniki Dikaiossini* 36 (1995), p. 156.

[70] Aréopage No. 657/1995 *Nomiko Vima* 45 (1997), p. 604-605

[71] Court of Athens No. 4046/1992, *Elliniki Dikaiossini* 34 (1993), p. 1519

[72] *Contra* the jurisprudence mentioned by P. Karaggioulé, "International Private Law in the hellenic jurisprudence", *RHDI* 49 (1996) p. 535

courts have the opportunity to ask it is performed either by the Greek consular authorities or by the competent foreign authorities and that the act of foreign Authority is valid if it complies either with its own legal system or the provisions of Greek law.

B. The Hague Convention on the Taking of Evidence Abroad contains very analytical provisions, but it does not appear that a decision by the Greek courts made under this Convention so far is contained in the various collections and legal journals.

C. It is worth noting that our Country sustains:

(i) that, in accordance with Article 23 of the Convention, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

(ii) that, under Article 18, it will provide the assistance necessary to accomplish acts of instruction as referred to in Articles 15, 16 and 17, provided it is conducted in accordance with the Greek law;

(iii) the request letters must be written in Greek or accompanied by a Greek translation (see Article 4, paragraph 2 of the Convention);

(iv) that judges of the requesting authority of another Contracting State may attend the execution of a rogatory commission, provided that their presence has previously been authorized by the Central Authority of Greece (see Article 8 of the Convention).

5. Recognition of decisions relating to maintenance obligations

A. By law, the regime of recognition and enforcement of decisions relating to maintenance obligations was that of Articles 323 and 905 v. proc. CIV. Greek, except for decisions which fall within the scope of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, or which fall into the scope of the EC Regulation 44 / 2001. Both texts are applied to maintenance obligations, despite the fact that,in principle, they are excluded from their application status and the ability of individuals, matrimonial property regimes, wills and inheritance (see Article 5 paragraph 2 and 27 Conv . Brussels).

B. Pursuant to section 323 c. proc. CIV. Greek, the conditions under which foreign judicial decisions (on contentious jurisdiction) are valid and have the authority of res judicata in the country (in principle without any

other proceedings) are as follows: (1) Whether the foreign decision has the res judicata under the law of the country where it was issued[73]; (2) that the matter was the purview of the courts of the State which is the court which pronounced the judgement; (3) that the defeated party has not been deprived of the right to defence, and, in general, participation in the trial, unless the deprivation took place in accordance with a provision that also applies to nationals of the State of the court which made the decision; (4) that the foreign judgement is not contrary to a Greek court decision rendered in the same case and having the authority of res judicata between the parties for which the decision of foreign court was given (5) that the foreign judgement is not contrary to morality or public order.

C. On the other hand, for the enforcement of a foreign judgement (which is always a decision by the competent Greek court made by Voluntary Jurisdiction), it is required that the above conditions of recognition have been fulfilled. There is no difference as regards to the first of these conditions: the foreign judgement to be enforced, must (rather than produce the res judicata abroad, but) be enforceable according to the law of the country where it was made (Article 905, paragraphs 2-3, c.proc.civ. Greek).

D. The most interesting indirect jurisdiction of foreign jurisdictions has made the decision on alimony. So that the foreign court is considered competent, and to ensure that its decision could be recognized or enforced in Greece (assuming that all other conditions are met), jurisdiction has to be according Greek law, in other words, (in principle) whether the jurisdiction of the place of domicile of the defendant (article 22 vs. proc. civ. Greek), or place of the last common residence of the spouses, or the State of one spouse's nationality, or where they held nationality at the conclusion of marriage,, where the demand for alimony is united with a divorce (or with another marital demand) (combined articles 39 , 612 and 592 c.proc.civ. Greek), or the State whose father or mother or child have nationality in the case of alimony request is united with an application for recognition of the existence of a relationship between parent and child, or with an application for recognition of the existence of parental responsibility (articles 622 and 614 c.proc.civ. Greek combined)[74]. The prevailing view in Greece in doctrine, as in jurisprudence, (but, in my opinion, not the most correct lege

[73] The Areopagus ruled that a Polish decision granting alimony to a child was not to be recognized in Greece, because the child had not been legally represented before the foreign court by his legal representative, and the judgement abroad had not acquired the force of *res judicata* to the child (Case No. 114/1991, *Ephimeris Ellinon Nomikon* 1992, p. 80).

[74] See Arvanitakis, *in* Kerameus/Kondylis/Nikas, *Commentaire par article du Code de procédure civile*, sous l'art. 681B, no 5 (in greek) ; Nikas*, ibid.*, sous l'art. 33, no 1 (in greek)

lata) admits that the alimony can also be brought before the court of the place of domicile of the applicant (Article 33 c.proc.civ. Greek and Greek section 321 cc, combined).

E. The regulation of the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to maintenance obligations are different from those above on several points:

(i) Under Article 4, first paragraph of the Hague Convention, a decision made in a Contracting State shall be recognized or enforced in another Contracting State if it can not be regularly appealed in the State of origin (which could be considered similar to that contained in section 323 c.proc.civ. Greek, and requires that the foreign decision has res judicata under the law the country where it was pronounced), and, in addition, it has been rendered by a competent authority considering Articles 7 or 8. But on this last point things seem quite different, because, if Article 8 of the Convention states that "the authorities of a Contracting State contractor who ruled on the claim to alimony are deemed competent under the Convention if these alimonies are due because of a divorce, separation, annulment or nullity of marriage before an authority of that State recognized as competent in this area, according to the law of the requested State "This, without identification, is close, to some extent, to Greek law. Article 7 of the Convention is a divergence from the law, even more impressive for those who do not adopt the dominant view above under B.5.d): "The authority of the State of origin [we said Article 7 of the Convention] is deemed competent under the Convention: (1) if the debtor or the creditor of alimony has its habitual resident in the State of origin during the proceedings, or (2) if the debtor and the creditor of alimony had the nationality of the State of origin during the proceedings, or (3) if the defendant was subject to the jurisdiction of this authority either expressly or by reflecting on the merits without reservations regarding the competence ".

(ii) "The authority of the requested State is bound by the fact findings on which the authority of the State of origin based its competence" (Article 9 of the Convention). In Greek law, on supports[75], the judge is not bound by those fact findings of the foreign jurisdiction, unless the facts in question are at the same time the basis of the intended action abroad on which status ruled the decision. In the latter case, the control by our authorities would

[75] See Koussoulis, *in* Kerameus/Kondylis/Nikas, *Commentaire par article du Code de procédure civile*, sous l'art. 323, no 6 (in Greek)

constitute an intolerable review of the merits of the judgement abroad, which, as a result, reached the conventional solution.

(iii) Regarding the impediments to the recognition or enforcement established by the Convention (Article 5), we simply note that the manifest incompatibility with the public policy of the State is also included under Greek law; that fraud committed in the procedure, which prevents the recognition, is not specifically included under Greek law but it may be included; whether we have different legal concepts in the reserve of public order, and that the lis pendens before a Greek authority, the first seizure, are not enough for Greek law to deny the recognition of foreign judgement[76]; that the incompatibility of foreign judgement with a decision made between the same parties and on the same subject in Greece, prevents the recognition in Greek law when the foreign judgement has acquired the force of res judicata between the parties for which it was made (the mere fact that it is made is not enough), while the incompatibility with a decision made in a third State abroad, Greek law does not prevent the recognition, even if this decision by the third State meets the conditions necessary for its recognition and its implementation in Greece.

(iv) Under the Convention, "a default judgement is recognized or enforced if the document instituting containing the essential elements of the application has been served to the defaulting party under the law of the State of origin and whether, given the circumstances, this part has had sufficient time to present his defence "(Article 6). This recalls the Greek solution (above, under B.5.b condition No 3), but without the width of the exception provided by the latter.

F. It should be noted here that Greece has reserved the right not to recognize or enforce decisions and conciliation in cases of child support: a) between parents on line collateral (excluding brothers and sisters) and b) between relatives by marriage (Articles 26 and 34 of the Convention).

6. Law applicable to maintenance obligations

A. In the Greek national system of conflict rules, espousal's support obligation was qualified as a personal relationship between spouses[77] and, as such, it was governed by the applicable law designated in accordance with Article 14 cc Greek: the law of the last common nationality of the spouses

[76] Cout of Athens no 11244/1980, *Dike* 1981, pp. 142-143
[77] Aréopage no 705/1974 *Nomiko Vima* 23 [1975], p. 527.

during marriage, provided that at least one spouse still conserves it. Failing such a law, the law of the last common habitual residence of the spouses during the marriage will be applicable; failing that, the law with which the spouses are most closely connected will apply. The same law governs the question of the impact that divorce has on the relationship (personal) between ex-spouses. However, the law that governs divorce in accordance with Article 16 cc Greek (i.e. the law applicable to personal relationships of spouses at the opening of the divorce proceedings) applies to any situation which arises after the divorce as a direct result of it i.e. to the question of whether the spouse who is to be blamed for the dissolution of marriage should or should not give alimony to the innocent spouse.[78]

B. Regarding the maintenance obligation between parents and children, conflict rules that govern the relationship between parents and children are applicable, which means that for children born during marriage, the law of the last common nationality of the child and its parents would apply; failing that, the law of their last common habitual residence; failing that, the national law of the Child (Article 18 cc Greek). For children born outside the marriage, it should be distinguished that the obligation between a child and his mother is contemplated in article 19 cc Greek, which established that the applicable law is the one of the last common nationality of the child and his mother. Failing that, the law of their last common habitual residence would apply; failing that, the national law of the mother (Article 19 cc Greek). The obligation between a child born outside the marriage and his father, according to article 20 cc Greek, is governed by the law of the last common nationality of the child and the father. Failing that, the law of their last common habitual residence; failing that, the national law of the father (Article 20 cc Greek).

C. The Hague Convention of 2 October 1973 on the law applicable to maintenance obligations introduced largely different rules: Primo loco "the internal law of the habitual residence of the maintenance creditor governs the obligations referred to in its articles; In case of a change of the creditor's habitual residence, the internal law of the new habitual residence will apply from when the change has occurred "(Article 4), or if the creditor can not obtain alimony from the debtor under this law, then it would be the common national law which applies (Article 5), and when the creditor can not get

[78] See G. Maridakis, *Droit international privé*, II (2nde éd., 1968), pp. 204-205 (in Greek) ; A. Grammatikaki - Alexiou / Z. Papassiopi – Passia / Ev. Vassilakakis, *Droit international privé* (3e éd., 2002), p. 207 (in Greek); Sp. Vrellis, *Droit international privé* (3e éd. 2008), pp. 319-320 (in Greek).

alimony from the debtor under this last law, then the internal the law of the authority before whom the proceedings are being taken is the law which applies tertio loco (Article 6). "Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations .The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled" (Article 8). " In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence." (Article 7) "The right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject" (Article 9).

D. Greece has reserved, in accordance with Article 14 of the Convention, the right not to apply the Convention to maintenance obligations: 1) between parents online collateral (excluding brothers and sisters), 2) between relatives by law; Or 3) between spouses whose marriage was declared null or was declared void by the decision of divorce, judicial separation, revocation, or cancellation of the marriage was rendered by default in a State where the defeated party does not have his habitual residence.

7. Child Abduction

A. In Greek law, disputes concerning the exercise of parental responsibility during marriage or after divorce or annulment of marriage, or in the case of children born outside the marriage, are subject to a specific procedure (Article 681B-681C v. proc.civ. Greek).

B. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, widely adopted throughout the world, deals with an extremely important issue. The rules are well known to be exposed here, even to be summarised. It would be enough to note that, under Article 42 of the Convention, Greece has stated (a) that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice, and (b) that it opposes the use by Article 24 of the French language on any

application, communication or other document sent to its Central Authority (Ministry of Justice).

C. Nevertheless, in relation to the member States of the European Union that have adopted the Hague Convention, the Brussels IIbis Regulation (EC Regulation 2201/2003), which applies to the scope of these Regulations, also covers issues which are under the scope of the Convention (see articles 10-11, 42 and 60 of the Regulations).

JAPAN

There are some Hague Conventions whose texts are similar to domestic norms in Japan, in particular

- Articles 3, 9 and 13 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; and

- Articles 4 and 5 of the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions.

There are no CIDIP Conventions whose texts are similar to domestic norms in Japan.

Domestic conflicts norms in Japan

Most of the domestic conflicts norms in Japan are provided in the "Act on General Rules for Application of Laws".

Matrimonial property regime

Article 26(2)[79] of the Act on matrimonial property regimes provides that the regime shall be governed by the law that the spouses select from the

[79] Article 26 of the Act reads: "(1) The preceding Article shall apply with necessary modifications (mutatis mutandis) to the parties' matrimonial property regime.

(2) However, that regime shall be governed by the law that the spouses select from among the following laws where such selection is made in a writing signed and dated by the spouses. The selection has only prospective effect.

(i) The law of the country of either spouse's nationality;

(ii) The law of the place of either spouse's habitual residence; or

(iii) Regarding immovables, the law of the place where they are situated.

(3) A matrimonial property regime governed by a foreign law shall not be asserted against third parties acting in good faith (bona fides) insofar as it concerns juristic acts performed in Japan or property situated in Japan. In the case where a regime shall not be applied, the matrimonial property regime created by Japanese law shall apply to the relations with such third parties.

(4) Notwithstanding the preceding paragraph, an ante- or pre-nuptial agreement concerning matrimonial property made under a foreign law according to paragraphs 1 and 2 shall be binding on any third party where the agreement is registered in Japan."

available laws, such as that of either spouse's nationality, habitual residence or the place where immovables are situated. Such a selection is made in writing, and signed and dated by the spouses. This provision is very similar to articles 3 and 9 of the Hague Convention on matrimonial property regimes. Article 26(3) and (4) of the Act inspired by article 9 of the Convention provides that in both cases where a matrimonial property regime under a foreign law shall not be asserted against third parties, and the cases where a ante-nuptial or pre-nuptial agreement made under a foreign law shall bind on any third party.

Article 26(1) of the Act provides the application of article 25[80] with necessary modifications (mutatis mutandis). Firstly with reference to the common national law of the spouses, secondly to the law of common habitual residence, and lastly to the law being most closely connected with the spouses if the spouses have not select the applicable law. This provision is slightly different from articles 4 and 5 of the Convention.

Adoption

Article 31[81] of the Act provides that adoption shall be governed by the national law of the adoptive parents, though article 4(1) of the Hague Convention on adoption provides that the authorities who have jurisdiction shall apply their internal law (forum law) to the conditions governing an adoption. According to article 3(1) of the Convention, the jurisdiction is vested in the authorities of the State either where the adopter habitually resides or of which the adopter is a national, so the applicable law shall be either the law of habitual residence of the national law of the adopter. This is the deference between the Act in Japan and the Convention.

In contrast, both article 31 of the Act and article 5(1) of the Convention require the application of the national law of the child relating to consents

[80] Article 25 of the Act on effects of marriage reads: "Where the national law of the spouses is the same, the effects of the marriage shall be governed by that national law. Where that is not the case but where the law of the spouses' place of habitual residence is the same, that law shall govern. Where none of these cases apply, the effects of the marriage shall be governed by the law of the place with which the spouses are most closely connected."

[81] Article 31 of the Act reads: "(1) Adoption shall be governed by the national law of the adoptive parents at the time of the adoption. Where the national law of the adopted child requires for adoption the agreement or consent of the adopted child or a third party, or the approval or any other decision by a public authority, this requirement must also be satisfied.

(2) Termination of the relationship between an adopted child and his or her natural family (relatives by consanguinity) and repudiation of an adoption shall be governed by the law designated in the first sentence of the preceding paragraph."

and consultations, aswell as those with respect to an adopter, his family or his or her spouse.

The fact that Japan is a Party to a Convention has had an impact on domestic law.

Firstly, the self-executive provisions of the Convention to which Japan is a Party shall be directly applied by the domestic courts because those provisions are considered to be one of domestic legal sources and have the same effects as domestic law.

Secondly, many relevant domestic statutes shall be modified in order to be consistent with the Convention when Japan becomes a Party to it.

Lastly, the texts of the Conventions to which Japan is a Party shall be taken into consideration when any new relevant statutes are adopted.

MEXICO

Mexico, unlike the majority of Latin American countries, went through several stages in its conflict system. Nevertheless, on the occasion of its economic opening in 1986, a legal opening appeared that began in 1987. Given the rapidity with which Mexico had to adapt its legal system to the change, one of the methods used was the ratification of international conventions in the matter of the Private International Law (DIPr) and, in the first stage, the ratification of conventions in the matter of Conflict of Laws approved in Latin American, concretely by the Specialized Inter-American Conference on DIPr. Alongside this, several of the dispositions contained in these Conventions were also incorporated in its national legal system.

In Mexico three stages in the matter of DIPr can be distinguished. The first one began at the movement of Independence, a time during which several dispositions of permissive character and assimilation from the foreigners to the Country were issued. With the Civil Code of 1870, that attitude of opening with respect to the foreigners turned into the reception of conflict norms of French origin, mainly the ones contained in the Napoleonic Code that established a statutory system based on the nationality of the people as the connecting point in determining the personal law. This system was reproduced in the Civil Code of 1884 and remained effective until 1932, a date when the second stage began. By a pure nationalistic spirit, a product of the revolutionary movement, the new Civil Code for the Federal District (CCDF) of 1932 modified the system of effective DIPr during 62 years, and

turned it into a system of absolute territorialism. Such a system was also adopted by the majority of the civil codes of each State of the Republic.

The third stage began on January 7 1988, with the modifications to the CCDF, as well as to the codes of civil procedures for the Federal District and the federal. In this stage the reception of International Conventions in Conflict Matter was the most important development. The first reception that the Mexican legal system had, originating in dispositions of a foreign conflict standardisation, was in Art. 121 of the Constitution of 1917, where a system of conflict of laws for the internal regulation of the conflicts between the states of the Federation was settled. This device was literally copied from the Art. 4° of the Constitution of the United States of America.

As of 1932, a system of absolute territorialism was settled with the CCDF; nevertheless, from its beginning, that system had exceptions In the CCDF itself, some rules of conflict in the matter of regulation on form of acts persisted, and execution of these and testaments were executed in a foreign country. The General Law of Titles and Operations of Credit, also issued in 1932, contains a chapter of conflict rules. In 1963 the Law of Marine Navigation and Commerce was published (abolished in January of 1994) and in its Art 3°, it established an interesting system of DIPr.

However, the then Mexican Institute of DIPr, now Academy, considered that Mexico could not be kept out of the current international trade, and promoted that the country took part in the Inter-American Specialized Conference on DIPr (CIDIP) and thus it participated in the CIDIP-I in 1975. The participation of Mexico in that conference was due to the impulse received from the Secretariat of Foreign Relations.

In 1977, the Independent National University of Mexico published the work; "International straight private, notes on the territorialism principle and the system of conflicts in Mexican Law", in which, after criticizing the prevailing territorialist system, it proposed a first draft of law on dispositions of private international law which would be added to the Civil Code for the Federal District, based, mainly on international instruments like the Inter-American Conventions and specially from The Hague Conference .

In 1978, the House of Representatives constituted the Commission of Jurists in order to prepare a first draft of a Civil Code for the Federal District. Several of the proposals formulated in the first draft of laws on dispositions in DIPr and the work mentioned at the end of the preceding paragraph, were incorporated in the first draft published in 1978 by the House of Representatives, in the first volume of "Documents of work for the study of

possible reforms to the Civil Code for the Federal District on subjects of the common order, and for all the Republic, on subjects of Federal order". In this document it can be appreciated that the reception of conflict rules derives from the Inter-American Conventions and were also ratified by Mexico in 1978. These were conventions that Mexico had negotiated three years before during the celebration of the CIDIP-I in Panama.

In 1984, the CIDIP-III in La Paz, Bolivia, occurred with the active participation of Mexico. Four Conventions were approved of which Mexico ratified three. By 1985, nine national seminaries had already occurred and a great part of its memories had been published and professors of 20 universities of the country had regularly attended. In that year the president of the Academy proposed the preparation of four modification projects to several members of the same institution, with the aim of discussing them during the 1986 seminary. In these projects the conflict dispositions derived from the Inter-American Conventions were included.

The subjects on which the projects were prepared were: international judicial cooperation, execution of judicial decisions, labour law and civil law. While preparing these projects they mainly considered the norms derived from the Conventions ratified by Mexico.

The Secretary of Interior elaborated a project of dispositions in 1987 that would replace the Commercial Code in the regulation of arbitration matter. It was based on UNCITRAL's Model Law on international commercial arbitration, but the project did not prosper. Nevertheless, the project was approved the following year and published in the Official Gazette of the Federation on January 4,1989 and soon was replaced by an even better project in 1993. Indeed, these dispositions, that conformed with the Fourth Title of the Fifth Book of the Commercial Code, were replaced in 1993 by the project that prepared the Legal Consultancy of the Secretary of Foreign Relations with the participation of the Secretary of Commerce and that was based, as mentioned, on the UNCITRAL Model Law.

NEW ZEALAND

The Hague Conventions implemented in New Zealand are consistent with norms in our domestic legislation. To this end, the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents 1961 is implemented through s 145 of the Evidence Act 2006. Similarly, the Hague Convention on the Taking of Evidence Abroad in Civil and

Commercial Matters 1970 is implemented through s 182 of the Evidence Act 2006. The Adoption (Intercountry) Act 1997 implements the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993 and reproduces the Convention in Schedule 1 of the Act. The Hague Convention on the Civil Aspects of International Child Abduction 1980 is implemented through the Child Care Act 2004, which incorporates the provisions of the Convention within the body of the Act and also reproduces the Convention in Schedule 1 of the Act.

In regard to international child abduction, the Convention has influenced the approach of New Zealand Courts in non-Convention cases. The Courts are prepared to return children wrongfully abducted here from originating non-Convention countries. The following are expressions of the sentiment to attain parity across Convention and non-Convention cases:

Lynch v Lynch [1992] NZFLR 523, 524: "… put into effect what the Act [implementing the Convention] intends to the greatest possible degree."

Lehartel v Lehartel [1993] 1 NZLR 578, 583: "… have regard to the principles of the convention as a factor to take into account in deciding how the Court should exercise its discretion" and "[w]here it is consistent with the welfare of the child as the paramount consideration, this Court should act in a way that will discourage the abduction of children across national borders" and avoid "possibility of inconsistent orders in the two countries." (586)

Jayamohan v Jayamohan [1995] NZFLR 913, 921: "Section 4 has been amended (by s 2(1) of the Guardianship Amendment Act 1994) to put the matter beyond any doubt in future Convention cases. In my view in non-Convention cases the Court should act by analogy. After all, they are only non-Convention cases because the other country involved has not committed itself to a now internationally accepted practice. But New Zealand most certainly has."

NORWAY

Norwegian International Private Law (IPL) is, to a large extent, based on customary law. Some Norwegian statutes include certain IPL rules, and Norway has ratified a number of Hague Conventions and some Nordic Conventions on IPL. In the case of Hague Conventions that are not implemented in Norwegian legislation, Norwegian IPL will often have no legislation on the issues involved. This means that there are few norms in

domestic legislation that are either similar or dissimilar to the Hague Conventions. I will therefore take the liberty of explaining some rules of customary law and their similarities and dissimilarities to some of the Hague Conventions.

Norwegian customary law is based on court decisions and legal doctrine. As there are relatively few Supreme Court decisions, Norwegian IPL consists mainly of broad principles, and therefore often lacks any clear definition of which issues are covered by each main rule/principle.

Norwegian IPL consists, to a large extent, of broad customary principles/rules, and the Supreme Court applies different methodological approaches. The most significant impact on domestic IPL is that the uncertainty of the customary rules (often the principle of the closest connection) is replaced by clear choice-of-law-rules. One example of this is the Convention of 15 June 1955 on the Law Applicable to International Sales of Goods which replaced the closest connection formula with clear choice-of-law rules.[82] Party autonomy would probably not have been recognised before the ratification of the Convention in 1964. The Convention seems to have had a particular impact on domestic law in the matter of party autonomy in contract law. Today it is accepted under Norwegian IPL that the parties may choose which law the contract should be governed by. Opinions differ as to whether this general principle of party autonomy in contract law is justified by analogy to the Convention or as a result of a comparative approach.[83]

POLAND

To make the comparison between the Hague Conventions and the domestic law, the four classical conflicts conventions to which Poland is a party shall be presented against the background of the Polish conflict rules as set forth in the statute of 12 November 1965 on private international law (the Polish PIL).

Additionally, some remarks will be made concerning the official draft of a new Polish PIL statute which was elaborated by the Codification

[82] Norway has not ratified the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. Norway is not a member of the European Union and does not have the EC rule on choice of law in contractual matters (earlier Rome Convention).

[83] See Gaarder/Lundgaard, op. cit. p. 243, and Cordero Moss, TfR 2007 pp. 681 et seq. See Thue, in Private International Law at the End of the 20th Century: Progress or Regress? p. 319 regarding the comparative approach in Norwegian IPL.

Commission on Civil Law and was widely discussed in recent months (the 2007 draft was published in the textbook of M. Pazdan, Prawo Prywatne Międzynarodowe, 10th ed., Warszawa 2007, p. 349 ff). Although it is difficult to predict whether the enactment of the new statute will take place in the foreseeable future, the solutions proposed in the draft are definitely worth considering in this Report.

1. The Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors.

The Convention in question applies to minors who have that status in accordance with the domestic law of the State of their nationality and that of their habitual residence (art. 12). The authorities competent to take measures directed at the protection of the person or property of a minor are the judicial or administrative authorities of the State of its habitual residence (art. 1) and the applicable law is the domestic law of those authorities (art. 2).

By way of exception, if the authorities of the State of the minor's nationality consider that the interests of the minor so require, they may, after having informed the authorities of the State of its habitual residence, take measures according to their own law for the protection of the person or property of the minor (art. 4). Moreover, all Contracting States are bound to recognise the authority concerning the minor which arises directly from the domestic law of the State of the minor's nationality.

Under Polish private international law, as it stands now, the issue of the protection of minors is not directly dealt with and it seems to be covered by the scope of two separate conflict rules concerning – respectively – the relationships between parent and child, which includes the question of parental authority (art. 19 §1 Polish PIL), and the institution of guardianship (art. 23 §1 Polish PIL). Such regulation on the conflict-of-laws level reflects the divisions present in the Polish substantive family law where the care and custody over minors is exercised either by parents with formal parental authority or by a guardian designated by the court. Within both institutions the child is expected to be provided with sufficient protection which – at least under Polish substantive law – is exercised with some control of the court.

In both cases mentioned above, the applicable law will be the national law of the person to be protected i.e. the child or the pupil. It is only when the national law cannot be identified (incl. the case of apatrids), a general subsidiary rule of the PIL statute comes into play and provides for the application of the law of domicile (art. 3 Polish PIL). Finally, the last resort

rule is that when the circumstances important for finding applicable law cannot be ascertained, the Polish law applies (art. 7 Polish PIL).

For the sake of the analysis that follows in the remaining part of this Report, it needs to be noted in passing that art. 3 and art. 7 of the Polish PIL will apply in all cases when the connecting factor of a given conflict rule does not make it possible to identify the law applicable in the first place.

Coming back to the main point, it may be observed that, but for the 1961 Hague Convention, in cases when the Polish court is seized of the matter concerning the protection of minors (whether under parental authority or guardianship), by virtue of conflict-of-laws rules currently in force in Poland, it is normally the law of the nationality of the minor that would apply and not the law of its habitual residence. This marks a major difference with the 1961 Convention since the latter evidently favours the solution where the protection measures are taken by the authorities which are 'closest' to the minor and in accordance with local law.

However, it is instructive to analyse the appropriate provisions of the 2007 PIL draft where important changes were put forward. Firstly, the issue of the protection of minors (and in fact of all persons without full capacity for legal acts) was covered by a single conflict provision (art. 13) which – as the draft expressly stipulates – is meant to apply - both in cases of persons under parental authority or under guardianship. Moreover, the applicable law designated by art. 13 is the law of the country where – at the time when the protective measure is needed – the person in question has its habitual residence.

Thus, without a direct reference to the 1961 Convention, the provisions of the 2007 PIL draft appear to be at least inspired by the Convention. As it will be further demonstrated by other examples, there seems to be a strong need for the harmonisation of the internal PIL rules with the international regulations by which Poland is bound.

2. Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions.

According to art. 1 of the Convention, a testamentary disposition shall be valid as regards form, if its form complies with the internal law:

a) of the place where the testator made it, or

b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or

e) so far as immovables are concerned, of the place where they are situated.

This approach makes it clear that the underlying idea is that of upholding the formal validity of any testamentary disposition which is made in an international setting (so called 'favor testamenti' approach).

The position of the Polish PIL statute is not so 'generous' in this respect. Art. 35, which deals with the validity of testamentary acts in general, gives far less possibilities of finding the law according to which the form of a testamentary disposition could be positively verified. The provision in question refers only to the law of testator's nationality (which is also the applicable law as far as substantive validity is concerned) and the law of the place where the testament was made.

Again, the situation looks different in the 2007 PIL draft whose art. 61 does not contain any conflict rule but simply refers to the 1961 Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions. This legislative technique, although controversial for some commentators, was meant to fully harmonise the domestic statute with the international regulations and to make sure that the law enforcement bodies (incl. courts) never make the mistake of relying on purely domestic conflict provisions when an international convention is applicable.

3. Convention Of 4 May 1971 On The Law Applicable To Traffic Accidents.

The Convention defines a traffic accident as 'an accident which involves one or more vehicles, whether motorized or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access' (art. 1 subparagraph 2).

The applicable law is, generally, the internal law of the country where the accident occurred (art. 3). The Convention provides for certain exceptions, though, where the internal law of the country of registration of a vehicle is applicable (see art. 4). Still, the latter may sometimes be replaced by the internal law of the country in which the vehicle is habitually stationed (art. 6).

Polish private international law of 1965 does not provide for a separate conflict rule that would be devoted exclusively to traffic accidents. According to the classifications made in Polish law, traffic accidents are a special case of torts. Consequently, if it had not been for the 1971 Hague Convention, the traffic accident case would fall under the broad and universal rule of the PIL statute concerning non contractual obligations (art. 31). The article in question provides in its paragraph 1 for the application of the law of the country where the event giving rise to civil liability has taken place. This would normally lead to the use of the same law as designated by art. 3 of the Convention. Thus, one could conclude that the main rule is harmonised. However, in cases where the parties are nationals of the same country and they are all domiciled there, art. 31 §2 of the Polish PIL provides for the application of the law of that country. This exception obviously goes moves in a different direction in comparison to the special rules of the Convention (cf. art. 4 and art. 6).

Again, though, it is important to acknowledge the changed approach to be found in art. 26 of the 2007 PIL draft which refers directly to the Hague Convention on the Law Applicable to Traffic Accidents aiming at better and more express harmonisation of domestic and international rules.

To conclude the remarks on the 1971 Convention, it needs to be recalled here that on January 11, 2009 the European Communities Regulation on the law applicable to non-contractual obligations shall start to apply. The Regulation does not devote a separate rule to traffic accidents but these would be covered by a general conflict provision concerning torts which may be found in art. 4. Unlike the Hague Convention and the Polish PIL, art. 4 section 1 of the Regulation provides, in the first place, for the application of the law of the country in which the damage occurs. By way of exception, if the person claimed to be liable and the person sustaining damage have their habitual residence in the same country at the time when the damage occurs; the law of that country shall apply (art. 4 section 2). There is also a corrective clause in art. 4 section 3, which allows the disregarding of the rules based on fixed connecting factors and the application of the law of the country with which, in view of all circumstances, the case is manifestly more closely connected. The modern approach of the Regulation is quite different from the 1971 Convention. However, as it was already pointed out, in the case of Poland and other EC signatories of the Convention, the provisions of the latter shall not be replaced by the Regulation which, in its art. 28, gives priority to previously concluded international conventions binding the European Communities Members States.

4. Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

The 1973 Convention has a fairly broad scope as it covers all kind of maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate (art. 1). The provisions of the Convention seem focused on offering protection to creditors of maintenance obligations already on the conflict-of-laws level. The basic rule provides for the application of the law of the habitual residence of the creditor (art. 4) but there are also special rules designed for situations when the law which is applicable in the first place does not allow obtaining maintenance from the debtor. Thus, as an alternative, the law of common nationality of the parties may apply (art. 5), and finally, if the result is still negative for the creditor, his last chance would be the law of the country of the authority seized (art. 6).

The scheme outlined above is subject to an interesting exception concerning the maintenance obligations arising in the 'post marital' setting. By virtue of art. 8 of the Convention, the maintenance obligations between the divorced spouses are governed by the law applied to divorce. The same concerns the case of a legal separation and a marriage, which has been declared void or annulled. However, this special rule holds true only in the Contracting State in which the decree for divorce (separation, annulment) was granted. One can presume that if the authority of another State is seized, the applicable law will be ascertained according to general rules.

Poland acceded to the 1973 Convention in the year 1996 with two reservations made in accordance with art. 24. Firstly, Poland reserved the right not to apply the Convention to maintenance obligations between persons related by affinity and between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the relevant decree has been rendered by default in a State in which the defaulting party did not have its habitual residence (art. 14 points 2 and 3). In the above situations the Polish statutory provisions on conflict of laws are applicable. Secondly, Poland decided to apply its internal substantive law if the creditor and the debtor are both Polish nationals and if the debtor has its habitual residence in Poland (art. 15).

Polish private international law of 1965 does not contain one universal rule devoted to all kinds of maintenance obligations. Art. 20 of the Polish PIL covers maintenance relationships between blood relatives and relatives by

marriage (affinity). Here, it is the national law of the creditor that applies and not the law of their habitual residence.

The situation is different in case of maintenance obligations in marital and post marital settings, which are covered by separate conflict rules. In the case of potential claims between married couples, art. 17 of the Polish PIL would be used, which concerns personal and economic relations between spouses and which designates the common law of nationality of the spouses as applicable law, or – in cases where they have different nationalities – the law of their common domicile, or finally– if there is no common domicile – the Polish law.

It is a prevailing view in Poland that – but for the 1973 Convention which usually applies here – maintenance obligations connected with divorce or legal separation would be subject to the law governing the divorce and separation (art. 18 of the Polish PIL). The applicable law is the law of the country of which both spouses hold nationality, or – in the absence thereof – the law of their common domicile, or – in the last instance – the Polish law.

Finally, as far as maintenance between spouses of an annulled marriage is concerned, it is commonly agreed that the applicable law would be the law governing the formal or material validity of marriage, depending on what grounds the annulment is declared (see art. 16 referring to art. 14 and 15 of the Polish PIL).

This somewhat complex situation with regard to maintenance obligations was supposed to have been simplified in the 2007 PIL draft. Just as in the case of the previously mentioned Hague Conventions concerning the form of testamentary dispositions and traffic accidents, art. 15 of the 2007 draft contains a direct reference to the 1973 Convention, which makes the latter generally applicable to all maintenance obligations within its scope. This presupposes that also in areas covered so far by the Polish reservations, the national legislator is now prepared to make the Convention apply.

QUÉBEC

Lessons can already be drawn from the short list of international conventions implemented in Québec. It needs to be noted that the methods of implementation vary considerably from one international instrument to another. The Convention of 15 November 1965 on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters was implemented through amendments to the Code of Civil Procedure and to the

rates applicable to bailiffs. The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction had a particular law inspired by the Convention without taking it word for word. The Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption has been implemented as an annex to a law including the full text of the Convention and giving it the force of law.

Hague Convention of 15 November 1965 in the Service Abroad of Judicial and Extra judicial Documents in Civil and Commercial Matters.

Canada acceded to the Convention in 1989. Since it did not include a clause to limit its application to certain provinces or territories in Canada, the Convention has been made applicable across the Canadian territory. Some changes have been introduced to various provincial and territorial laws in Canada to implement it. Québec has passed a law and two decrees to implement the Convention. The Ministry of Justice of Québec is the central authority designated to implement the demands of service. Canada and Québec have not objected to the additional modes of transmission of documents to theirrecipients.
Regarding the post, this non-opposition raises an interesting question. Indeed, the Code of Civil Procedure (CCP) prohibits the use of the mail service for the procedure to initiate proceedings, unless a judicial authorization has been granted. It seems to us that in this case a legislative amendment was necessary since we fail to qualify a further statement to exclude the post in the case of process in Québec.

In Dreyfus, Judge Lebel, on behalf of the Court, said that the Convention modified various legislative provisions concerning the administration of justice. The Statute has incorporated some provisions from the Convention but without introducing the rules provided in governing the different types of service that contains the latter. The inclusion in the Québec law only covers the provisions concerning judgments obtained as a result of a failure to appear.

Thus, articles 198.1 and 484.I C.p.c. provide respectively:

198.1 Where a proceeding introductive of suit was transmitted to a foreign state in order to be served in accordance with any mode of service acknowledged by the law of that state for the service of proceedings from abroad in its territory and it is proved that, despite reasonable efforts in applying to the proper authorities of that state to obtain a return of service, no such return was received within six months of the transmission of the

application, the judge may render a judgment against a defendant who has not appeared or who has not pleaded.

484. In the case provided for in article 198.1, the judgment cannot be revoked on the motion of the party condemned by default to appear or to plead made within one year from the date of judgment, unless that party proves that, by no fault of his own, he did not acquire knowledge of the proceedings in time to file a defence or to exercise a recourse against the decision and unless the grounds of his defence do not appear unfounded.

In this regard, it appears to us that it was sufficient to implement the Convention in order to limit the effect of Article 198.1 CCP on the States which are a party of the Hague Convention. In the case of other States who are party to the Convention, a judgement should be made more quickly. That would be an incentive for these countries to become party to the Convention.

Canada is a traditionally dualistic country: the domestic law has supremacy over international law. However, it is not necessary to adopt implementing legislation when the law is already in conformity with international law. There are other examples of conventions which have been adopted and that bind Québec and Canada without any implementing legislation.

In this case, one might wonder whether it was necessary or not to adopt an act implementing the whole Convention.

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

As previously mentioned, Québec has billed a law inspired in the Convention without taking it word for word. An example of one of the differences which can be noted from the Convention is that the Act refers in Art 41 to reciprocity by stating that the Government, upon recommendation, shall designate by order any State, province or territory in which he considers that Québec residents may benefit from measures similar to those set out in the Act.

TAIWAN

Although Taiwan is not a member of any Hague Conventions or CIDIP Conventions, this does not mean that these Conventions have no influence upon Taiwan’s domestic conflict of laws rules. Since both the Hague Conventions and CIDIP Conventions are developed to establish a global standard private international law and represent the global trend and

consensus of the development of private international law to a certain degree, the legislators in Taiwan sometimes refer to the principles embodied in them. Therefore, some indirect impact may be observed in Taiwan's domestic law.

The provisions regulated in Taiwan Conflicts Act or proposed to be added to the Law have nothing to do with the implementation of Taiwan's treaty obligations, but are merely a source of reference.

Under the current Taiwan Conflicts Act, it seems that the legislators do not fully take into account the international conflicts conventions when enacting the Law. The only provision possessing a connection with the international Convention and which may be observed from its legislative reason, is Article 26 of the Taiwan Conflicts Act. Article 26 provides: "Where the law of the nation of the party concerned shall be applied under this Law and the party concerned has several nationalities acquired at different times, the law of the nation of the party concerned shall be decided according to the nationality he last acquired; if the nationalities were acquired simultaneously, the law of the nation which is closest in the relationship with the party concerned shall apply; provided that the party concerned is to be considered as a national of the Republic of China in accordance with law of nationality of the Republic of China, the law of the Republic of China shall apply." In its legislative reason, the legislator clearly stated that this provision was to take reference from the spirit of Article 5[1] and Article 3[2] of the 1930 The League of Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws (hereinafter the 1930 Hague Convention on Nationality).[3] This is the only statement that may be observed under the current Taiwan Conflicts Act which has connection with the international Convention.[4]

However, in recognizing that the current Taiwan Conflicts Act was enacted in 1953 and is in need of updating, there is a huge range of amendments in the 2007 Draft of Taiwan Conflicts Act, and some amendments incorporate the ideas developed in Hague Conventions and CIDIP Conventions, which are demonstrated as follows:

a. The Nationality of a Legal Person

The legislative explanation of Article 13 of the Draft mentions that this article is made in reference to Article 2 of the 1979 CIDIP Inter-American Convention on Conflict of Laws Concerning Commercial Companies, and

therefore provides that the national law of the legal person is the law of the place where they are incorporated.

b. The Applicable Law to Agency

The legislative explanation of Articles 17-19 of the Draft mentions that the amended applicable law to agency is taken reference to Articles 5, 6 11, 12, 13, 14 and 15 of the 1978 Hague Convention on the Law Applicable to Agency. Article 17 stipulates that the applicable law of the agency relationship shall be the law which the principal and the agent expressly agree upon, or the law of the place where the agency relationship is most closely connected, if without such express agreement. Article 18 further provides that, between the principal and the third party, the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the law expressly agreed upon or the law of the place where the agency relationship is most closely connected, if without such express agreement. Article 19 also follows the same rule established by Article 18 when dealing with the relationship between the agent and the third party.

c. The Applicable Law to Bills of Exchange, Promissory Notes and Checks

The legislative explanation of Article 21 of the Draft mentions that this article is made in reference to Articles 3-5 of the 1975 CIDIP Inter-American Convention on conflict of laws concerning bills of exchange, promissory notes and invoices and Article 3-5 of the 1979 CIDIP Inter-American Convention on Conflicts of Laws Concerning Checks, which provides that the law governing the rights arising from a bill, note or check shall be the law of the place of the conduct, or the law of the place of payment if the place of conduct cannot be identified.

d. The Applicable Law to Product Liability

The legislative explanation of Article 26 of the Draft mentions that this article is made in reference to Articles 4-7 of the 1973 Hague Convention on the Law Applicable to Products Liability, which regulates that the applicable law of product liability shall be the internal law of the state where the products manufacturer incorporated, but the law of the place of injury, the law of the place where the injured purchases the products or the place of the

national state of the injured may become applicable law if the products manufacturer has agreed in advance to sell the products to the territory of any of the above places and is so designated by the injured to be the applicable law.

e. The Applicable Law to Securities Held with an Intermediary

The legislative explanation of Article 44 of the Draft mentions that this article is made in reference to the spirit of the 2002 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, which regulates that certain rights of the securities shall be governed by the law to which the contract of depository expressly refers or the law of the place with the closest relationship if without such express mentioning.

f. The Applicable Law to Matrimonial Property Regimes

The legislative explanation of Article 48 of the Draft mentions that this article is made in reference to the 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes, which provides that the matrimonial property regime is governed by the national law or domicile of either the husband or the wife provided they agree upon it in writing, or the internal law of the common nationality if without such agreement, or the law of their common domicile if without such common state, or the law of the place with the closest relationship with the marital relationship if without such common domicile.

g. The Applicable Law to Parents and Children Relationship

The legislative explanation of Article 55 of the Draft mentions that this article is made in reference to the principle embodied in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which stipulates that the legal relationship between parents and children shall be governed by the national law of the children.

h. The Applicable Law to Maintenance Obligations

The legislative explanation of Article 57 of the Draft mentions that this article is made in reference to the principle embodied in the 1973 Hague

Convention on the Law Applicable to Maintenance Obligations and the 1989 CIDIP Inter-American Convention on Support Obligations, which stipulates that the maintenance shall be governed by the national law of maintenance creditor.

i. The Applicable Law to Wills

The legislative explanation of Article 61 of the Draft mentions that this article is made in reference to Articles 1 and 2 of the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, which regulates that the form of a will and its revocation shall be governed by either the law of the place where the will is made, the law of the domicile of the testator when he dies, or the law of the place of the real property if the will involves real property.

TUNISIA

The Redacting Committee of the Tunisian Code of Private International Law of 27th November 1997 was sometimes influenced in drafting some conflict rules by the Hague Conventions. The Commission, however, has not yet transcripted the rules exactly as they are in these Conventions.

Hereby, we can give some examples:

Article 55 of the Code of Private International Law provides that "the form of wills is subject to the testator's national law or to the place where it is established", it is influenced by the Hague Convention of 5 October 1961 on the Form of Testamentary Dispositions. The influence is shown by the idea of favouring the formal validity of wills. Nevertheless, the possible laws applicable to the form are much more numerous in Article 1 of the Convention, which refers to a number of laws that can be applied.

In section 72 of the Code of Private International Law the same criteria on product liability can be found as that provided by the Hague Convention on the law applicable to product liability, concluded on October 2, 1973 and entered into force on October 1, 1977.

But while the Hague Convention uses the technical reunification of contact points in sections 4, 5 and 6, Article 72 of the Tunisian Code of International Private Law uses almost the same criteria in order to provide the victim with

options because of products with: "The liability is as per the victim's choice…"

Sometimes, the influence of the Hague Conventions on the Code of Private International Law is even more visible. Thus, the source of inspiration for Articles 73, 74 and 75 of the Code of Private International Law governing the liability resulting from traffic accidents is clearly the Hague Convention of May 2, 1971, on the law applicable to road traffic accidents. For example, like Article 3 of the Convention, Article 73 of the Code holds the law of the place of the accident as a principle rule.

Exceptions to the lex loci delicti are also provided. Some of these are specific exceptions to the text of Tunisia. For example, Article 73 paragraph 2 states that "the victim can rely on the law of the place of tort".

Other exceptions are directly inspired by the Hague Convention of 1971 (and in particular Article 4): these are exceptions based on a grouping of contact points. Thus, paragraph 3 of Article 73 reads: "However, when all parties are resident in the same country which is where one of the vehicles involved in the accident is registered, it will apply the law of that Estate."

USA

U.S. lawmakers considering the question of how to improve the procedural aspects of cross-border litigation initially favored a unilateral approach. This approach was embodied in a series of amendments to the Federal Rules of Civil Procedure carried out in 1963, as well as in a 1964 statute intended to modernize and liberalize judicial assistance with respect to litigation underway in foreign countries. It was hoped that such unilateral liberalization of U.S. procedural rules would spur reciprocal action on the part of other countries.[84] In 1964, however, the United States joined the Hague Conference, and attention shifted to multilateral conventions as the vehicle for procedural reform.

[84] William C. Harvey, *The United States and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, 11 HARV. INT'L L. J. 476, 483 (1970). *But see* Burbank, *The Reluctant Partner, supra* note 7, at 113 (noting that some of the amendments may have increased the flexibility of litigants involved in international litigation, but did not necessarily take adequate account of foreign interests).

The Hague Apostille Convention

The Apostille Convention, a self-executing treaty, entered into force for the United States on October 15, 1981, following U.S. accession. The United States has designated the U.S. Department of State; the clerks of U.S. federal, district, territory, and specialized courts; and the Secretaries of State of the respective states as entities authorized to issue apostilles.

In 1991, the Federal Rules of Civil Procedure were amended to change the process by which federal courts authenticate records received from other States party to the Convention. Federal Rule 44(a)(2) now states that "final certification [by diplomatic officers] is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties."

The Convention has not been implemented in any regular fashion at the state level. In 1982 NCCUSL adopted the Uniform Law on Notarial Acts.[85] Section 6(b) of that Law explicitly incorporates the mandate of the Hague Convention, providing that "[a]n 'Apostille' in the form prescribed by the Hague Convention of October 5, 1961, conclusively establishes that the signature of the notarial officer is genuine and that the officer holds the indicated office." The comments to the uniform law, noting that apostilles as used in the Convention are "no more than a standard form for authentication," further encourage recognition of apostilles issued by non-member States as well.[86] However, the Uniform Law has been adopted by only ten U.S. states and the District of Columbia. Another model law, the Model Notary Act promulgated by the National Notary Association in 2002, also reflects the United States' accession to the Hague Convention. That Act addresses the authentication of U.S. documents for use in other countries, and requires evidence of the authenticity of the official seal and signature of local notaries to be in the form of apostille prescribed by the Convention when the document in question will be issued for use in an another member state.[87] Like the Uniform Law on Notarial Acts, the Model Law has been adopted in only a handful of states.

Due to the lack of widespread adoption of these uniform and model laws, many states still have legislation in place that does not specifically refer to the Convention, leading to the possibility of confusion or failure to

[85] Available at www.nccusl.org, Final Acts and Legislation.
[86] *Id.*, Comments to Section 6.
[87] Model Notary Act § 10-1(2), § 10-3, available at www.nationalnotary.org.

recognize conforming apostilles.[88] There is little evidence, however, that U.S. state or federal courts are not fulfilling U.S. obligations under the Convention, and the handful of reported cases citing it give proper effect to its provisions.

The Hague Service Convention

The Hague Service Convention, uniformly interpreted by U.S. courts as a self-executing treaty,[89] entered into force on February 10, 1969. Six years prior to its entry into force, the Federal Rules of Civil Procedure had been amended to address the issue of service upon parties in foreign countries. The amended rule clarified that authority to effectuate foreign service must be found in a relevant federal statute, or in a state statute or rule of court in the state in which the district court sits. It then outlined a number of alternative methods deemed sufficient to effectuate the so authorized service. These included service by the method prescribed under the law of the foreign country in question; service by means of letter rogatory; service by personal delivery; and service by certain types of mail.[90] At the time of the Convention's entry into force, the Federal Rules permitted certain methods of service that were not recognized by some of the other countries party to the Convention. The Convention empowered such countries to foreclose the use of those methods by making formal objections, requiring service by Convention methods alone.

In 1993, the Federal Rules of Civil Procedure were amended to include Rule 4(f)(1), which states that "[S]ervice ... may be effected in a place not within any judicial district of the United States: (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague [Service Convention]."[91]

The leading case interpreting the Service Convention, Volkswagenwerk A.G. v. Schlunk,[92] was decided by the Supreme Court in 1988. That case involved an attempt by a U.S. plaintiff to serve process on defendant Volkswagen AG, a German corporation, through service in Illinois with its domestic subsidiary as its agent. The defendant moved to quash the service, asserting that it only could be served in accordance with the Hague

[88] *See* T. David Hoyle, *Seal of Disapproval: International Implications of South Carolina's Notary Statute*, 3 S.C.J. Int'l & Bus. 1 (2006).

[89] *See, e.g.,* Vorhees v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983).

[90] *See* Advisory Committee Notes to Rule 4, 1963 Amendment, Subdivision (i).

[91] Rule 4(h) extends this provision, apart from the section on personal delivery, to service on corporations.

[92] 486 U.S. 694 (1988).

Convention procedure.[93] The case was initiated in Illinois state court and therefore concerned the interaction between the Hague Convention and state procedural law. The Court began by recognizing that the Hague Service Convention was mandatory, confirming that "[b]y virtue of the Supremacy Clause, ... the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies."[94] It then turned to the question of the Convention's scope as articulated in Article 1 (providing that the Convention shall apply "where there is occasion to transmit a judicial ... document for service abroad"). Because the Convention did not specify the circumstances in which there was such an occasion, the Court concluded that the question must be decided by the law of the forum state.[95] In other words, "[i]f the internal law of the forum state defines the applicable method of serving process requiring the transmittal of documents abroad, then the Hague Service Convention applies."[96] In the case at bar, it found that Illinois law did not require the transmittal of documents abroad – because it permitted "substitute service" on the domestic agent, service could be completed entirely within Illinois, meaning that the Convention simply did not apply.[97]

The Schlunk decision has drawn much criticism. A concurring opinion in the case noted the implausibility of the majority's reading, finding it doubtful "that the Convention's framers intended to leave each contracting nation, and each of the 50 States within our nation, free to decide for itself under what circumstances, if any, the Convention would control."[98] As one commentator later put it, "[t]o yield construction of an international treaty to the statutes and procedural rules of the fifty states obviously promotes neither uniformity nor confidence in American judicial administration by signatories."[99] The lack of certainty flowing from the Schlunk decision is exacerbated by the disparity in state laws regarding service of process, which differ widely; some provide that service anywhere outside the state –

[93] 486 U.S. at 697.
[94] 486 U.S. at 699.
[95] 486 U.S. at 700.
[96] *Id.*
[97] 486 U.S. at 706.
[98] 486 U.S. at 708 (Brennan, J., concurring in the judgment).
[99] Weis, *supra* note 57, at 912. *See also* Borschow Hosp. & Medical Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 472, 477 (D. Puerto Rico 1992) ("[s]tate law may ... triumph over the Convention by making its application unnecessary.").

including in foreign countries – must be effected by the same means as service within the state.[100]

Nevertheless, although the cramped interpretation of the Convention in Schlunk has narrowed the treaty's scope of application, service of process in general raises fewer concerns than the Evidence Convention, as discussed below. While U.S. procedures remain more liberal than those stated in the Convention itself, there is no disagreement about the underlying goal (affording notice in connection with opportunity to be heard). In addition, the internal rules of many states do generally require the transmission of documents abroad in order to effectuate service on a foreign defendant, and therefore trigger application of the Convention procedures.[101] Finally, as courts have repeatedly recognized, litigants have an incentive to comply with the Convention procedures in order to maximize the likelihood that a resulting judgment will be enforced in other countries.

One potential inconsistency between the Convention and internal law relates to the waiver of service mechanism permitted by Federal Rule 4(d). Under that Rule, a plaintiff may – by mail – notify the defendant of the commencement of the action (attaching a copy of the complaint and other information) and request a waiver of formal service of a summons. This mechanism is intended to reduce the cost of service, particularly on defendants located abroad, where translation and other additional formalities may be required.[102] A defendant located within the United States who fails to comply with such a request will then bear the costs associated with subsequent service, unless it can show good cause for that failure.[103] While this cost-shifting feature does not apply to defendants located in other countries, the broader question is whether this mechanism violates the Convention's prohibition of service by mail, at least with respect to countries that have lodged a reservation under Article 10.[104]

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[100] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 827 (4th ed. 2007).

[101] *See, e.g.,* Kott v. Superior Court, 53 Cal. Rptr. 2d 215 (2d Dist. Cal. 2002) (stating that the only exception under California law is service by publication where the party's address is not discoverable).

[102] Advisory Committee Notes to Rule 4, 1993 Amendments.

[103] Fed. R. Civ. Proc. 4(d)(2).

[104] The Advisory Committee Notes articulate the "hop[e] that, since transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court, use of the procedure will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail..." Advisory Committee Notes to Rule 4, 1993 Amendments. *See* Burbank, *Reluctant Partner*, *supra* note 7, at 117 (noting the lack of differentiation between formal service and such a waiver request, and questioning the authority of a foreign litigant to waive the sovereignty objections of its home country).

e. The Hague Evidence Convention[105]

The Hague Evidence Convention, which the Supreme Court has characterized as a self-executing treaty, entered into force for the United States on October 7, 1972. No implementing legislation was prepared, and, with minor exceptions, the Federal Rules of Civil Procedure were not changed to effectuate the purposes of the Hague Evidence Convention.[106]

Unlike in the area of service of process, there are substantial differences between U.S. procedure and the procedure of virtually all other states party to the Convention regarding discovery practice. The Federal Rules of Civil Procedure, as well as the procedural rules followed in state courts, provide a number of avenues by which a litigant may obtain discovery, including document requests; written interrogatories; and depositions of both parties and non-party witnesses.[107] A party may also demand on-site inspection of property or things relevant to the litigation.[108] Both parties and non-parties may be required to produce documents in their possession or control, regardless of where the documents are located.[109] Similarly, witnesses can be deposed wherever there is subpoena power over them.[110] These procedures are available not only for merits discovery but also for discovery sought in order to establish personal jurisdiction over a foreign entity;[111] additionally, and importantly, they are available pre-trial. Compulsory process is available if parties fail to comply with discovery requests, and continued noncompliance can lead to a variety of sanctions, including default judgment.[112]

Thus, while the Hague Convention procedures did liberalize then-existing mechanisms for the cross-border taking of evidence, they remained

[105] Some portions of the following discussion of the Evidence Convention were originally published in Hannah L. Buxbaum, *Improving Transatlantic Cooperation in the Taking of Evidence,* in INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 343, 345-46 (A. Nuyts & N. Watté eds., 2005).

[106] Rule 28, for instance, which addresses persons before whom depositions may be taken, was amended to incorporate Convention terminology. See Advisory Committee Notes, 1993 Amendments to Rule 28.

[107] Federal Rules of Civil Procedure [hereinafter "FRCP"] 34 (production of documents), 33 (interrogatories to parties), 30 (depositions upon oral examination).

[108] FRCP 34(a).

[109] FRCP 34 (production by parties), 45 (non-parties). For a discussion of the "control" test, see Dietrich v. Bauer et al., 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. 2000).

[110] FRCP 28(b), 29, 30(a).

[111] *See* Insurance Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinée, 456 U.S. 694 (1982).

[112] FRCP 37. *See, e.g.,* Amer. Home Assurance Co. v. Société Commerciale Toutelectric, 128 Cal. Rptr. 2d 430 (Ct. App. Calif. 2002) (upholding a default judgment entered against a French corporation as a result of its failure to comply with various discovery orders).

substantially more restrictive than U.S. procedural rules. Furthermore, many countries that adopted the Convention essentially opted out of some of its more liberal provisions, most critically through the Article 23 reservations regarding pre-trial discovery. For these reasons, many litigants before U.S. courts continued to seek discovery under domestic rules even after the United States acceded to the Hague Evidence Convention.

U.S. courts were divided on whether Convention procedures were mandatory or merely optional in transnational cases,[113] and in 1987, the U.S. Supreme Court addressed this question in Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.[114] The Court held that Convention procedures were optional, and, further, that principles of international comity required not first resort to the Convention, but instead a "particularized analysis" in each case of whether evidence should be gathered under its procedures or under U.S. state or federal procedural rules.[115] The Court indicated that the choice between Hague Convention procedures and domestic procedures must be made on a case by case basis, and specifically instructed lower courts to consider the special burdens that discovery may impose on foreign parties.[116] Nevertheless, the Court did not encourage litigants to use those procedures, noting at one point that "[i]n many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."[117] Perhaps picking up on such cues, practice in lower courts reflects a continued preference for application of U.S. state or federal procedural rules.[118] For this reason, transatlantic evidence gathering in U.S. civil litigation proceeds largely outside the Hague Convention framework. This is true of outgoing assistance as well, since U.S. law provides that foreign judicial authorities, as well as the litigants before foreign tribunals

[113] *Compare* Volkswagenwerk AG v. Superior Court, 176 Cal. Rptr. 874 (Cal. App. 1981) (first resort to the Convention required) with In re Anschuetz & Co., 754 F.2d 602 (5th Cir. 1985) (first resort not required).

[114] Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987).

[115] *Id.* at 543-44. For commentary on this decision, see George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TULANE L. REV. 525 (1989); David J. Gerber, *International Discovery After Aérospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521 (1988).

[116] *Aérospatiale*, 482 U.S. at 546.

[117] *Aérospatiale,* 482 U.S. at 542. In a footnote to this observation, the Court did concede that "in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pretrial civil discovery."

[118] *See* Compendium of Reported Post-Aérospatiale Cases Citing the Hague Evidence Convention, Annex 1 to the Response of the United States of America to the Special Commission Questionnaire, available at www.hcch.net.

themselves, may request the assistance of U.S. courts in the taking of evidence without using Convention procedures.[119]

From time to time, proposals have been put forward to amend the Federal Rules of Civil Procedure in order to require first resort to the Evidence Convention,[120] or to make the Convention the exclusive means of obtaining discovery in transnational cases.[121] The most sustained reform effort failed in the early 1990s, and since then the issue has remained dormant.

Family Law. Hague Abduction Convention

The United States signed the Abduction Convention in 1981, and the U.S. Senate gave its advice and consent in 1986. Although the treaty was considered self-executing, federal legislation was prepared in order to secure uniform implementation of the Convention within the United States.[122] On April 29, 1988, Congress enacted the International Child Abduction Remedies Act (ICARA),[123] and the Convention entered into force for the United States on July 1, 1988.

Prior to ICARA's enactment, the civil aspects of child abduction by non-custodial parents were regulated by the laws of the several states. These in turn were based on the Uniform Child Custody Jurisdiction Act (UCCJA), adopted by NCCUSL in 1968 and enacted in every state by 1981. That law established rules governing initial jurisdiction over child custody disputes, as well as the recognition and enforcement of custody decrees issued in other states and jurisdiction to modify such decrees. Its primary goal was the unification of state law governing jurisdiction over interstate custody disputes.[124] Section 23 of the UCCJA, however, extended its application to international custody disputes, stating that "[t]he provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees ... rendered by appropriate authorities of other nations, if reasonable notice and opportunity to be heard were given to all affected persons."[125]

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[119] 28 U.S.C. § 1782.

[120] *See* Weis, *supra* note 57, at 930-33

[121] Andreas Lowenfeld, *Introduction: Discovering Discovery, International Style,* 16 N.Y.U. J. INT'L L. & POL. 957, 959 (1984).

[122] Peter H. Pfund, *Remarks*, 57 LAW & CONTEMP. PROBS. 159, 161 (Summer 1994).

[123] Pub. L. No. 100-300, 102 Stat. 437 (1988), codified at 42 U.S.C. §§ 11601-11610.

[124] *See generally* D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 556-60 (2004).

[125] UCCJA Section 23. That provision was not included in the implementing legislation of all states, however, and was interpreted inconsistently in others. *See* Blair, *supra* note 111, at 557.

Many of the Convention's provisions differed substantially from those of the UCCJA. For example, the UCCJA included no time limit for the initiation of return proceedings, whereas under the Convention mandatory return is available only for one year following a child's wrongful removal;[126] the UCCJA applied only when an official custody order predated the abduction, whereas the Convention lacks that requirement. Moreover, the UCCJA differed from the Hague Convention with respect to the critical choice-of-law provision. Under the Hague Convention the law of the country in which the child has its "habitual residence" governs the determination whether the removal of the child was wrongful[127] – and, implicitly, ultimate determinations regarding custody.[128] The UCCJA, on the other hand, set forth four alternative bases of initial jurisdiction, establishing no clear hierarchy among them.[129] At the time ICARA was enacted, it preempted inconsistent state legislation with regard to intercountry abduction. Because the remedies outlined in the Convention are non-exclusive,[130] however, ICARA did not entirely displace pre-existing state laws based on the UCCJA.

In 1997, NCCUSL withdrew the UCCJA and adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Because the UCCJEA's adoption followed the entry into force of the Hague Convention, its drafters were able to address the Convention's effect. Section 302 provides that the Act's enforcement remedies may be used to "enforce an order for the return of [a] child made under the Hague Convention..." The Act also includes one exception to the recognition and enforcement standard drawn from the Hague Convention, reserving the right of U.S. courts to deny recognition of foreign custodial orders that "violat[e] fundamental principles of human rights."[131]

Although the UCCJEA was intended to coordinate with the Hague Convention, the intersection of state law and ICARA remains complicated. First of all, the UCCJEA has not yet been adopted in all 50 U.S. states; in a handful, the UCCJA, which differs from the Hague Convention in the ways

[126] Hague Abduction Convention Article 12 (after the expiration of one year following the wrongful removal, return need not be ordered if the child is "settled in its new environment.").

[127] Kijowska v. Haines, 463 F.3d 583, 586 (7th Cir. 2006).

[128] *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005) (describing the "underlying premise of the Convention that the State of habitual residence of the child is the appropriate place to make any decision about custody and visitation.").

[129] UCCJA Section 3.

[130] Convention Article 29; ICARA § 11603(h).

[131] Section 105(c); *cf.* Hague Convention Section 20.

noted above, continues in force. More generally, the jurisprudence on intercountry abductions that has emerged both in the lower federal courts and in state courts reveals several problem areas.

VENEZUELA

The Private International Law Statute has a particularly close relationship with the Inter-American convention on general rules of private international law. It is well known that the Venezuelan Project of Private International Law Statute, elaborated in 1963-1965, had a direct influence on the Inter-American convention on general rules of private international law. The content of many articles of the Inter-American Convention was taken from the said Project.

In 1998, the Venezuelan Project of Private International Law was enforced as a Statute. Most of the articles that regulate general institutions remained the same. The biggest difference between them is that the Convention regulates fraud and the Statute does not do so in general. It has a fraud regulation regarding the applicable law to divorce. Therefore, both instruments have a very similar content as specified in the table below.

Inter-American Convention on general rules of private international law	**Venezuelan Statute**
Article 2[132]: Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked.	Article 2: Foreign law proving to be competent shall be applied in accordance with the principles governing in the respective foreign country, so as to allow the objectives sought by the Venezuelan rules of conflict should be met. Article 60: Foreign Law shall be applied ex officio. The parties

[132] In this context the Inter-American Convention on proof of and information on foreign law (03/29/1985), also influenced the Venezuelan Private International Law Statute, because it developed and detailed the content of the article 2 the Inter-American Convention on general rules of private international law.

	may bring information related to the applicable foreign Law and the Courts and authorities may issue orders tending to better knowledge thereof.
Article 3: Whenever the law of a State Party has institutions or procedures essential for its proper application that are not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have any like institutions or procedures.	Article 9: When the foreign Law having been declared applicable to the issue should establish essential institutions or proceedings for adequate application thereof not being contemplated by the Venezuelan legal system, applications of said foreign Law may be denied provided that Venezuelan Law should not have analogous institutions or proceedings.
Article 4: All the appeals provided for in the procedural law of the place where the proceedings are held shall also be admissible for cases in which the law of any of the other States Parties is applicable.	Article 61: Recourses provided by the law shall be admissible under any juridical system which should have been applied in the decision being subject to such recourses.
Article 5: The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (order public).	Article 8: Provisions of foreign Law to be applied in accordance with this statute shall only be excluded when their application should produce results being clearly incompatible with the essential principles of Venezuelan public policy.
Article 7: Juridical relationships validly established in a State Party in accordance with all the laws with which they have a	Article 5: Issues of law having been created in accordance with a foreign Law attributing its own competence under international

connection at the time of their establishment shall be recognized in the other States Parties, provided that they are not contrary to the principles of their public policy (order public).	admissible criteria shall produce effect in the republic, provided they are not in contradiction with Venezuelan rules of conflict, that the Venezuelan law should claim exclusive competence over the respective matter, or that they should be clearly incompatible with general principles of Venezuelan public policy.
Article 8: Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue.	Article 6: Previous, preliminary or incidental issues that may arise with respect to a main issue need not necessarily be solved under the Law regulating the latter.
Article 9: The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.	Article 7: The several Laws that may be competent to govern the different aspects of a juridical relationship, shall be applied harmoniously, aiming at reaching the goals sought by each of those Law. Possible difficulties resulting from their simultaneous application shall be solved considering the requirements imposed by equity in the specific case.

The Private International Law Statute was influenced by the Inter-American convention on the law applicable to international contracts. In fact, the Statute's Preamble states that articles ruling contractual obligations took the Convention and the doctrine as inspirational guide.

Inter-American Convention on the law applicable to international contracts	**Venezuelan Statute**
Article 7: The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.	Article 29: Conventional obligations are governed by the Law agreed to by the parties.
Article 9: If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State	Article 30: Lacking a valid indication, conventional obligations are governed by the Law to which they are most directly linked. The Court shall consider all the objective and subjective elements arising from the contract in order to determine such Law. It shall bear in mind also the General Principles of Business Law accepted by international organizations.

could, exceptionally, apply to that part of the contract.	
Article 10: In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.	Article 31: In addition to the provisions of the former articles, whenever it should so result, application shall be made of norms, customs and principles of International Business Law, as well of generally accepted trade uses and practices, with the purpose of reifying the requirements imposed by justice and fairness in the solution of a concrete case.

The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption also had an impact on the Venezuelan Statute of protection of the children and adolescents. Chapters II (related to the requirements for intercountry adoptions) and IV (dedicated to the procedural requirements in intercountry adoption), had a profound impact on the Venezuelan Statement.

It is very interesting that the Venezuelan Project of Private International Law Statute was considered when the Inter-American convention on domicile of natural persons in private international law was elaborated. However, Venezuela only signed (but did not ratify) this Convention. However, the Venezuelan Statute of Private International Law, in its articles 11 to 16, reflects the general principles of the said Convention. That is to say that the conjugal domicile is the place where the spouses live together, without prejudice to the right of each spouse to have his or her domicile. The domicile of diplomatic agents shall be their last domicile in the territory of the accrediting State. Nevertheless, the Venezuelan Statute differs from the Convention on the regulation of the domicile of incompetent persons. For the national instrument, the domicile of incompetent persons shall be that of their regular residence. On the contrary, for the international instrument, the domicile of incompetent persons is that of their legal representatives, except when they are abandoned by those representatives, in which case their former domicile shall continue.

Regarding the commercial companies, the Venezuelan Statute includes, as does the Inter-American Convention on conflicts of laws concerning commercial companies, an autonomous characterization related to the place where they are constituted. It is notorious that both instruments establish the place where the companies are constituted to rule, as applicable law, the existence, capacity, operation and dissolution of commercial companies.

The Inter-American Conventions on the international return of children, execution of preventive measures, conflict of laws concerning the adoption of minors and on international protection in minors, influenced the inclusion of a rule regulating preventive measures in the Venezuelan Statute.

Finally, it important to highlight that the article 54 of the Venezuelan Statute permits the partial efficacy of a foreign judgment. This new regulation was created considering the Inter-American convention on extraterritorial validity of judgments and arbitral awards.

ARGENTINA

After the amendment of the Argentine Constitution in 1994, the precedence of conventions over domestic law was made explicit.

In Argentina, and according to art. 31 of the Constitution, international conventions prevail over domestic law.

Human Rights Conventions have constitutional status and international treaties and conventions relating to any other matter are below the Constitution but, they prevail over domestic law.-

Argentina is a party of the Vienna Convention of the Rights of the Treaties which establishes the precedence of treaties over domestic law.

CANADA

The Canadian Constitution states that private law, with few exceptions, is a matter under the legislative authority of the provinces. The method used by each jurisdiction to implement an international convention will determine the precedence of domestic law or international conventions. Some examples are as follows,

Hague Convention on the Civil Aspects of International Child Abduction (1980)

The Convention is annexed to each statute as a schedule. The potential conflict between the rules in the Convention and those in other provincial laws relating to custody is expressly resolved in favour of the Convention.[133]

Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

The implementing legislation provides that where there is a conflict between the law of the enacting jurisdiction and the Convention, the Convention prevails. The exception to this pattern of implementation is Alberta, where the Convention is implemented by substantive provision paralleling most of the Convention provisions, and by regulations made under the statute.

CZECH REPUBLIC

Pursuant to Section 2, Czech Private International Law Act, provisions of international treaties binding on the Czech Republic shall take precedence over the Act, or, more precisely, provisions of the PILA shall be applied only if such a treaty does not provide otherwise. The wording of this rather outdated clause concerning the preferential application of international treaties does not explicitly require the publication of such a treaty in the Collection of Laws (since the year 2000 the publication in the Collection of International Treaties). However, the publication of such a treaty in the Collection of Laws was considered, at least in Czech legal literature, to be a prerequisite for its application as a necessary requirement of legality, despite of the fact that this condition was not formally required by the law.[134] This situation, rather unclear in particular with respect to the practice of Czech courts, was changed with the Constitutional Act No. 395/2001 Coll., amending the Constitution of the Czech Republic, effective as of June 1, 2002, which brought in a general solution to the preferential application of international treaties, so far limited only to treaties on human rights. Under Article 10 of the amended Constitution, officially promulgated international treaties, whose ratification was consented to by the Parliament and which are binding for the Czech Republic, form part of the Czech legal system; if an international treaty provides different to a relevant act, the international treaty shall be applied.

[133] See, for instance, in Alberta, International Child Abduction Act, R.S.A. 2000, c. I-4, s. 7; in Ontario, Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46(8). The Alberta statute follows the model Act proposed by the Uniform Law Conference.

[134] Cf. Z. Kučera, L. Tichý, 'Zákon o mezinárodním právu soukromém a procesním. Komentář' (Act on Private International Law and Rules of Procedure Relating Thereto, Commentary, in Czech), Prague 1989, 31.

This means that an international convention complying with the prerequisites of Article 10 of the Czech Constitution, that is, consent of the Parliament, ratification and official promulgation of the convention in the Collection of international treaties, takes precedence over the respective provisions of the Czech domestic law. The requirement of the publication of conventions in the Collection of international treaties now generally applies.

GERMANY

The German constitution (Basic Law, "Grundgesetz") deals with the force of international conventions[135]. Ratification is necessary[136]. Under German constitutional law an international convention as such takes no precedence over German federal law; in principle the treaty simply has the force of a federal statute[137]. The Basic Law always remains paramount. However, there is a special provision in the Introductory Act according to which rules in public international treaties, insofar as they have become directly applicable intra-state law, prevail over the Introductory Act (Art. 3 para. 2 sent. 1). Regulations in legislative acts of the European Community remain unaffected (Art. 3 para. 2 sent. 2).

GREECE

The Greek Constitution states in Article 28, first paragraph that "the rules of international law generally accepted and international conventions from their ratification and their entry into force under the conditions each of them states, are an integral part of Greek domestic law and take precedence over any contrary provision of law [...] ". This constitutional provision grants the International Conventions (under the conditions mentioned) with a higher place than that of domestic laws. The internal law, even when billed after the ratification of an international convention can not derogate the provisions of the Convention.

[135] Basic Law for the Federal Republic of Germany (Promulgated by the Parliamentary Council on 23 May 1949) (as amended by the Unification Treaty of 31 Aug. 1990 and Federal Statute of 23 Sept. 1990) as amended.

[136] See Art. 59 Basic Law.

[137] Cf. *Wolfe*, A Tale of Two States: Success and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany, N.Y.U. J. Int. L. & Pol. 33 (2000) 285 (368).

JAPAN

There are no definite provisions relating to this matter. The prevailing opinion and practice considers that an international Convention shall precede domestic law, based on Article 98(2) of the Constitution of Japan[138].

MEXICO

Section 133 of Mexico's Constitution, sets forth that: The Political Constitution of the United States of Mexico, the laws issued by the Congress of the Union and the treaties that are executed in accordance with the Constitution, signed by the President of the Republic, will constitute the supreme law for the entire Union. The Constitution also establishes, in section 121, that the judges of each State of the Republic will solve any contradictions that may appear amongst the local constitutions and laws. Therefore, Mexico's legislative pyramid finds the Constitution at the top, followed by the international treaties and then the laws issued by the Congress.

NEW ZEALAND

New Zealand does not have an entrenched constitution or a single document that would be considered to be a constitution. Instead New Zealand's constitutional framework is made up of collection of statutes, cases, conventions, and customs.

New Zealand has a dualist system where international law is a different system of law from domestic law and it operates on the international plane and not the domestic plane. In the past, courts could not apply an international treaty to New Zealand domestic law until the government had adopted the treaty into domestic law.

It is a fundamental constitutional principle that Parliament is sovereign (Bill of Rights Act 1688, art 1) and that courts cannot interfere with legislative action or acts or acts of state. However, it is the courts role to interpret legislation. When interpreting legislation or the meaning of specific words

[138] Article 98 of the Constitution of Japan reads: "(1) This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. (2) The treaties concluded by Japan and established laws of nations shall be faithfully observed."

the courts look primarily at the purpose of that particular Act (Acts Interpretation Act 1924, s5(j)) and may refer to its Regulations.

The traditional dualist approach is no longer as clearcut as it once was, especially in the field of human rights (see Tangiora v Wellington District Legal Services Committee [1997] NZAR 118). Although international law cannot override domestic law, the obligations created by a treaty may impact upon related domestic law. The courts can presume that Parliament does not intend to legislate in breach of international law or treaty obligations.

NORWAY

There are no decisions on conflicts between conflicts Conventions and the Constitution. Most of the provisions of the Norwegian Constitution from 1814 regulate the power of the King (the Government), the Parliament and the judiciary power. The Constitution has been amended several times since being adopted but has never been subject to any major revision. It would not seem to enshrine any rights that could be in conflict with conflict Conventions. It may be mentioned that article 110 c of the Constitution contains a provision regarding human rights: “It is the responsibility of the authorities of the State to respect and ensure human rights.” The provision does not, however, guarantee specific rights for the citizens, and cannot therefore conflict with conflict conventions.

POLAND

1. According to art. 87 Section 2 of the Polish Constitution of April 2, 1997, international conventions ratified by Poland constitute one of the binding sources of law whereby the rights and obligations of Polish citizens may be regulated. Upon their publication in the Polish Official Journal, the ratified conventions become directly applicable as an integral part of the domestic legal system (art. 91 Section 1 of the Constitution). The only exception concerns conventions in which the application is not possible without an implementing statute. This is not the case with the Hague Conventions since their provisions are sufficiently clear to be applied directly without the intermediation of a separate national statute.

The act of ratification with regard to international conventions is the prerogative of the President of the Republic of Poland (art. 133 Section 1 point 1 of the Constitution). It has to be remembered, though, that the

majority of conventions in Poland can be ratified only upon a prior parliamentary consent which should be given in the form of an appropriate statute. This will apply to all conventions elaborated by the Hague Conference since they concern issues which belong to the statutory domain where the parliamentary consent is obligatory (see art. 89 section 1 point 5 of the Constitution).

The Constitution further provides that international conventions ratified upon obtaining the said consent shall enjoy priority in relation to ordinary statutes in all cases when their respective provisions cannot be reconciled (art. 91 Section 2). This means that whenever a possible clash appears, the court seized of the case should set aside the domestic statute and apply the provisions of the convention. Additionally, the Constitutional Tribunal in Poland is a body entrusted with, among other things, the general control of conformity of statutes and other domestic acts with the ratified international conventions (see art. 2 Section 1 point 2 and 3 of the statute of 1 August 1997 on the Constitutional Tribunal, Dz.U. Nr 102, item 643 with subsequent changes).

It should be pointed out that although the current Polish Constitution was enacted in 1997, its provisions concerning the position of ratified international conventions are also applicable to conventions which – like the majority of those elaborated by the Hague Conference – were ratified by Poland before the new Constitution entered into force (see art. 241 section 1 of the Constitution, which is specifically devoted to this issue).

In conclusion, the Polish Constitution makes it rather clear that the provisions of the Hague Conventions (whether regular conflicts conventions or conventions belonging to other groups) will be given priority in Poland and should be applied directly with precedence over other sources of domestic law (with the exception of the Constitution itself, which always enjoys the paramount supremacy).

2. There is also a possibility of a potential clash between the provisions of the ratified international conventions and the legal instruments enacted by the European Communities to which Poland belongs. The Communities possess the competence to legislate in the area of private international law as well as in the field of international civil procedure. This competence has been widely used in recent years. The legislative activities of the Communities usually take the form of Regulations which are directly applicable and binding in the Member States and which enjoy precedence over domestic laws. It needs to be noted, though, that these instruments

usually contain a special clause concerning the relationship with existing international conventions covering the same subject matter. By virtue of that clause, priority is normally given to conventions already in force unless they exclusively concern relations between two or more of the EU Member States with no participation of third countries.

An example of such clause is art. 28 of the Regulation (EC) no. 864/2007 of the European Parliament and of the Council, dated 11 July 2007, on the law applicable to non-contractual obligations (Rome II) (Official Journal EU L 199/40 of 31 July 2007). Thus, it may be observed that, by virtue of the said art. 28, the Regulation, which is going to apply as from 11 January 2009, shall not set aside the 1971 Convention on the Law Applicable to Traffic Accidents notwithstanding the fact that the Convention concerns the subject matter falling clearly within the scope of the Regulation. The issue seems quite important since the particular conflict rules of the two instruments differ significantly.

QUÉBEC

The risk of incompatibility between domestic law and international law is virtually eliminated by introducing the Convention as an annex in the law as is the case for the Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Adoption International. This has been implemented by a law annexing the text of the convention and giving it the force of law.

This risk is real when a law is adopted to implement an international instrument, as for the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, or when provisions are introduced to amend the general legislative body, like with the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, without having the wording of that international instrument fully incorporated.

This risk of conflict is minimized when the implementing laws refer to the international instrument, and even more when it is indicated that they were adopted to give effect to that international instrument. For example, the preamble of the Law on Civil Aspects of International Abduction of Children and Interprovincial provides: "Considering that Québec supports the principles and rules established by the Convention and considers it should be applied to as many cases as possible".

However, and if a conflict between domestic law and international law may arise, domestic law prevails over international law.

TUNISIA

As mentioned, Tunisia is not yet a party of any convention on conflicts of law. However, as a general principle, it needs to be said that Section 32 of the Tunisian Constitution states that international conventions prevail over domestic law. The third paragraph of the said Section states: "'The treaties come into force only after ratification and provided they are applied by another party. The Treaties ratified by the President and approved by the Chamber of Deputies have a higher authority than the laws. "

USA

Constitutional Structure. Supremacy over state law

The "supremacy clause" of the United States Constitution states that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[139]

Once a treaty takes internal effect, the supremacy clause places it above state law, both constitutional and statutory. The clause further ensures that treaties obtain a status of equal dignity with the Constitution and U.S. federal law; however, it does not create a hierarchy of authority among those forms of law.[140] The courts have nevertheless "regularly and uniformly recognized the supremacy of the [federal] Constitution over a treaty."[141] Because the treaty power itself arises from the distribution of powers articulated in the Constitution, a treaty can not "authorize what the constitution forbids."[142]

[139] U.S. CONST. Art. VI cl. 2.

[140] *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

[141] Reid v. Covert, 354 U.S. 1, 17 (1957); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987).

[142] Geofroy v. Riggs, 133 U.S. 258, 267 (date). *See also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 950 (2004) (noting that "an exercise of the treaty power is [not] detached from the express limitations of the Constitution," and that treaties are therefore

As between ordinary federal legislation and treaties, inconsistencies are resolved according to the principles set forth in subpart B below.

VENEZUELA

Venezuela's legal system has remained silent on this subject since 1914. The present Constitution does not rule on this matter in a particular disposition. It only refers, in its article 23, to the prevalence of Human Right Treaties over the Constitution itself and to other Venezuelan regulations only when such treaties are more favorable to a certain situation. The same article establishes that those treaties are entitled to direct application by the tribunals and the rest of the national organs. However, constitutional article 7 establishes that the Constitution is the supreme rule and the system's foundation.

This situation opens the possibility of assuming different positions:

Following the monist theory, the Constitution prevails over the international conventions.

Following the dualist theory, there's a vacuum in the legal system, and therefore, this matter doesn't have a precise answer.

Eclectic theories propose to solve this situation based on the practical results: following article 1 of the Venezuelan Private International Law Statute, the national jurisprudence applies the international treaties with precedence to the internal law.

It is necessary to highlight the important role of article 151 of the Venezuelan Constitution. This article establishes the imperative submission to the Venezuelan jurisdiction and law, whenever contracts of "public interest" are celebrated. This obligation shall be fulfilled even when is not contemplated expressly in the contract. However, there's one acknowledged exception: the submission shall not be contrary to the nature of the contract itself.

This vague regulation has been addressed many times by the Private International Law doctrine. When shall a contract be characterized as being related to "public interest"? When is this imperative submission contrary to the nature of the contract?

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subject to individual rights articulated in the Constitution as well as doctrines of federalism and separation of powers).

HOW ARE INCONSISTENCIES BETWEEN DOMESTIC LAW AND THE CONVENTIONS RESOLVED?

ARGENTINA

Before the constitutional reform which took place in 1994, there was no certainty on how to solve potential conflicts between international law and domestic law. However in two cases the federal Supreme Court established the precedence of international law over domestic law, and settled the dispute. [143]

After the reform of the Constitution in 1994, the text of the Constitution itself determines the precedence of international law over domestic law[144].

CANADA

Hague Convention on the Civil Aspects of International Child Abduction (1980)

The potential conflict between the rules in the convention and those in other provincial laws relating to custody is expressly resolved in favour of the Convention.[145]

CROATIA

Because the Croatian legal system regards the international treaties, including the Hague Conventions, as being of a stronger legal force than domestic laws, the cases of inconsistencies should not pose many difficulties. Possible problems may concern determining the conventions' scope of application since it is only outside this scope that the domestic laws apply.

There are, nevertheless, certain situations in which domestic laws my affect the operation (not the application) of the Hague Conventions rules, such as

[143] CSJN "Ekmekdjian, Miguel Angel c/ Neustadt Bernardo y otros", 1/12/1988 , CSJN "Ekmekdjian Miguel Angel c/ Sofovich Gerardo y otros",07/07/1992, CSJN "Fibraca" and CSJN "Cafés La Virginia"

[144] Art. 31 and Art. 75.22 of the Argentine Constitution.

[145] See, for instance, in Alberta, International Child Abduction Act, R.S.A. 2000, c. I-4, s. 7; in Ontario, Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46(8). The Alberta statute follows the model Act proposed by the Uniform Law Conference.

when reference is made to the domestic laws of the forum by virtue of a pulic policy clause.[146]

CZECH REPUBLIC

If any provision of the Czech domestic law is in conflict with an international treaty or convention, such a provision may not be applied. Its application would constitute grounds for lodging an appeal against the judicial decision applying that provision because such a decision would be reached in violation of the legal order of the Czech Republic, as the Czech Constitution would be breached. Thus, the inconsistencies between domestic law and international conventions should be resolved in favour of the conventions.

GERMANY

The danger of inconsistencies between domestic law and the conventions arises mainly in the context of constitutional law issues. In several cases the Federal Constitutional Court had to deal with the constitutionality of Hague Conventions. Under the Basic Law there is the question whether the Convention as such is constitutional. In most cases, however, the only question to arise is whether the application contradicts constitutional requirements. In Germany a constitutional complaint may be filed against a final, last-instance decision for an alleged violation of fundamental rights as protected by the Constitution. Consequently, the proceedings are generally brought as individual complaints against German court decisions or decisions of German judicial authorities applying the respective conventions[147]. It is generally not the convention as such which is being challenged, but the application of a foreign law which allegedly contradicts principles of German law. This happens mainly in respect of the rules of common law jurisdictions. The application and enforcement of the law of the United States of America in particular caused difficulties[148]. In child abduction cases, procedural defects are often claimed without support. Generally there are some decisions of the Federal Constitutional Court on

[146] More on these issues see in the Craotian National Report.

[147] See § 93b in conjunction with § 93a of the Federal Constitutional Court Act

[148] *von Hein*, Recent German jurisprudence on cooperation with the United States in civil and commercial matters : a defense of sovereignty or judicial protectionism?, in: Gottschalk et al. (ed.), Conflict of laws in a globalized world (Cambridge 2007) 101 et seq.

the principal issues. Later complaints are no longer admitted because of a lack of fundamental significance.

Under German constitutional law a whole range of fundamental rights stemming from the German Basic Law may be involved[149]. One issue is the "general freedom of action", i.e. the right to the free development of personality (Art. 2 para. 1 of the Basic Law) in conjunction with the rule of law[150]. Additionally, the child's right to dignity (Art. 1 para. 1 Basic Law) can play a role[151]. On occasion it has also been argued that there is a violation of the essential principles of a free state governed by the rule of law (Art. 20 of the Basic Law).

In cases of service of a statement of claim a violation of Art. 12 para. 1 of the Basic Law was denied because the provision does not regulate the practice of an occupation or a profession[152]. Furthermore, a violation of Art. 14 para. 1 of the Basic Law (protection of property) did not occur since the act of serving the statement of claim does not presently and directly affect legal values protected by Art. 14 para. 1 of the Basic Law[153].

Protection of marriage and the family under Art. 6 para. 1 Basic Law is an important issue. The protection of the rights of children under Art. 6 para. 2 Basic Law is another question in abduction cases[154]. From a procedural perspective, the right to be heard (Art. 103 Basic Law) has to be respected[155]. It is a demanding task to interpret the constitutional guarantees, especially in the context of cross-border proceedings[156]. The peculiarities of international cases have to be recognised. It is also necessary that courts and German authorities define their role as just one of many players in an increasingly globalized world[157].

One possibility for defending one's own legal system against the solutions of the Convention is a public policy clause or a similar clause found in the

[149] In more detail, see *Pirrung* (supra note 5) 341 et seq.

[150] Fed. Const. Court 10 Oct. 1995, IPRax 1997, 123 Annot. *E. Klein* (106). Commented by *Dyer* ILM 35 (1996) 529; 14 June 2007, NJW 2007, 3709.

[151] Fed. Const. Court 10 Oct. 1995, IPRax 1997, 123. Commented by *Dyer* ILM 35 (1996) 529.

[152] Fed. Const. Ct. 14 June 2007, NJW 2007, 3709.

[153] Fed. Const. Ct. 14 June 2007, NJW 2007, 3709.

[154] Fed. Const. Ct. 3 May 1999, NJW 1999, 3622 = IPRax 2000, 224 Annot. *Staudinger* (194); 18 July 2006, FamRZ 2006, 1261.

[155] See Fed. Const. Court 18 July 2006, FamRZ 2006, 1261.

[156] Cf. *Coester-Waltjen,* Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsberührung, BerDtGesVR 38 (1998) 9 et seq.

[157] Cf. *von Hein* (supra note 54) 123 et seq.

Convention itself, cf. for the Hague Abduction Convention (no. 19) and the Hague Service Convention (no. 28).

However, often it is not so much a reluctance to apply the Convention correctly, but the purposes and mechanisms of the Convention or of the applicable foreign law that do not exactly align with domestic law. Domestic judges feel uncomfortable and do not want to deviate from general rules or infringe the established legal positions of domestic citizens. Therefore, particularly in the law of procedure, specific statutes which implement the Conventions fully and clarify contradictions are necessary. Especially in the context of protection of children, special authorities play an even greater role. Within the European Union, national courts become more and more accustomed at establishing contact directly with their counterparts in other Member States.

GREECE

The fact that Greece is a party of the Conventions, results in the fact that the geographical scope of internal rules governing matters - falling within the scope of these Conventions - is reduced, since those rules do not apply in the relations between Greece and any other Contracting States. Domestic Law remain applicable in cases where another Contracting State is not involved in the case. Sometimes there are matters where the scope of domestic law is completely eliminated, because the rules are completely replaced by conventional rules. Such is the case with the applicable law relating to maintenance obligations, where the rules of the Hague Convention have replaced the conflict indefinitely in this area. Indeed, when "the law designated by the Convention shall apply irrespective of any requirement of reciprocity, even if it is the law of a Contracting State" (Article 3), 14, 18 - 20 Cc of Greek no longer apply in respect of maintenance obligations. They nevertheless continue to apply to all other personal relationships between spouses and all other relationships between parents and children, designating the law which will apply.

JAPAN

There are no inconsistencies between domestic law and Conventions in theory because relevant domestic law shall be modified in order to be consistent with the Convention when Japan becomes a Party to it as above-mentioned. If any, the courts in Japan shall apply Conventions according to

article 98(2) of the Constitution and the Diet shall amend or repeal the domestic law in conflict with the Convention.

MEXICO

There have been only a few cases relating to section 121 of the Mexico Constitution since the different Civil and Procedure Codes issued by the different States of the Republic have followed the Civil and the Procedure Code of the Federal District, and therefore, no major differences have arisen and no inconsistency problems have appeared.

NEW ZEALAND

There has been some judicial recognition of international treaties being used as a ground for judicial review in relation to the exercise of statutory power. In Tavita v Minister of Immigration [1994] 2 NZLR 257 the Ministry of Immigration had served an expulsion notice on a Samoan citizen. The main issue in the proceedings before the Court of Appeal was whether unincorporated treaty obligations should be taken into consideration by administrative authorities when exercising their discretionary powers. The two relevant international instruments being discussed were the International Covenant on Civil and Political Rights 1966, and the Convention on the Rights of the Child 1989. Both treaties had been entered into by the New Zealand government and were therefore binding on New Zealand at international law but the international instruments had not been incorporated into New Zealand's domestic law. The court noted that the Crown's argument, that the Minister of Immigration could ignore New Zealand's international human rights obligations when making an expulsion notice, was an "unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing" (266; per Cook P for the Court (CA)).

The court therefore observed that: "A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights, norms, or obligations, the Executive is necessarily free to ignore them." (266; per Cook P for the court (CA))

The Court did not deal with the effect of international Human Rights Conventions on national legislation in general or rule that mandatory consideration of international instruments be undertaken by administrative authorities. Tavita resulted in new procedures being introduced so that statutes relating to immigration matters must now be read conformably with New Zealand's international obligations.

Furthermore, in Punter v Secretary for Justice [2007] 1 NZLR 40, the approach of the New Zealand Courts to the interpretation of domestic statutes implementing international conventions was yet again confirmed: the statute should be interpreted "consistently with the Hague Convention and the manner in which it is interpreted in other contracting states" (para [10]). The Court (Glazebrook and Robertson JJ) referred to the Vienna Convention on the Law of Treaties 1980, which requires treaties to be interpreted in good faith in accordance with the ordinary meaning of the words as seen in their context and in the light of the treaty's object and purpose. In Zaoui v Attorney-General (No 2) [2005] 1 NZLR 690 (paras [128] - [130]), Glazebrook J said that this approach was effectively the same as the approach to the interpretation of statutes adopted in New Zealand's Interpretation Act 1999 (see s 5). There are, however, provisions in the Vienna Convention that have no counterpart in the Interpretation Act, such as the principle that subsequent practice in the application of a treaty by state parties is to be taken into account in its interpretation (art 31(3)(b) of the Convention). The closest analogy to this provision would be s 6 of the Interpretation Act, which provides that enactments apply to circumstances as they arise. In Zaoui, Glazebrook J (para [131]) expressed the view that, in the event of a divergence in interpretation between domestic principles and the Vienna Convention the question whether domestic or international interpretation principles should apply must be resolved through statutory interpretation. For example, in the case of international child abduction, the direct reference to the Convention on the Civil Aspects of Child Abduction in the Care of Children Act 2004 and its annexure to the Act, point to the application of international principles of interpretation in the event of a divergence: Punter (para [12]).

NORWAY

Norway has a dualistic approach. Conventions ratified by Norway are therefore not directly applicable. Some Conventions have been implemented through legislation and others as regulations. This means that they have the

same formal status as other legislation and regulations. A consequence of this is that inconsistencies are solved through the principles of lex superior, lex posterior and lex specialis. There is also a presumption that Norwegian law is in compliance with the international law, including Conventions that have been ratified by Norway.[158] The implication of this principle is that when there seem to be inconsistencies between different provisions of domestic law, the courts tend to apply the provisions that have their origin in a Convention. This is regarded as a harmonisation of different sources of law.

The situation would be different if there were inconsistencies between domestic law and a Convention ratified by Norway where the Convention has not been implemented through legislation or by regulation pursuant to provisions in the legislation. The courts would then be bound by domestic law and not by the Convention. Where the provisions of domestic law can be interpreted in different ways (and most of them can), the provisions of the Conventions could still be included as relevant sources of law. In this situation too, there is a presumption that Norwegian law is in compliance with Conventions ratified by Norway. This is regarded as harmonisation of legal sources; in other words: domestic law would be interpreted in light of the Convention. There is therefore no general answer as to whether domestic law or the Convention would be given priority. If a Convention is not implemented thorough legislation and no harmonisation is possible between domestic law and the Convention, domestic law would be given priority.

POLAND

As previously mentioned, the Polish Constitution further provides that international Conventions ratified upon obtaining the said consent shall enjoy priority in relation to ordinary statutes in all cases when their respective provisions cannot be reconciled (art. 91 section 2). This means that whenever a possible clash appears, the court seized of the case should set aside the domestic statute and apply the provisions of the convention. Additionally, the Constitutional Tribunal in Poland is a body entrusted with, among other things, the general control of conformity of statutes and other domestic acts with the ratified international conventions (see art. 2 section 1 point 2 and 3 of the statute of 1 August 1997 on the Constitutional Tribunal, Dz.U. Nr 102, item 643 with subsequent changes).

[158] See Rt. 2000 p. 1811 (p. 1826), Nygaard, Rettsgrunnlag og standpunkt, Bergen 2004 pp. 144 et seq.

In the area of conflict of laws, the Polish statute of 1965 on private international law (Dz.U. Nr 46, item 290 with subsequent changes) spells out clearly in its art. 1 §2 that the conflict rules contained therein do not apply whenever an international convention to which Poland is a party provides otherwise. As it will be explained, the substantive regulation of the Polish PIL statute often looks different to the provisions of the Hague conflicts conventions but the statute shall always give way whenever any such convention is applicable.

QUÉBEC

Domestic law is presumed to be consistent with international law. If it is not, domestic law prevails.

TUNISIA

The contradictions or clashes between international conventions and domestic laws are solved in Tunisian law by giving preference to international conventions. Article 32 of the Constitution is explicit on this point by stating that: "Treaties ratified by the President and approved by the Chamber of Deputies have a higher authority than the law."

Although Tunisia does not have a specific institution to monitor the supremacy of international conventions over domestic law, there are many decisions of civil and administrative courts which have refused to enforce domestic laws which clash with international conventions ratified by Tunisia, whether before or after and have given international conventions the supremacy over domestic law.

USA

When considering the internal rather than international effect of U.S. treaty obligations,[159] U.S. courts distinguish between self-executing treaties and non-self executing treaties. The former take effect internally – and therefore may be enforced in domestic courts – immediately upon ratification by the

[159] Both types of treaty bind the United States in the international arena; the distinction is critical only when it comes to the internal status of the treaty, and its enforceability in domestic courts.

United States;[160] the latter, by contrast, must first be implemented through domestic legislative enactment.[161] Whether a treaty is self-executing or not is a matter of intent (though whose intent remains the subject of considerable debate among commentators).[162] If the treaty-maker had the intent to create judicially enforceable private rights, then the treaty is assumed to be self-executing. As one early decision noted, in such cases the treaty addresses itself to the judicial branch rather than the political branch, supporting the conclusion of immediate enforceability in domestic courts.[163]

Private international law conventions typically do contain rules intended for direct enforcement in courts, and not merely promises of an executory nature. Like the Warsaw Convention, a treaty often pointed to as the paradigm of a self-executing treaty, they "have traction only in the context of private disputes ..., in which litigation is the presumed dispute resolution mechanism."[164] As a category, then, they would be viewed as self-executing; and courts interpreting individual conflicts conventions have indeed reached that conclusion.[165]

A recent decision by the U.S. Supreme Court, Medellin v. Texas,[166] highlights (and arguably heightens) the uncertainties in determining whether a treaty is self-executing or not. In that case, the Court examined the Vienna Convention on Consular Relations, the Optional Protocol concerning the settlement of disputes thereunder, and the U.N. Charter in order to decide whether a judgment of the International Court of Justice was directly enforceable in a U.S. state court. In the portion of its opinion addressing the self-execution analysis, the Court placed central emphasis on the text of the relevant treaty itself: "[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect;"[167] "Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who

[160] *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("[A treaty is] to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision").

[161] On the debate regarding self-executing treaties, see generally Van Alstine, *supra* note 21, at 907-17.

[162] *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 705-08 (1995).

[163] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[164] Paul Stephan, *Private Remedies for Treaty Violations After Sanchez-Llamas*, 11 LEWIS & CLARK L. REV. 65, 78 (2007).

[165] *See generally* Van Alstine, *supra* note 21, at 921-27 (discussing self-executing treaties in the area of private international law, among others).

[166] 552 U.S. __ (2008).

[167] Slip Op. at 23.

negotiated it and the Senate that confirmed it that the treaty has domestic effect."[168]

In a lengthy dissenting opinion, Justice Breyer rejected this focus on the text of treaties. He noted that many treaties held to be self-executing lack a clear indication to that effect, pointing out that the treaty-making process involves many countries whose own internal laws regarding domestic implementation differ substantially, and might thereby preclude clear textual statements.[169] In determining whether a treaty is self-executing, he states, factors beyond the treaty's text must be considered, including subject matter: "[D]oes it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts."[170] While he concedes that a multi-factor analysis does not create a "magic formula," he argues that such an evaluation helps "constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado."[171]

The impact of the Medellin decision is not yet fully clear. If the decision is read to mean that a treaty is not self-executing unless it contains a clear statement to that effect, then the opinion calls into doubt the status of private international law conventions along with many other treaties. However, the majority opinion stops short of requiring that a treaty actually declares itself to be self-executing; it simply puts primary emphasis on a treaty's textual provisions. In the case of most conflicts conventions, those textual provisions clearly reflect a determination that the treaties are intended to have domestic effect, since their goal is to create rights enforceable in disputes between private parties. It is therefore this Reporter's view that the Medellin decision will not affect the status of private international law treaties.

[168] *Id.* at 25.
[169] 552 U.S. __ (Breyer, J., dissenting), at 11.
[170] *Id.* at 13-14.
[171] *Id.* at 14.

PRINCIPLES OF CONSTRUCTION RELEVANT TO HIERARCHY

As noted above, the supremacy clause of the Federal Constitution does not establish a hierarchy of authority between treaties and ordinary federal legislation. To all extent possible, U.S. courts will interpret both treaties and federal statute in order to avoid direct conflict between them. Pursuant to the so-called "Charming Betsy" presumption, courts in the United States will not construe a statute in a manner that would violate international law if any other construction is possible.[172] Similarly, courts attempt to interpret treaty obligations in a manner that preserves pre- or co-existing statutes.[173]

If a direct conflict between a treaty and federal law is unavoidable, however, U.S. courts follow the "last in time" rule.[174] This principle applies in both directions: thus, while a treaty will supplant a pre-existing federal statute, a later-adopted statute can also supplant a treaty. Courts do however require a strong showing of Congressional intent to abrogate treaty law in the latter case.[175]

VENEZUELA

In Venezuela, inconsistencies are resolved in a very classic fashion. We solve them by including reservations to the ratification, invoking international public order or by denouncing the treaty.

[172] The presumption derives from the decision of the Supreme Court in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also* RESTATEMENT, *supra* note 20, at § 114.

[173] *See, e.g., Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 49 (D.C.D.C. 1984) ("Treaties should be construed so as to effect their purposes, and to be as consistent, insofar as possible, with coexisting statutes" (internal citations omitted)).

[174] *See Alverez v. U.S.*, 216 U.S. 167, 175 (1910) ("[A]n act of Congress, passed after a treaty takes effect, must be respected and enforced, despite any previous or existing treaty provision on the same subject."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("...if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing"); Reid v. Covert at 18 ("...an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and [when] a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."). *See also* RESTATEMENT, *supra* note 20, at § 115.

[175] *See Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984); Van Alstine, *supra* note 21, at 920-21.

IMPLEMENTATION OF CONFLICTS CONVENTIONS

HOW HAS THE IMPLEMENTATION OF THE CONVENTIONS RATIFIED BY YOUR COUNTRY TAKEN PLACE?

ARGENTINA

The presidency is in charge of the negotiation process of an international convention, according to the Constitution. The Congress has to ratify the treaty. The process of implementation of an international instrument finishes with the publication of the complete text of the Statute of approval and the convention in the Official Gazette.

CANADA

As already explained, the Canadian constitutional position towards private law, with few exceptions, is that it is a matter under the legislative authority of the provinces. The Federal Government has the power to enter into treaties on behalf of Canada, but Canada follows the British constitutional rule that to become part of the domestic legal system, treaties must be implemented by legislation. The Judicial Committee of the Privy Council in 1937 held that the provincial authority over legislative subject-matter cannot be subverted by the federal decision to enter into a treaty, which means that a treaty dealing with private law must be implemented by provincial legislation. Where the treaty includes a federal state clause permitting a state party to designate sub-units of the state within which the treaty will apply, the treaty can be implemented by the provinces one by one. Where the treaty has no such clause, all the jurisdictions in Canada must pass implementing legislation, calling for a degree of coordinated legislative will that has often proved difficult to achieve.

A body that has played a large role in fostering the coordinated implementation of international conventions (not just on conflict of laws) throughout Canada is the Uniform Law Conference of Canada.[176] Its members are, in part, drawn from the ministry of justice or the ministry of

[176] See the Uniform Law Conference of Canada's website, online: www.ulcc.ca. Its work overall is described in Arthur Close, "The Uniform Law Conference and the Harmonization of Law in Canada" (2007), 40 U.B.C.L. Rev. 535-58; its work in treaty implementation legislation is mentioned at n. 44. See also Gérald Goldstein, "L'expérience canadienne en matière d'uniformisation, d'harmonisation et de coordination des droits" (1998), *** R.J.T. 235.

the attorney-general of each province and territory and of the federal government. However, the statutes it promulgates have no official status. It is up to each Canadian jurisdiction whether it wishes to adopt the statute and, if so, whether it wishes to deviate from the model the Conference has put forward. The Conference has prepared uniform statutes to implement three of the four Hague Conventions to which Canada is a party,[177] as well as two Hague Conventions that are not yet in force and to which Canada is not yet a party.[178] These model statutes, with some modifications, have been adopted as the implementing legislation in each common law province and territory that has given effect to the relevant convention.

Hague Convention on the Civil Aspects of International Child Abduction (1980)

Canada ratified the Convention, effective 1983. It was the first Hague Convention to which Canada became a party. All Canadian common law jurisdictions have implemented the Convention by a few statutory provisions giving the Convention the force of law and designating the Central Authority for the province or territory for the purpose of the Convention. The Convention is annexed to each statute as a schedule.

Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

The Convention entered into force in Canada on April 1st 1997 in the five provinces which were the first to enact implementing legislation, i.e. British Columbia, Prince Edward Island, Manitoba, New Brunswick and Saskatchewan. With one exception, the implementing legislation in each of these provinces and territories follows, albeit with variations, the Uniform Intercountry Adoption (Hague Convention) Act proposed by the Uniform Law Conference of Canada in 1993. This statute declares that when the Convention enters into force in respect of the province, the Convention is law in the enacting jurisdiction; in other words, the terms of the Convention are incorporated into the local law.[179]

[177] *International Child Abduction Act* (promulgated 1981) for the Hague Convention on the Civil Aspects of International Child Abduction; *Intercountry Adoption (Hague Convention) Act* (1993) for the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; and *International Trusts Act* (1987) for the Hague Convention on the Law Applicable to Trusts and on their Recognition.

[178] *International Protection of Adults (Hague Convention) Implementation Act* (promulgated 2001); *Parental Responsibility and Measures for the Protection of Children (Hague Convention) Act* (2001).

[179] See the Uniform Law Conference of Canada's website, online: www.ulcc.ca. Its work overall is described in Arthur Close, "The Uniform Law Conference and the Harmonization of Law in Canada"

Hague Convention on the Service abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)

Canada became a party to this Convention by accession, effective 1988. Unlike the other Hague Conventions, it has been implemented in the common law Canadian jurisdictions, not by statute but by delegated legislation, namely, the rules of court (also called rules of civil procedure in some provinces). The rules of court are, in effect, regulations made under the statute that govern the existence and operation of the court in question. The Convention's provisions have been given effect in this way in the rules of the courts of every common law jurisdiction of Canada, as well as those of the Federal Courts and the Tax Court of Canada.

One major difference in the implementing rules is that some provinces' rules require compliance with the Convention if the defendant is to be served in a contracting state, and other provinces' rules do not. The latter provinces also permit service in any non-Convention manner, usually personal service that would be a valid method of service within the province. Compliance with the Convention, when serving a person in a contracting state, is mandatory in the rules of the Federal Court, the (federal) Tax Court, New Brunswick, Nova Scotia, and Ontario. The other jurisdictions allow, as an alternative, other methods of service that comply with the province's own rules.

Hague Convention on the Law Applicable to Trusts and on Their Recognition (1985)

This is the only one of the four Hague Conventions to which Canada is a party that has not been implemented in all the common law jurisdictions of Canada, with Ontario, the Northwest Territories, Nunavut and Yukon not yet having passed it into law. Since private international law cases involving trusts are relatively rare in Canada, adoption of the Convention by these jurisdictions may not have been seen as a high priority, although it does provide some certainty in an underdeveloped area of law.

The implementing legislation in the jurisdictions that have given effect to the Convention follow a model Act put forward by the Uniform Law Conference.[180] The model Act expressly excludes cases in which the conflict is between the laws of two or more Canadian jurisdictions.[181] An interesting

(2007), 40 U.B.C.L. Rev. 535-58; its work in treaty implementation legislation is mentioned at n. 44. See also Gérald Goldstein, "L'expérience canadienne en matière d'uniformisation, d'harmonisation et de coordination des droits" (1998), 32 Rev. Jur. Thémis 235.

[180] *Uniform International Trusts Act* (1989).

[181] *Ibid.*, s. 2(2).

feature of the Convention, which is reflected in the Model Act, is the right of a state party to make the reservations permitted by the Convention separately for each territorial unit within the state to which the Convention is declared to apply.[182] The three potential reservations relate to the right to give effect, irrespective of the law that governs a trust, to rules of law of a closely connected foreign state that "must be applied even to international situations, irrespective of rules of the conflict of laws" (in other words, laws of immediate application or mandatory rules);[183] the obligation to recognize a trust if it is governed by the law of a non-contracting state;[184] and the obligation to apply the Convention to trusts created before the date on which the Convention enters into force for the enacting jurisdiction. Only Alberta has made the first reservation.[185] No province has made the second reservation. Alberta, Manitoba, New Brunswick and Saskatchewan have made the third reservation.[186]

The Model Act also contemplates that enacting jurisdictions may wish to extend the scope of the Convention's provisions beyond the "trusts created voluntarily and evidenced in writing" to which the Convention is expressly restricted.[187] The Act contains an optional provision that extends the Convention to "trusts declared by judicial decisions including constructive trusts and resulting trusts",[188] although such a trust or a several aspect of such a trust need not be recognized or given effect if the court of the enacting jurisdiction "is satisfied that there is a substantial reason for refusing to give recognition or effect to the trust or aspect".[189]

CROATIA

As previously noted, international treaties have full legal effects in Croatia upon their entry into force and their rules are directly applicable without the need for an implementing measure, except where so required under the treaty

[182] Reservations are permitted to art. 16, 21 and 22, and art. 26 expressly allows a reservation to be expressed on each occasion that a state party makes a declaration under art. 29 that the convention extends to one of its territorial units.

[183] Art. 16, para. 2.

[184] Art. 21.

[185] *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, s. 1(4).

[186] *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, s. 1(5); *International Trusts Act*, C.C.S.M., c. T165, s. 3; *International Trusts Act*, S.N.B. 1988, c. I-12.3, s. 5; *Trusts Convention Implementation Act*, S.S. 1994, c. T-23.1, s. 4.

[187] Art. 3.

[188] S. 3(1).

[189] S. 3(2).

or due the nature of a rule. In relation to the majority of the Hague Conventions to which Croatia is a contracting party, there are no implementing laws or regulations. One exception is the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, for the purpose of which the special Act determines the jurisdiction of courts and administrative bodies to issue an apostille.[190]

Regarding the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the Government launched an initiative a few years ago for enacting the legislation that would provide for the detailed procedures envisaged in the Convention itself. The aim is to achieve more efficiency since the application of this Convention proved to be very difficult and unsatisfactory hitherto. These issues are addressed in more details below.

CZECH REPUBLIC

Czech law is essentially based on the monistic theory. Published international treaties, whose ratification was consented to by the Parliament and which are binding for the Czech Republic, form part of the Czech legal order; if an international treaty provides different to a relevant act, the international treaty shall be applied (Article 10 of the Czech Constitution). International conventions are published in the Collection of International Treaties (for details see item 8 above); the publication is sufficient to prove their primacy over Czech laws. If it appears to be necessary to adopt special provisions within the Czech domestic law providing, for example, for a specific court procedure, the relevant provisions of international treaties are implemented into a particular Czech law. In some cases, the Czech law in question even refers to a particular international treaty, which was implemented through the relevant amended provision.[191]

GERMANY

The implementation of international conventions raises different issues. At first, ratification requires that the Convention is entered into force according to national constitutional law. In Germany one will also find implementing legislation which is generally drafted with a certain degree of detail. It is also

[190] More on these issues see in the Craotian National Report.

[191] See above - Sections 68a-68c Czech PILA concerning the procedure on declaration on enforceability of foreign judgments.

important that the texts of the conventions are accessible and that the rules are known by parties, judges and legal professionals. This requires training and specialisation. In all these respects there are ongoing efforts in Germany.

Some problems are predictable where there are reservations under the conventions. The existence of reservations shows that there may be conflicts and the scope of these reservations may be disputed. The interpretation of the conventions – especially insofar as they contain general clauses and exceptions – is also of crucial importance.

JAPAN

According to the Article 98(2) of the Constitution of Japan, it does not need any special procedures to implement the Conventions ratified by Japan if the Conventions are self-executing by nature.

NEW ZEALAND

If New Zealand is to fulfil the promises made in the treaty, the government has to adopt that treaty into New Zealand's domestic law. It is the responsibility of the Cabinet (the executive branch of government) to ratify international treaties. There are three authoritative and primary sources of law: statute, precedent (case law), and customs or usage (these usually have historical origins). For treaties to be enforceable in New Zealand, they have to be incorporated into one of the primary sources of law – usually statute.

How the government incorporates treaty obligations into domestic law can differ considerably (Law Commission Report 45: The Treaty Making Process Reform and the Role of Parliament (December 1997) Wellington, New Zealand). To directly give effect to the treaty, the government will pass a statute that adopts the treaty into domestic law. A less direct effect of giving effect to treaty obligations is to pass a statute that encompasses the 'spirit' of the treaty without quoting directly from that particular treaty.

NORWAY

Some of the Hague Conventions have been approved through legislation. In Norway there are two different ways of implementing Conventions through legislation. A Convention can either be translated into Norwegian and then adopted (transformed) as an Act of Parliament, or it can be adopted as an Act in

the original language. With the Hague Conventions, the translation method has been used in Norway. The translated version is then the official one. Although the translation will be the official version in Norway, the original official version of the Convention can also be included in the interpretation of the Act. Also in this situation, there is a presumption that Norwegian law is in compliance with Conventions ratified by Norway. The presumption that the legislator intended to adopt the provisions of the Convention, is of course strong when the Act is a direct translation of the Convention. The advantage with the translation method is that the Act can be read in Norwegian and is thus easily accessible to the courts, lawyers and the public. The disadvantage is that translation carries a risk of inconsistencies between the Convention and the domestic Act. There can also be a risk that the Act will be interpreted without an eye on the international context but only in the light of Norwegian legal method.[192]

Other Conventions have been translated and reformulated, and then approved as Acts.[193] This method runs a higher risk of mistakes in translation. An example of such a mistake is section 6 of the Act of 3 April 1964 (no. 1) concerning International Private Law Rules for Sales of Goods, which is the implementation of the Convention of 15 June 1955 on the law applicable to international sales of goods. Section 6 of the Act states: "A foreign rule of law which is not in accordance with the moral order in Norway may not be applied under this Act". This does not express the content of article 6 of the Convention: "In each of the contracting States, the application of the law determined by the present Convention may be excluded on a ground of public policy."[194]

POLAND

The Hague Conventions are directly applicable in Poland. When the ratification process is completed and the publication in the Polish Official Journal has taken place, the individuals can invoke the provisions of such

[192] The Convention of 1 March 1954 on Civil procedure, the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Convention of 2 October 1973 on the Law applicable to Products Liability and the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, are translated into Norwegian and approved as acts.

[193] The Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations and the Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions. have been translated and reformulated, and then approved as acts.

[194] From the translated version in the American Journal of Comparative Law, 1 (1952) p. 276.

conventions in the courts and the judicial authorities are bound to apply them.

Unfortunately, the publication in the Official Journal often takes places a long time after the formal ratification. This means that a given convention might already be binding upon Poland on the international level, but it will not be used by the courts which, in the light of art. 91 section 1 of the Constitution, must await the official publication. This practice, which is heavily criticised by commentators, may sometimes postpone the application of an international convention for many months or even for years.

As far as the actual use of the conventions is concerned, it is important to start with a general observation, that – under the Polish law – the court is obliged to make use of the law applicable in a given field by its own motion, be it substantive law, conflict rules or procedural provisions. This includes the law as set forth in ratified (and published) international conventions. Unfortunately, the theory does not always go hand in hand with practice. Not infrequently, the courts are not aware of the conventions which should be applied. Sometimes it is the parties and their professional attorneys that indicate the necessity to use a given conventional regulation but it also happens that the problem goes unnoticed and the case is settled according to purely internal rules even though the issue in question is covered by a convention. In case of typical conflicts conventions, the mistake is sometimes discovered by the Ministry of Justice when the court seized requests from the Ministry – in accordance with the Code of civil procedure (art. 1143) – the text of foreign law necessary to decide the dispute at hand. Only then it often transpires that the applicable law, whose text is needed, was asserted on the basis of the domestic statute of 1965 on private international law and not on the basis of a relevant convention.

In order to increase the general awareness of the binding conflicts conventions and to harmonise the domestic conflict rules with the international ones, important changes were put forward in the 2007 draft of a new Polish statute on private international law. First of all, the draft employs a special legislative technique whereby direct references to relevant conventions are made. This technique was used in arts. 26, 58 and 61 of the draft as far as the determination of the law applicable to traffic accidents, maintenance obligations and the form of testamentary dispositions is concerned. On the other hand, as previously explained, when it concerns the protection of persons without full capacity for legal acts, art. 13 of the 2007 draft provides for the solutions which are materially in line with the 1961

Convention, in so far as they concern the law applicable in respect of the protection of minors.

QUÉBEC

For the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

By the adoption of a statute that modifies the existing law

For the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

By the adoption of a statute without annexing the text of the Convention and without giving it force of law

For the Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption

By the adoption of a motion by the National Assembly, then by the adoption of a statute annexing the text of the Convention and giving it force of law.

Since 2002, An Act respecting the Ministère des Relations internationales, L.R.Q., c. M-25.1.1, provides that the National Assembly may be seized 2 times, and the Government, 4, with a convention:

1°) to authorize the participation of experts to the negotiations and stating what should be their instructions (there is no need for that if the expert is not representing the government of Québec)

2°) once it is adopted, to agree, or not, to the signing of such a convention by the federal government which is the only one who has the right under the Canadian constitution to sign the agreement.

3°) for the preparation of the motion proposing that an important international commitment tabled in the National Assembly be approved or rejected by the Assembly.

4°) Then the Convention might require, for its implementation by Québec, the passing of an Act

5°) The Government must, in order to be bound by an international accord pertaining to any matter within the constitutional jurisdiction of Québec and to give its assent to Canada's expressing its consent to be bound by such an accord, make an order to that effect.

TUNISIA

According to Article 32 of the Constitution, the President of the Republic ratifies the treaties.

The 2nd paragraph of the said article enumerates a list of treaties which, prior to ratification, need their approval by the Chamber of Deputies. In this list we find "the treaties containing provisions of a legislative nature," which includes the conventions relating to conflicts of laws.

Approval and ratification are not enough, since Article 32 of the Constitution also requires the condition of reciprocity in these terms: "Treaties come into force only after ratification and provided they are applied by another party."

USA

Multilateral conflicts conventions are generally viewed as self-executing.[195] They can therefore be enforced in domestic courts upon ratification, with no additional implementing process as the CISG illustrates.[196] In most cases, however, in order to ensure uniform and effective implementation within the fifty states, private international law conventions are incorporated into some form of domestic legislation. This may occur either at the federal level (through enactment of a federal statute or rules of procedure applicable in federal courts) or at the state level.

Implementation through federal legislation

In some cases, conflicts conventions are implemented by enactment of a federal statute. This approach is clearly appropriate if the subject matter in question was already governed by federal law at the time of a convention's ratification.[197] Other factors may also militate in favor of implementation at the federal level, which, in general, provides the highest possible level of uniformity and predictability. For instance, if the treaty in question refers to the internal law of member states in connection with particular obligations or

[195] *See* Van Alstine, *supra* note 21, at 922-25 (discussing the fields in which self-executing treaties have particular influence, and identifying the CISG and the Hague Service, Evidence and Abduction Conventions as self-executing).

[196] This creates, as one commentator has noted, the risk of "obscurity of law," in that courts and practitioners, particularly at the state level, may not have ready access to the convention itself or supplementary information regarding its implementation. Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 319-20 (2005).

[197] As in the case of arbitration, discussed below.

exceptions, it may be desirable to use federal legislation in order to make that law as accessible and as clear to treaty partners as possible. In addition, a particular conflicts convention may impinge only slightly on substantive matters, and therefore its implementation through federal law would be unlikely to override strong policy interests of the states. Finally, the costs of implementation and subsequent administration are likely to be lower with a single federal statute than with a state-by-state implementation process.[198]

Implementation Through Federal Rulemaking

For conventions dealing with aspects of judicial process, implementation is often achieved by means of additions or amendments to the rules of civil procedure. Procedural law is sometimes the subject of ordinary Congressional legislation. The 1964 reforms in the area of international judicial assistance were achieved by statutory enactment,[199] for instance; and Congress has in recent decades become more actively engaged in procedural reform generally (as evidenced, for instance, by the recent overhaul of the class action process). More frequently, however, the promulgation of rules of civil procedure is delegated to the judiciary.

The Rules Enabling Act of 1934 authorized the U.S. Supreme Court to promulgate rules of practice and procedure for all cases heard in the federal district and appellate courts.[200] In this process, internal committees of the Judicial Conference of the United States, and then the Judicial Conference itself, consider proposed amendments.[201] If they are approved, the Supreme Court then orders their promulgation. The Supreme Court subsequently transmits the rules to Congress, and the rules will then take effect, no earlier than six months following such transmittal, "unless otherwise provided by law."[202] The latter clause reserves Congress' right to approve or reject the rules. It is a passive right, however, and so rules can, and most frequently do, become effective with no actual review or approval by Congress.

When this form of rulemaking is used in areas already governed by conflicts conventions, it creates a certain disconnect in the implementation process, as

[198] For a full discussion of the comparative benefits of federal implementation, in connection with the Hague Choice of Court Convention, see Stephen Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, Univ. of Pennsylvania Law School Public Law and Legal Theory Research Paper Series, Research Paper No. 06-27 (2006), at 7-8.

[199] The 1964 amendments to the Judicial Code unilaterally established rules governing outgoing judicial assistance.

[200] 28 U.S.C. § 2072.

[201] 28 U.S.C. § 2073.

[202] 28 U.S.C. § 2074.

the parties charged with treaty-making power generally play no role in federal rulemaking.[203] This is particularly troubling in light of the Rules Enabling Act's "supersession clause," which provides that once a rule has taken effect, "all laws in conflict with it shall be of no further force or effect."[204] While commentators dispute the import of this clause,[205] it at least raises the troubling possibility that a provision adopted through the federal judicial rulemaking process could trump a pre-existing treaty obligation.[206]

Implementation Through State Legislation

When conflicts conventions address substantive areas governed by state law, U.S. lawmakers may choose to implement legislation at the state level. (Again, because private international law conventions are self-executing, they are enforceable in domestic courts without such implementation; nevertheless, it is generally used to promote the uniform application of the conventions.) Sometimes state implementation will occur parallel with federal implementation. The Federal Arbitration Act, for instance, applies only to proceedings in federal court. Following ratification of the New York Convention, however, some states acted independently, enacting laws intended to implement it in local proceedings as well.[207]

The choice to adopt implementing measures at the state level can fragment the task of interpreting and applying treaty law, defeating the very uniformity that is often the purpose of these conventions. To mitigate that risk, the process of state implementation of federal treaties is often conducted under the auspices of the National Conference of Commissioners on Uniform State Laws (NCCUSL).[208] This organization was created in

[203] This has led some commentators to suggest that the promulgation of rules with foreign relations impact should be left to Congress, see e.g. George K. Walker, *The Federal Rules of Civil Procedure in the Context of Transnational Law*, 57 LAW & CONTEMP. PROBS. 183, 207-08 (Summer 1994), or at least involve greater participation beyond the judicial branch, see e.g. Burbank, *Reluctant Partner*, *supra* note 7.

[204] As amended, the relevant provision now reads: "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).

[205] Compare Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 (1999) and Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012 (1989).

[206] Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1486-88 (1991).

[207] *See* Reitz, *supra* note 40, at 320 n. 60.

[208] For a description of the activities of the NCCUSL, and its involvement, often through the U.S. Department of State, in international activities, see Reitz, *supra* note 40. *See also* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance With International Law*, 82 N.C. L. REV. 457, 499-507 (2004).

1892 in order to promote uniformity of laws in U.S. states.[209] It is active in commercial law, family law and conflicts of law, among other areas, and works by promulgating either model laws or uniform laws for consideration by the individual states. While the adoption of such a law by NCCUSL cannot guarantee full and uniform enactment in every state,[210] it improves the likelihood of such a result. In certain respects, however, the relationship between NCCUSL and those responsible for negotiating U.S. private international law treaties can be somewhat fraught. The Uniform Law Commission identifies as one of its goals "help[ing] fend off federal preemption."[211] Because a federal treaty pre-empts state law just as a federal statute would, treaty-making in areas such as family law or contracts law may be viewed as a form of creeping encroachment by the federal government on areas of state concern.

VENEZUELA

After the international negotiation process, which is to be performed by the Executive Branch of the government[212], the Legislative branch evaluates the international instrument, and, if it agrees with its content, dictates an "Approbatory Statute". Such Statute does not compromise the President, meaning that it doesn't oblige him to ratify the treaty. If the President doesn't sign the convention, it is not considered to be in force.

The entry into force depends on what the treaty disposes on this regard. Generally, the implementation ends with the publication of the complete text of the Approbatory Statute and the treaty in the "Gaceta Oficial".

[209] *See* National Conference of Commissioners on Uniform State Laws, About NCCUSL, History, *at* www.nccusl.org.

[210] *See* William J. Woodward, Jr., *Saving the Hague Choice of Court Convention*, 29 U.PA. J. INT'L L. 657, 702-03 (discussing the history of the NCCUSL's efforts in harmonizing diverse state law).

[211] National Conference of Commissioners on Uniform State Laws, About NCCUSL, Frequently Asked Questions, *at* www.nccusl.org.

[212] Article 236 (4) Venezuelan Constitution.

CITE JURISPRUDENCE APPLYING THE HAGUE CONVENTION OF 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE HAGUE CONVENTIONS OF 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION.

ARGENTINA

Hague Convention of 1980 on the Civil Aspects of International Child Abduction

National Supreme Court of Justice, 14/06/1995, "Wilner, Eduardo Mario c/ Osswald María Gabriela"[213]

The parents, both Argentine citizens were married on 3 December, 1985 in Buenos Aires and moved to Canada in March 1986.. On 6 June, 1990 their daughter was born in Guelph, Ontario. The family lived at a university residence for married students and the daughter attended kindergarten there.

In December 1994, the mother flew with the daughter to spend the Christmas holidays with her family. The father gave his consent to the trip as they were to return to Canada on 22 January. However the conflicts began on 6 January when the mother informed the father of her intention to stay in Argentina with their daughter.

The father filed a request for restitution one month later in Ontario based on the Convention of International Child Abduction and on 7 March, the Court in Ontario granted the father's petition for custody of the daughter. On 21 March the Central Authority of Argentina filed the request for restitution before the local judge.

The judge, as well as the Court of Appeal, ordered the restitution of the daughter to the father applying the Convention.

The mother filed a complaint before the Federal Supreme Court, arguing that the decisions violated international treaties ratified by Argentina, and did not take into account the child´s best interests. She also argued that the instant case was about the recognition of a foreign decision and that her right to a fair trial had not been granted. The Supreme Court´s decision was adopted by the majority of its members[214]. The Court analyzed both arguments of the

[213] LL 1996, A-260, DJ 2996-1, 387 and Fallos 318:1269

[214] There were three votes in dicidense by C.S. Fayt, E. Moliné O ´Connor and G.A.F. Lopez

mother and decided that the matter, subject to decision, is a request for the restitution of a child through a proceeding established in The Hague Convention of Civil Aspects of International Abduction of Children, adopted by The Hague Conference on 25 October 1980 in force in Argentina and which guarantees the immediate restitution of children wrongfully removed or retained in any State Party of the Convention (Art. 1, a). It added that the right of the father to obtain the immediate restitution of the child to the place of its habitual residence before the wrongful retention occurred pre-exists any judicial decision in relation to the custody.

Court of Appeal, H, 02/03/1995, "A.L. A. s/ Rogatory letter"[215]

In this case the Spanish Central Authority requests the restitution on behalf of the father of a girl which left Spain illegally with her mother and moved to Argentina. The parents were separated, both residing in Spain where the girl lived with the mother. In the divorce proceedings conducted in Spain, custody and guardianship of the girl were given to the mother in April 1991. In July 1991 the Spanish judge requested the delivery of the passports of both parents to prevent them from leaving the country without judicial authorizartion. Notwithstanding this measure, the mother left Spain with the daughter sometime between July and September 1991. As a result, the Spanish judge awarded the custody to the father.

The first instance judge in Argentina rejected the request made by the father because the mother had left Spain while having custody of the child. The judge considered that it was not an illegal abduction in the terms of the Convention. In addition, he considered, taking into account art 13 para. b of the Convention, that the girl would suffer great emotional damage in the case of restitution, since she was already used to her new environment in Argentina.

The Court of Appeal overturned the decision, deciding that the case met the requirements of art. 3 of the Convention.

In August 29, 1995 the Supreme Court confirmed the judgement of the Court of Appeal which ordered the girl's immediate restitution to Spain[216].

Court of 1st Instance, N.13, San Isidro, Prov. Buenos Aires, "P., P. v P.H. s/ Rogatory letter"[217]

[215] LL 1996, B-611, DJ 1996-1, 1185.
[216] Fallos 318:1676
[217] Unpublished but discussed in JA 1996-I, pp. 967-980

The mother, born in Cuba and a national of the United States, left Argentina with her three children, aged 10, 8 and 5, towards Florida, in the United States, without the consent of the father. The judges, who intervened in the proceedings for custody which were initiated by the mother in the United States and by the father in Argentina, decided that the habitual residence of the minors and their parents was in Argentina, despite the fact that the parents had a property in Florida and travelled frequently to the United States. Subsequently, in April 1992 the father moved with his two daughters back from Florida to Buenos Aires, Argentina.

The father requested the restitution of the eldest daughter to Argentina, but the request was rejected by the Court of Miami because it considered that she was rooted in Florida and did not want to return to Argentina. The judge considered that the girl had reached an age and maturity appropriate to take into account her opinions. He also believed that there would have been a serious risk that her return to Argentina would expose her to psychological harm or that it would put her in an intolerable situation.

Following this, the mother asked the Central Authority of the United States for the restitution of the other two daughters. The Central Authority of United States faxed the request to the Central Authority of Argentina.

The Argentine judge decided to reject the petition for restitution because he believed that the move made by the father with two of the children had not been illegal since the mother had previously fled from Argentina with the three daughters.

The judge took into account the testimony of the mother before the Court of Miami in which she admitted that to move her three daughters to the United States without the consent of the father required by Article 264 of the Argentine Civil Code, she had bribed the migrations official with the equivalent of $300 USD.

Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Since Argentina is not a party of this Convention there is no jurisprudence applied to the matter.

CANADA

Hague Convention on the Civil Aspects of International Child Abduction (1980)

Thomson v. Thomson

The most prominent example of this issue is in the leading Supreme Court of Canada decision on the Convention, Thomson v. Thomson.[218]

A father, resident in Scotland, sought the return of his less than one-year-old son from Manitoba under the convention. The Manitoba court ordered the mother to return the son to Scotland but, to deal with the fact that the father had been given custody by a Scottish court's "chasing order" and so would have the right to custody of the child as soon as the mother arrived with the son in Scotland, the court granted the mother interim custody for four months. The jurisdiction to award interim custody was drawn from the statute that implemented the Convention, but the relevant section formed part of a group of provisions dealing with the recognition and enforcement of extraprovincial custody orders, not orders for the return of a child under the Convention. The Act does not clearly state that provisions implementing the convention take precedence over other provisions of the Act. The Manitoba Court of Appeal nevertheless held this part of the judge's order was invalid. The section, which authorizes an interim custody order even in favour of someone who has "wrongfully removed" or "wrongfully retained" a child, could not be construed to apply to orders under the Convention because it was inconsistent with the obligation under the Convention to order the return of the child "forthwith".

The Supreme Court of Canada held that the interim order was no longer needed because the father had given an undertaking not to enforce any right to custody he had under Scottish law until a full hearing of the matter if the mother accompanied the child back to Scotland. However, La Forest J., for the majority, expressed the opinion obiter that the Court of Appeal was right. The Convention rules must operate independently of the general provisions for enforcing foreign custody orders. The Act did not call for "[s]uch mixing of independently devised comprehensive procedures".[219] If orders were necessary to mitigate potential harm to the child from an order for return that the court was obliged to make, "the court must be assumed to have sufficient control over its process to take the necessary action to meet the purpose and

[218] [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.
[219] *Ibid.* at 603 S.C.R., 291 D.L.R.

spirit of the Convention". In other words, the power to make supplementary orders had to be found not in the separate, express provisions of the Act but in the Convention scheme itself, which impliedly might call for transitory measures to meet the practical exigencies of giving effect to the purposes of the convention. In a separate concurring judgment, L'Heureux-Dubé J. disagreed sharply on this point, holding that the Act on its proper construction did intend that the express power to order interim custody should be available to Convention cases. "The emphasis placed upon prompt return in the Convention must be interpreted in light of the paramount objective of the best interests of children and in light of the express wording of the [statute] through which the Convention was enacted in Manitoba, and should not mean return without regard for the immediate needs or circumstances of the child."

The Convention has been the subject of a large body of jurisprudence in common law Canada. I have selected for discussion the cases that I think may be the most interesting from a comparative law point of view.

Another important point made by the Supreme Court in Thomson v. Thomson is the need to keep international uniformity in mind when interpreting a Canadian statute that implements an international convention. "It would be odd," said La Forest J., "if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended."[220] For this reason, the court approved having recourse to the travaux préparatoires for the Convention, although under Canadian law the use that can be made of legislative history and preparatory materials in interpreting an ordinary statute is much more circumscribed.[221] The travaux provided important support for the court's conclusion that the Scottish court itself had rights of custody, within the meaning of the Convention, because, while granting the mother interim custody, the court prohibited her from removing the child from Scotland without permission of the court, thus reserving to the court itself the right to determine the child's place of residence.

A more controversial aspect of Thomson v. Thomson, which also drew to some extent on the travaux préparatoires, was the way the court drew the line between prohibitions on removal of a child that are imposed to protect

[220] *Ibid.* at 578 S.C.R., 272 D.L.R.

[221] *Ibid.*, *loc. cit.* The court referred to art. 32 of the Vienna Convention on the Law of Treaties, which deals with supplementary means of interpretation.

rights of custody and those that protect rights of access. The Convention, the court said, was intended to support custody rights but not access rights. The non-removal clause in the Scottish court's interim custody order in Thomson gave rise to a right of custody in the court because the purpose of the clause was to protect the court's jurisdiction to decide on permanent custody. La Forest J. indicated, however, that if a non-removal clause were included in an order granting permanent custody, the purpose of the clause would usually be solely to protect the other parent's access rights, so that a removal in breach of such a clause might well not be a wrongful removal under the convention because only the other parent's access rights, not custody rights, were at stake. The court reiterated this view in a subsequent case from Québec. One author has suggested that this view is out of step with the way the Convention has been interpreted elsewhere, because other courts have seen the non-removal clause as creating a right of custody in the access parent.[222]

The issue of habitual residence has not given rise to a great deal of case law. A couple of cases have involved infants who were taken by their mother, or by prospective adoptive parents with the mother's consent, soon after birth from the jurisdiction where they were born. The courts have held that those children could not be said to have been habitually resident in the country of their birth, at least where the mother's connections with the jurisdiction of birth were not strong. Fathers were therefore unable to have the children returned under the Convention. [223]

Habitual residence is clearly distinguished from the Anglo-Canadian concept of domicile, which places much more emphasis on the very long-term intentions of the individual in question. A Canadian diplomat, for example, was held to be habitually resident in Poland, of which his wife was a national and where they and their two children had lived for seven years, during which he was posted in Warsaw. The father's transfer back to Canada and his subsequent decision to separate from his wife did not alter the children's habitual residence because under Polish law he could not move

[222] Martha Bailey, "The Right of a Non-custodial Parent to an Order for Return of a Child Under the Hague Convention" (1996), 13 Can. J. Fam. L. 287. Compare *Re H (A Minor) (Aboduction: Rights of Custody)*, [2000] 2 A.C. 291 (H.L.), holding that a the application by a father for guardianship and access rights created custody rights in the court that were violated by removal of the child.

[223] *S.(J.W.)* v. *M.(N.C.)* (1993), 12 Alta. L.R. (3d) 379, 145 A.R. 200 (*sub nom. D.(H.A.)* v. *M.(N.C.)*) (C.A.); *White-Fourgere v. Holman*, 2006 BCSC 1606; *Jackson v. Graczyk*, 2007 ONCA 388, 45 R.F.L. (6th) 63. In each case there were also other grounds for holding the removal was not wrongful.

the children permanently without the mother's consent. His refusal to return the children at the end of a holiday visit was therefore wrongful retention.[224]

The cases show a number of instances in which, as the Convention requires, Canadian common law courts have looked to the law of the child's habitual residence in order to determine whether the rights claimed by the other parent were rights of custody for the purposes of the Convention. They have been held to exist in favour of parents who, according to that law, were entitled to joint custody of the child.[225] On the basis of expert evidence on the local law, a father was found to have custody rights although the child had never lived with him and he had never lived with the mother.[226] The relevant custody rights have been found to be vested in a court, as in Thomson,[227] and in a government guardianship department that was investigating the child's welfare.[228]

Most cases in which wrongful removal was in issue turned on the question whether the applicant parent was exercising rights of custody. Consent, however, has sometimes been the critical question. In a recent British Columbia case, the father's consent to the removal of the children from Australia to Canada was held to be obtained by the mother's deception that she intended to return, and was therefore no genuine consent.[229]

One question that involves the respective roles of the courts in the requesting state and the requested state is whether a court in the requesting state can assist the applicant parent by making a "chasing order" after the removal of the child. If the removal was wrongful to begin with the chasing order adds nothing, legally, to the applicant's case, but if the removal was not wrongful the question is whether the chasing order can be the ground for a finding that detention in the requested state is wrongful. This point came up in Thomson v. Thomson.[230] The Scottish court had made a chasing order of custody in the father's favour after the mother had moved with the child to Manitoba. The Supreme Court took the position that such an order could not, in itself,

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[224] *Korutowska-Wooff* v. *Wooff* (2004), 242 D.L.R. (4th) 385, 5 R.F.L. (6th) 104 (Ont. C.A.), leave to appeal to S.C.C. refused, 14 July 2005.

[225] *C.(D.M.)* v. *W.(D.L.)* (2001), 15 R.F.L. (5th) 35 (B.C.C.A.); *New Brunswick (Attorney General)* v. *Majeau-Prasad* (2000), 10 R.F.L. (5th) 389 (N.B.Q.B.); *Antonini* v. *Antonini* (1996), [1997] 1 W.W.R. 168, 149 Sask. R 279 (Q.B.).

[226] *Wedig v. Gaukel*, 2007 ONCA 521, 38 RFL (6th) 91.

[227] *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253; also *Thorne* v. *Dryden-Hall* (1997), 148 D.L.R. (4th) 508, 35 B.C.L.R. (3d) 121 (C.A.); *Kinnersley-Turner* v. *Kinnersley-Turner* (1996), 24 R.F.L. (4th) 252, 94 O.A.C. 376 (C.A.).

[228] *Rechsteiner* v. *Kendell* (1999), 1 R.F.L. (5th) 101 (Ont. C.A.).

[229] *Mathews v. Mathews*, 2007 BCSC 1825.

[230] [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.

make the retention wrongful. The court relied on the absence of any provision in the Convention about giving effect to ex post facto custody orders in the requesting state, and, again, on the travaux préparatoires for the convention, which discussed wrongful retention only in terms of retention after expiry of a period of access.[231] The court noted that several British courts had seemed to decide that chasing orders could give rise to wrongful retention under the convention, but it treated the decisions warily, observing that a chasing order made against a custodial parent (other than one with only interim custody) would seem aimed at protecting interests other than custody rights. "Should such a situation arise here, it would have to be very carefully scrutinized to see if this conformed to the letter and spirit of the Convention."[232]

In two very similar cases from Alberta, fathers argued that their announced wish to have their children returned to France made the mothers' retention of the children in Canada wrongful. In both cases the argument was rejected because the change of heart occurred after the family had moved permanently to Canada, the father originally intending to move to Canada with them. The children were therefore habitually resident in Canada at the time when the detention supposedly became wrongful.[233]

The Convention provides for four principal grounds on which the return of a child may be refused, notwithstanding a wrongful removal or retention. (1) The first only applies if the proceedings for return are commenced more than one year after the date of wrongful removal or retention. In such a case an order for return may be refused if "it is demonstrated that the child is now settled in its new environment".[234] The other three can be raised in any case: (2) There is no obligation to order return if the rights of custody being invoked in the application for return were not actually being exercised at the time of the removal or retention, or the removal or retention was consented to or subsequently acquiesced in by the person or institution that had the custody rights in question.[235] (3) Nor is there an obligation to order return if "there is a grave risk that his or her return would expose the child to physical

[231] *Ibid.* at 592-93 S.C.R., 283-84 D.L.R.

[232] *Ibid.* at 594 S.C.R., 284-85 D.L.R. See also *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481 at ¶ 51.

[233] *deHaan* v. *Gracia*, 2004 ABQB 74, 1 R.F.L. (6th) 140; *Proia* v. *Proia* (2003), 41 R.F.L. (5th) 371 (Alta. Q.B.). Compare *Den Ouden v. Laframboise*, 2006 ABCA 403, 417 A.R. 179, in which the father changed his mind on moving to Canada before the mother and children left the Netherlands and the mother's failure to return the children therefore was wrongful retention.

[234] Art. 12, para. 2.

[235] Art. 13, para. 1, subpara. (a).

or psychological harm or otherwise place the child in an intolerable situation".[236] (4) An order for return may also be refused if the judicial or administrative authority "finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".[237] (The convention provides a fifth ground where the return of the child would "not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms",[238] but this is seldom invoked and appears not to have been the subject of any Canadian common law decision).[239]

Exception (1) is not a major threat to the effectiveness and uniformity of the Convention system because it is only available if the application is made more than a year after the date of the removal or retention. Nor is exception (2), because the court or administrative authority does not have great leeway in deciding whether the rights of custody were being exercised, or whether the removal or retention was consented to or acquiesced in; those issues are usually fairly closely tied to the facts.[240] But exceptions (3) and (4) both turn on an evaluation of the circumstances that some courts or authorities may approach very differently from others, and so call for restrained application, lest they become over-used and so undermine the purpose of the Convention to offer a reliable mechanism for securing a child's return.

Canadian common law courts have tended to be mindful of this risk when approaching exceptions (3) and (4). A good illustration is a case from Nova Scotia[241] in which a daughter had been wrongfully removed in 1995 by her mother from Iowa, where the father had visiting rights that the mother wanted to prevent him from exercising. It was not until 2001 that the father learned of the daughter's whereabouts as a result of the mother being divorced in Nova Scotia from her second husband. The father's application for return of his daughter to Iowa succeeded at first instance. The mother admitted that she had wrongfully removed the child from Iowa and the judge found that a return to Iowa would not expose the daughter, now aged about ten, to a grave risk of physical or psychological harm or otherwise place her

[236] Art. 13, para. 1, subpara. (b).
[237] Art. 13, para. (2).
[238] Art. 20.
[239] It was discussed, but in circumstances clearly outside the provision, in *S.(J.S.) v. S.(P.R.)*, 2001 SKQB 283, [2001] 9 W.W.R. 581.
[240] Mere delay for eight months could not be acquiescence: *Ibrahim v. Girgis*, 2008 ONCA 23. The acquiescence exception was also rejected on the facts in *Katsigiannis v. Kottick-Katsigiannis* (2001), 203 D.L.R. (4th) 386 (Ont. C.A.).
[241] *Aulwes* v. *Mai* (2002), 220 D.L.R. (4th) 577, 209 N.S.R. 92d) 248 (*sub nom. A.(J.E.)* v. *M.(C.L.)*) (N.S.C.A.).

in an intolerable situation. The mother appealed on the basis that the judge had failed to give sufficient weight to the fact that the daughter did not want to return to Iowa (exception (4), the "own wishes" exception) or to the fact that the child was settled into her environment in Nova Scotia, where she had lived for the last four years (exception (1), the "settled in" exception).

The Court of Appeal upheld the order for return. It thought the trial judge had not been wrong to discount the child's own views, given that she was dependent on, and probably influenced by, her mother. Once it was found that a return would not pose a grave risk of physical or psychological harm to her, it followed that her own wishes should not be given great weight. The court stressed that one of the policies underlying the Convention is to deter child abduction, and that policy is promoted by certainty that return will be ordered. For that reason, courts should not be too ready to give effect to the "settled into the environment" exception. The exception should be applied only where circumstances had weakened the case for entrusting the courts of the habitual residence with the issues relating to the child's best interests.[242] The court said the child's links to Iowa could not be ignored, and neither could the justice or logic of entrusting the child's interests to the courts of that state. In addition, the court remarked that the child's circumstances in Nova Scotia were not all that settled, given the breakup of the mother's second marriage and the uncertainty as to whether mother and daughter could stay in Canada, now that immigration officials were investigating whether they should be deported as having entered the country illegally.

Exception (3), the "grave risk" exception, is probably the most often argued because it is so easily raised. On the whole, the courts have approached it with circumspection. Where they have accepted it, there were usually fairly extreme problems with the circumstances of the parent claiming return. Thus a return to Hong Kong at the instance of the mother was refused by the British Columbia courts because the mother led an unstable life, was prone to hide the child from the father, and had no immigration permission for the daughter for more than a short period. These factors were reinforced by the father's being in prison in Alberta for the next two years and so unable to travel abroad to protect his or the daughter's interest in any custody proceedings.[243] In a recent case[244] an Alberta court refused to return a child

[242] Those circumstances were found in the Alberta case, *Hamel-Smith* v. *Gonsalves* (2000), 185 D.L.R. (4th) 713, 5 R.F.L. (5th) 368 (Alta. Q.B.).

[243] *Chan* v. *Chow* (2001), 199 D.L.R. (4th) 478, [2001] 8 W.W.R. 63 (B.C.C.A.). Compare *Jabbaz* v. *Mouammar* (2003), 226 D.L.R. (4th) 494 (Ont. C.A.), in which the mother's uncertain immigration status in the United States did not present a grave risk to the child if she were ordered returned to the mother in California. The Ontario court said it was in no position to assess that the mother's immigration status was

to France, where her father lived, because the mother had shown on a balance of probabilities that there was a grave risk that the daughter would be exposed to physical or psychological harm because of her father's sexual abuse. The court held that a French court, which had attempted to enforce the father's right of access, had been manifestly wrong to reject a Canadian child psychologist's opinion that the daughter's allegations were credible and not produced by the mother's manipulation. In an Ontario case[245] the "grave risk" was shown because the mother, on whom the two-year-old child was completely dependent would be in a dangerous situation herself if the child were ordered returned, the father having been shown to be abusive and violent towards the mother. And a "grave risk" was found in another Ontario case in which the applicant father was a fugitive from justice in Hungary.[246]

In ordering a half-aboriginal child returned to a non-aboriginal environment in Oregon, where the father lived and from which the child had been wrongfully removed, a British Columbia court said that the "grave risk of physical or psychological harm" must be an intolerable situation going beyond the normal disruption to be expected from the removal of a small child, and stressed that the court was not concerned with determining the best interests of the child as under a custody application.[247] On the other hand, in Thomson v. Thomson,[248] the Supreme Court rejected an argument that courts must take account only of grave risks stemming from the return as such and not grave risks stemming from separation from the parent currently with the child. "[F]rom a child-centred perspective," La Forest J. said, "harm is harm."[249] However, the physical or psychological harm must be "harm to a degree that also amounts to an intolerable situation",[250] and the court accepted that "it would only be in the rarest of cases that the effects of 'settling in' to the abductor's environment would constitute the level of harm contemplated by the Convention".[251] There are a considerable number

or what the American authorities might do. On the other hand, in *Espiritu v. Bielza*, 2007 ONCJ 175, 39 R.F.L. (6th) 218, the applicant parent did not live in Texas, where he said his custody rights were violated, but in the Philippines, and he had had virtually no contact with the child; the "grave risk" exception was held to be made out.

[244] *R.(D.) v. K.(A.A.)*, 2006 ABQB 286, [2006] 12 W.W.R. 239.

[245] *Pollastro v. Pollastro* (1999), 171 D.L.R. (4th) 32 (Ont. C.A.).

[246] *Kovacs v. Kovacs* (2002), 212 D.L.R. (4th) 711 (Ont. S.C.J.).

[247] *Hoskins* v. *Boyd*, [1997] 6 W.W.R. 526, 34 B.C.L.R. (3d) 121 (C.A.).

[248] [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253.

[249] *Ibid.* at 597 S.C.R., 287 D.L.R.

[250] *Ibid.* at 596 S.C.R., 286 D.L.R.

[251] *Ibid.* at 597 S.C.R., 287 D.L.R.

of other cases in which the "grave risk" exception has been argued but rejected.[252]

In one Ontario case, the court refused to order the return of the child on the ground of the "grave risk" exception, and so allowed the abducting parent to retain the child for the time being, but at the same time the court held that a court in North Carolina was more appropriate than one in Ontario for deciding on custody and so the mother was ordered not to remove the child from Ontario until a further order of the North Carolina court.[253]

In a few cases, Canadian common law courts have dealt with the wrongful removal of children from Canada to elsewhere. In one case an Ontario court made a finding of wrongful removal at the request of the Lord Chancellor's Department as the Central Authority for England and Wales, pursuant to article 15 of the Convention, which contemplates such judicial co-operation.[254] In another Ontario case the court made a similar finding of wrongful removal under the Convention, not at the request of the authorities in the Czech Republic, where the father took the child, but as a step in Ontario custody proceedings to which both parents were parties. The father was ordered to return the child to Ontario before his application for custody could proceed.[255]

In a recent case, a court in Oklahoma had refused to order the return of a child to Ontario under the Convention, because it found the "own views" exception (number (4) above) to be made out; the child, aged 14, did not wish to return. The Ontario court, which was asked to take jurisdiction in custody, refused to do so, holding that the Oklahoma decision was reasonable and the Oklahoma court was therefore the more appropriate forum for custody proceedings.[256]

2. Hague Convention On Protection Of Children And Cooperation In Respect Of Intercountry Adoption (1993).

[252] *C.(D.M.)* v. *W.(D.L.)* (2001), 15 R.F.L. (5th) 35 (B.C.C.A.); *Mahler* v. *Mahler* (1999), 3 R.F.L. (5th) 428 (Man. Q.B.); *New Brunswick (Attorney General)* v. *Majeau-Prasad* (2000), 10 R.F.L. (5th) 389 (N.B.Q.B.); *Finzio* v. *Scoppio-Finzio* (1999), 1 R.F.L. (5th) 222 (Ont. C.A.). In *Chalkley* v. *Chalkley* (1995), 100 Man. R. (2d) 34 (C.A.), the exception was made out for one child but not the other.

[253] *Williams* v. *Elliott* (2001), 21 R.F.L. (5th) 247 (Ont. S.C.J.).

[254] *Beckett v. Morris* (1996), 24 R.F.L. (4th) 275 (Ont. Div. Ct.).

[255] *Benditkis v. Benditkis* (20 Nov. 2007), Doc. No. 05-FL-3204 (Ont. S.C.J.)

[256] *Pitts v. De Silva*, 2008 ONCA 9.

As far as the author has been able to determine, there is no Canadian common law jurisprudence on the Convention.[257] This is not surprising since the Convention deals more with the licensing of agencies, and procedures to be followed in approving an adoption, than with rules of law.

CROATIA

Over the last three years, there were a total of 85 proceedings for the return of children initiated before the Croatian authorities, 20 of which have been instigated by foreign applicants concerning children taken to Croatia, and in 65 cases the Croatian Central Authority has transmitted to foreign authorities the applications for the return of children wrongfully removed from Croatia. The case law overview presents: first, an extreme case of inefficiency by the Croatian authorities in applying the 1980 Hague Abduction Convention, second, a case well-describing the developments leading to the initiative for enacting the implementing legislation, and third, the case which might be seen as an average course of the proceedings in Croatia in recent years.[258]

A. THE 1998 AUSTRIAN INCOMING RETURN CASE

In this case H.A., an Austrian father, applied for the return of his children from Croatia. H.A.'s children were allegedly wrongfully removed from Austria to Croatia by their Croatian mother. In May 1998, H.A. sent the application for the return of his two children to the Croatian Ministry of Labour and Social Welfare through the Austrian Ministry of Justice. Although the application was received by the Ministry of Labour and Social Welfare being the Central Authority within the framework of the 1980 Hague Child Abduction Convention, the application was conveyed to the Municipal Court in Zagreb by the Ministry of Justice, as the "assisting authority" under the 1980 Hague Abduction Convention.[259] All the more, it was sent to this Court on 5 November 1999 more than a year subsequent to its receipt in the Ministry. Upon receiving the application, the Municipal Court in Zagreb remitted the application back to the Ministry of Health and

[257] There is one case, *L.(T.I.) v. F.(J.L.)*, 2001 MBCA 22, 197 D.L.R. (4th) 721, which decides that the adoption before it was not an intercountry adoption because the child and the adoptive parents were all habitually resident in Manitoba. In any case the other jurisdiction involved, North Dakota, was not then designated as a jurisdiction to which the convention applied, so the general provisions of Manitoba law on intercountry adoptions would have been applicable.

[258] More details on the discussed cases are available in the Craotian National Report.

[259] The Ministry of Justice, Decision no. Su-812/99.

Social Welfare. According to the Court's reasoning, the latter was empowered to act as the Central Authority pursuant to Article 6 of the 1980 Hague Abduction Convention, and therefore conveying the application to the Court could not have been done by the Ministry of Justice. Unfortunately, following this bureaucratic ping-pong the Ministry of Health and Social Welfare remained idle until 2004 when the Minster himself, sent the letter to the Municipal Court in Zagreb inquiring as to why the proceedings for the return of the children had not been initiated. Despite the fact that the Court had received the written application in compliance with the 1980 Hague Child Abduction Convention, the Municipal Court in Zagreb responded that it could not have proceeded upon it.[260] In the Court's opinion, the only competent body which could have taken an appropriate measure in order to assure the voluntary return of the children was the Ministry of Health and Social Affairs. The Court further stated that this Ministry failed to take any measure whatsoever to assure the return of the children, while the Ministry of Justice lacked locus standi to initiate the proceedings. Meanwhile, in May 1999, the Croatian mother initiated the proceedings before the Zagreb Social Welfare Centre claiming custody of her children. The Centre rendered the preliminary decision appointing the mother as temporary guardian of the children. Interestingly enough, when in 2004 the Municipal Court in Zagreb inquired about the status of the case, the temporary decision was still in force, a full five years after it was rendered (!). This case clearly demonstrates how the inefficiency of the Croatian judicial and administrative authorities can be unfavourable to the parent seeking the return of a child.

B. THE 2001 GERMAN INCOMING RETURN CASE AND THE RELATED ECHR JUDGEMENT

The 2001 German incoming return case was eventually brought before the European Court for Human Rights (ECHR) in 2004 as Karadžić v. Croatia.[261] The facts of the case, as presented in the ECHR decision, were as follows. Edina Karadžić, a national of Bosnia and Herzegovina had lived with her son and his father in Germany. Under German law she had sole custody of her son. In 1999, the father fled Germany and moved to Croatia. On 18 September 2000, he kidnapped the child in Germany and took him to

[260] Municipal Court in Zagreb (*Općinski sud u Zagrebu*), Communication no. 534-06-03-04-1, 4 March 2004.

[261] ECHR, *Karadžić v. Croatia,* Final 15.3.2006, Application no. 35030/04.

Croatia. The German court decision on the child's wrongfull removal was rendered in 2001, and affirmed in 2003. In 2001, Edina Karadžić requested help from the German Central authority, who immediately contacted the Croatian Ministry of Health and Social Welfare, the Croatian Central Authority.

In 2001, the Croatian Ministry of Health and Social Welfare instructed the Poreč Social Welfare Centre to order the father to return his son to his mother in Germany, which he refused to do. Consequently, later in 2001 the Poreč Social Welfare Centre instituted proceedings for the child's return before the Poreč Municipal Court and the latter rendered its decision mid 2002 ordering the father to return the child to his mother. The County Court overulled the first-instance decision and remitted the case to the Municipal Court, which, in the new proceedings, found, in mid 2003 in favour of the child's mother and ordered the child's return to Germany. This decision was affirmed by the County Court a few months later.

Subsequent to Edina Karadžić request, the Poreč Municipal Court issued the enforcement order in September 2003, ordering the immediate execution of the Court decision on the child's return to Germany. A month later, a court bailiff attempted to enforce the decision but without success since the child was not in the father's house. Because the father did not want to reveal the child's location, the police were asked to locate the child. After an unsuccessful police inquiry, in May 2004, the Poreč Municipal Court imposed a sanction of thirty-day detention on the father for failing to comply with the Court order for the child's return. Furthermore, the Poreč police filed a criminal complaint against the father and he was taken into custody but managed to escape. Hence, two years after the Municipal Court in Poreč rendered its decision ordering the child's return, the child still had not returned to Germany.

In her application to the ECHR, Edina Karadžić claimed that the Croatian authorities had been extremely slow in all the actions undertaken to reunite her with her child, particularly taking into consideration the obligations imposed on the Croatian requested authorities by the 1980 Hague Child Abduction Convention. The ECHR concluded that in this case the Croatian authorities failed to make adequate and effective efforts to reunite her with

her son as required by the positive obligations arising under Article 8 of the European Convention on Human Rights.[262]

C. THE 2003 UNITED STATES INCOMING RETURN CASE

Through the competent American Central Authority, R.H.R, an American citizen sent the request to the Croatian Central Authority, the Ministry of Health and Social Welfare, for the return of his son who was wrongfully taken from the United States to Croatia by the child's mother, together with the US Court Order for temporary custody and child's return in September 2002 and an Order for taking the child away from the mother. The Ministry of Health and Social Welfare received the application for the return of the child sent at the end of 2002. After receiving the application in January 2003, the Ministry of Health and Social Welfare contacted the Social Welfare Centre requesting the latter to take the necessary measures to obtain voluntary return of the child. Although being summoned several times by the Centre to give the statement and to return the child,[263] the mother had refused to do either. Not being able to obtain voluntary return of the child, the Ministry of Health and Social Welfare conveyed the application for the return to the Municipal Court in Zadar where the mother and child were located.

At the hearing before the Municipal Court in Zadar on 24 March 2003, the mother opposed the application for the child's return to the United States on the basis of Article 13(1) arguing that the return would seriously endanger the child, both physically and mentally, that she had never received the two US Court Orders, and that she and her son have lived together from the day the child was born. She emphasized that the father had lived with them for a short time and that he had left them and remarried. Moreover, she initiated criminal proceedings against him claiming that he had violated the child's interest by releasing the information about the case to the Croatian media. In March 2003, she also requested the custody to be granted to her, but the Municipal Court in Zadar dismissed the claim stating that it lacked international jurisdiction to hear the matter.

[262] More details on the facts of the case and the elaborated and commented reasoning of the ECHR are included in the Craotian National Report.

[263] The Zadar Social Welfare Centre acted in accordance with Article 7 of the 1980 Hague Abduction Convention and attempted to secure the voluntary return of the child or to assist in amicable resolution of the dispute.

The Municipal Court in Zadar misunderstood its task under the 1890 Hague Convention and in April 2003 it recognized the United States Court Orders in order to characterize mother's conduct as wrongful.[264] The mother appealed. In July 2003 the County Court in Zadar ruled in her favour,[265] and remitted the case back to the Municipal Court for deciding anew. In the renewed proceedings, the Municipal Court in Zadar, relying on Article 14 of the 1980 Hague Child Abduction Convention, did what it was supoosed to have done befoe: it took notice and directly considered the United States Court Orders for the purpose of determining whether the child was wrongfully removed from the United States to Croatia.[266] In August 2004, the Zadar Court decided that the removal of the child to Croatia was wrongful and ordered its return. Prior to reaching this decision the Court conducted a detailed procedure for the taking of evidence in order to establish whether the child's return to the United States would expose it to physical or psychological harm because of the mother's allegations.

Obviously, it took the Court some 18 months to render a final decision granting the child's return. Although the Zadar Court's clearly made an error when recognizing the United States Court Orders which prolonged the Hague Abduction proceedings for half a year, it, however, cannot be blamed for spending a year wishing to reach the best possible decision. In order to reach the best possible decision, the Court heard both parents and several witnesses, including the expert witness to the circumstances of the medical and psychological conditions of the parents and the child. This was the only way the Zadar Court could have made sure that, by ordering child's return to the United States, the child's best interests would be protected.

D. THE PROPOSED IMPLEMENTING LEGISLATION

Regardless of the improvements which are evident from the chronological presentation of the three selected cases, the problems with effective application of the 1980 Hague Child Abduction Convention have not been completely eliminated to date. Even before the judgement in Karadžić, there

[264] Recognizing the United States court orders for temporary custody and child's return to the United States the Municipal Court in Zadar carried out applying the rules on the recognition and enforcement of foreign court decisions contained din the Croatian Private International Law Act, *Narodne novine RH*53/1991.

[265] The County Court in Zadar (*Županijski sud u Zadru*), Gž-690/03, 16 July 2003.

[266] The Municipal Court in Zadar decided that the United States Orders have to be recognized in accordance with the Croatian Private International Law Act reasoning that, because Article 14 of the Hague Abduction Convention has priority over Croatian national law, it can take notice of foreign court decision without recourse to the recognition of foreign decisions which would have been otherwise applicable.

was awareness in Croatia that something had to be done in order to facilitate the application of the 1980 Hague Child Abduction Convention. However, the ECHR's judgment in this case cleared any doubts that extremely protracted proceedings for the return of child were a direct consequence of the lack of implementing legislation from the 1980 Hague Child Abduction Convention. In order to avoid further violations of human rights, especially the right to a respect of private and family life, and to ensure more efficient application of the 1980 Hague Child Abduction Convention, in 2007, the Croatian Government established a Working Group with the task of drafting the implementing legislation for the 1980 Hague Child Abduction Convention.[267] This drafting process is in the highly developed stage and the proposed provisions are explained in detail in the Croatian National Report.

CZECH REPUBLIC

Hague Convention on the Civil Aspects Of International Child Abduction (1980)

In the Czech Republic, there have been many cases of international abduction of children heavily covered by media. These cases have been recently solved, however, sometimes in rather differing ways. Some decisions have been criticized by legal specialists particularly with respect to the application and interpretation of Article 13 (b) of the Hague Convention on International Child Abduction, under which the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a serious risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Recently, the most discussed cases publicized in the Czech media were cases of children Sarah Barao (7 years), Adrian Santana (4), and siblings Sofie (8) and Lucas (11) Krajnik.[268]

Sarah Barao

Czech female Natalie married Portuguese Jorge Barao; they have a daughter, Sarah, and the family lived in Portugal. Natalie arrived in the Czech

[267] Croatian Government, Decision no. 022-03/07-02/19, 7.12.2007.

[268] Full names of children are provided because all cases have been heavily covered by media which revealed the names. Published judicial decisions contain only the initials of names.

Republic with her daughter and refused to return. instead, she initiated a divorce proceeding. In January 2007, a Czech court decided that mother of Sarah committed abduction of her child and was ordered to return the child back to her father in Portugal. One month later a Portuguese court changed the decision and decided that the daughter may live with and be brought up by her mother in the Czech Republic.

Adrian Santana

Czech female Veronika Horvathova lived with her husband and son Adrian in the United States and she left the US and arrived with her son in the Czech Republic. The reason for her departure from the US was alleged cruelty committed by her husband against her and their son. In October 2006, a Czech court decided that Adrian be returned to this father in the US as Adrian had been allegedly abducted by his mother and the mother instituted a divorce proceeding. The decision was changed as late as in July 2007. The Supreme Court of the Czech Republic quashed the judgment and returned the case back to a Prague district court. In February 2008, the district court decided that Adrian should not be returned to his father to the US as it was not in the best interests of Adrian.

Sofie and Lucas Krajnik

Czech female Marcela Krajnikova married Argentine Roque Fiordalis and they lived in Argentina. After five years, their relationship broke down and in 2002 Marcela fled with her children Sofie and Lucas to the Czech Republic. She alleged that her husband had subjected her and their children to physical and psychological cruelty. The husband insisted that she had committed abduction as the children had travelled without his consent. In 2006 a Czech court decided that both parents had equal rights and that children would be removed from mother and returned to their father in Argentina. The children were subjected to a dramatic mode of enforcement of judgment by an executor. Lucas was taken by the executor from an outdoor school training and younger Sofie from her kindergarten. Their mother did not have a chance to say good bye to them. The children have been in Argentina ever since. In the opinion of the Ministry of Labour and Social Affairs, which is immediately superior to the Czech Office for International Legal Protection of Children, the forcible transport of the children to Argentina constituted a breach of the children's rights as they had been exposed to psychological harm. As can be seen, individual cases are quite specific and each of them deserves separate attention.

RECENT JURISPRUDENCE IN INTERNATIONAL CHILD ABDUCTION

JUDGMENT NO. 440/2000 OF THE CONSTITUTIONAL COURT OF 7TH DECEMBER 2000[269]

The judgment No. 440/2000 of the Constitutional Court of 7th December 2000 has been the most significant for the decision-making of Czech courts and usually referred to by the Supreme Court in its decisions. The judgment deals with the following issue:

Complainant D.D., a Czech female citizen, challenged in her constitutional complaint the final judgments of a regional and district courts alleging, briefly speaking, that those courts violated her constitutionally protected rights contained in the Czech Charter of Fundamental Rights and Freedoms; the violation subsists in the fact that both courts compelled the complainant "to leave the country against her will in order to preserve her right to raise her daughter". D.D. had lived with her Israeli husband and daughter Karolina in Haifa for 8 years and her daughter attended school there. The mother left Israel for the Czech Republic with her daughter and without the consent of the father. The Czech courts ordered that daughter Karolina should be returned to the place of the father's residence in accordance with the Hague Convention on Child Abduction. In her complaint to the Constitutional Court, D.D. claimed that the decisions of both Czech courts could not rely on the Convention as the change of residence of daughter (from Israel to the Czech Republic) had been done as a result of her agreement with father. As far as the procedural issues were concerned, the mother claimed insufficient fact-finding by the courts, particularly with respect to the personal situation of her daughter for whom the return to her father's residence in Israel would be a traumatizing experience. The mother believed that the courts acted erroneously when they failed to hear her minor daughter primarily with respect to her return to Israel. The complainant asked the Constitutional Court to quash the judgments of the general courts due to the fact that their enforcement could have caused significant harm to the interests of her daughter and the complainant applied for the suspension of enforcement of the judgments. The courts stated that because the complainant and her daughter had arrived in the Czech Republic without the father's consent and resided there permanently, the only possibility they had was to conclude that the complainant, by her conduct, accomplished all

[269] Collection of judgments and resolutions of the Constitutional Court No. N 185/20 SbNU 285, published in Czech on <http://nalus.usoud.cz/Search/Search.aspx>.

elements of unlawful retention of a child in the sense of the Convention (Article 1) for the application of which other conditions also existed.

Considering the criteria for the application of the Hague Convention, the Constitutional Court regards as significant and relevant whether

the change of residence of the minor was done by a unilateral act of the complainant or whether father of the minor acquiesced to it [Article13 (a) in fine of the Convention];

the return of the minor to the residence of her father does or does not mean any danger of mental harm to be caused to the minor, or may or may not expose her to any other intolerable situation [Article 13 (b) of the Convention], or whether the minor expresses her dissent with her return to her father's residence (under the conditions stipulated by the Convention).

The Constitutional Court identified procedural errors and incomplete fact findings in the case at issue. The Court has concluded as follows:

"If children have their statutory protection (Section 32 and subsequent of the Family Act No. 94/1963 Coll.) as well as their constitutional protection (Article 32 (1) and (2) of the Charter of Fundamental Rights and Freedoms) guaranteed, both the statutory and constitutional guarantees, when applied, should be based not only on very precise fact-finding in the case at issue but also on a precise legal opinion inferred therefrom; considering the application of the Convention (Article 13) this means that reasons eliminating the return of the child to the father's place of residence (Article 3 of the Convention) must be ascertained and explained sufficiently to such extent that the threat of serious danger of physical or psychological harm, or any other intolerable situation, resulting from the compelled return may be excluded with the highest degree of probability; accordingly, all circumstances should be identified and revealed which may indicate a real position of the minor's father with respect to the minor's recent residence in the Czech Republic."

This judgment of the Constitutional Court has been often quoted by the Supreme Court of the Czech Republic; however, it should be noted that the judgment was issued several years ago and that the context has changed partially. On the one hand, there are newer international treaties and conventions adopted primarily by the Council of Europe, and the Czech Republic acceded to the European Union, i.e. EC Regulation No. 2201/2003 concerning jurisdiction and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis) is

applicable today. On the other hand, a certain shift can also be traced in judgments of the European Court of Human Rights. The possibility of proper fact-finding is significantly limited as there is only the maximum of six weeks when the return of a child to his habitual place of residence should be decided under Article 11 (3) of the Brussels II Regulation. The Hague Convention also invokes the welfare of the child, i.e. the issue of the protection of a child's rights complements the procedural requirement of speedy proceedings. As stated by Czech Ombudsman, every judge should himself, weigh up the two principles during proceedings, and he or she should do it in such a way that a fair trial may be secured.[270]

JUDGMENT OF THE SUPREME COURT OF THE CZECH REPUBLIC NO. 30 CDO 474/2007 OF 20TH JUNE 2007[271]

One of the latest judgments of the Supreme Court of the Czech Republic following the above-mentioned decision of the Constitutional Court, is judgment No. 30 Cdo 474/2007 of 20th June 2007 (Santana; the facts were described supra).

The Supreme Court quashed the decisions of the general courts (District and Regional Courts) which had ordered that the child be returned to the United States (in 2005 a Californian court ordered the conditions for joint custody of the minor; one condition was that the child could not be removed from the US without a prior written consent by the other parent or a Californian court order). The Supreme Court has concluded that, when interpreting Article 13 of the Convention, the following issues should be noted: despite the fact that the circumstances are restrictive under which an administrative or judicial body of the requested state is not obliged to order that a child be returned to the requesting state, the restrictive regulation of reasons for the refusal to return a child (as exceptions from the duty to return the child immediately) does not prevent a court from considering whether the person, institution or any other body disagreeing with the return have been able to prove the existence of circumstances under Article 13 (a) or (b) of the Convention. Consideration whether there is a serious danger that the return may expose the child to physical or mental harm or any other intolerable situation under Article 13 (b) of the Convention should always apply to a particular case

[270] Public Defender of Rights – Ombudsman, Final Opinion – Measures proposed for the rectification of issues of abduction of children from abroad No. 2840/2006/VOP/ON, 8.8.2006, see (in Czech) <http:/www.ochrance.cz>.

[271] Published in Pravni rozhledy 1/2008, 30, see also (in Czech) <http://www.nsoud.cz/rozhod.php>.

individually; this means that the circumstances of every case, which are always unique, should be considered on a strictly individual basis. Thus the Article may only be exceptionally applied by courts such as when a child becomes a victim of a crime committed by his or her parent (cruelty, sexual abuse), as was inferred by the general courts in the Santana case. Subsequently many other situations may occur as a result of which the return of a child becomes undesirable or in conflict with the child's interests, for example where a parent requesting the return will not be able to provide sufficient care (whether the insufficiency is caused on the part of the parent or the child), where the child may be exposed to domestic violence, etc. There are other relevant factors to be considered such as the mental or physical conditions of the child and the requesting parent, or if the child does not agree with his or her return, which should be taken into account depending on the age and degree of maturity of the child..

The Supreme Court does not agree with the appellate court (Regional Court) which concluded that Article 13 of the Convention should be interpreted in the following way: "the decision not to return the child to his or her habitual place of residence may be issued only if a serious danger of mental or physical harm has been proved even if the mother intends to follow her child". Thus the Regional Court inferred that in that particular case "the child would not suffer the alleged mental or physical harm as a result of the return to his habitual place of residence, but in the causal link to the decision of his mother not to return with him to the habitual place of residence". As is clear from the title of the Convention, its subject-matter subsists in the civil aspects of international abduction of children; this means that reasons for a court or any other competent body to decide to return or not to return a child to his or her habitual place of residence under Article 13 (b) of the Convention may be considered exclusively with respect to the child and his or her interests regardless of whether the parent, having unlawfully removed the child, will return to the habitual residence with the child (compare also the Supreme Court decision No. 30 Cdo 34/2003 of 29th January 2004[272]).

The decision of the Supreme Court of 20th June 2007 may be considered as decision breaking through the recent practice.

[272] See (in Czech) <http://www.nsoud.cz/rozhod.php>.

JUDGMENT OF THE SUPREME COURT OF THE CZECH REPUBLIC NO. 30 CDO 5473/2007 OF 5TH MARCH 2008[273]

In the judgment, the Supreme Court stressed the necessity to restrictively evaluate the possible exceptions to the obligation to return the child to his or her habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction. The Court defined a "grave risk" which prevents the return of the child to the habitual residence and it also dealt with the refusal of the mother to return to the original habitual residence of her children and the refusal to return her children. The Supreme Court quashed the decisions of the general courts (District and Regional Courts) which had rejected the request of the Israeli father to order that the children were removed from the Czech mother in the Czech Republic and returned to Israel.

A Czech female citizen married an Israeli citizen in Israel and their two children were born in Israel and they lived there until the mother brought them to Czech Republic solely for a visit. However, they remained there and did not return. The Israeli father required the return of his children to Israel and the issue was whether, under the present situation, there was a "grave risk" for the children to return to Israel. The Court came to the conclusion that a "grave risk" was there only if the return would expose the child to an immediately threatening danger before the enactment of the decision on the right to child care, for example a return of the child to a war zone or a famine area or a serious threat of abuse to the child. The Ministry of Justice in Israel, as a central authority in this respect, provided the information that both children have conditions for a safe return and therefore it was not possible to deduce that their return to Israel would put them into serious danger. While assessing the conditions of the children's return, the argument that the children were emotionally tied to their mother and had, in the meantime, adapted to their new home environment in the Czech Republic could not be accepted either. On the contrary, it was in the best interests of both children, following the Hague Child Abduction Convention, as well as Article 3 (1) of the United Nations Convention on the Rights of the Child, that the decision on the merits of the case on the right to custody of children be issued by the court located in the place of their habitual residence, that is, in Israel, which had the best knowledge of their relationships and their situation.

[273] Published in Pravni rozhledy No. 14/2008, 532, see also (in Czech) <http://www.nsoud.cz/rozhod.php>.

This rather restrictive concept of the "grave risk" which prevents the return of the child to the habitual residence can break the existing practice of the Czech courts and contribute to the international harmony in these very delicate decisions.

GERMANY

Germany ratified the Hague Convention of 1980 on the Civil Aspects of International Child Abduction in 1990 and it entered into effect for Germany later that year. The Abduction Convention requires the effective "return" of a child who has been wrongfully removed from their habitual place of residence or retained in another Contracting State and provides an effective mechanism for the swift return home of children. It aims to establish a consistent approach in handling international civil child abduction cases. In Germany, proceedings under the Hague Convention follow §§ 37 et seq. of the Int. Fam. L. Proceedings Act; "non-contentious" questions are also dealt with in the Act on Non-Contentious Proceedings[274]. The Federal Office of Justice fulfils its functions as a Central authority. However, if Germany is the State to where the child has been abducted, problems may result. The return proceedings may conflict with the usual approach of German courts which in effect tend to grant protection to domestic parties[275].

In the past Germany has been the recipient of extensive international criticism, alleging that German courts were violating their treaty obligations by failing to return children who had been abducted to Germany by German nationals. The United States and other countries have been critical of Germany's handling of international parental child abduction cases filed by foreign parents for not fully and consistently following the criteria and procedures established under the 1980 Hague Convention[276]. Regarding France, a special mediation by a French-German team took place[277]. The

[274] Gesetz über die freiwillige Gerichtsbarkeit (FGG) of May 20, 1898 (as amended) – Cf. *Wolfe* (supra note 52) 315 et seq.

[275] *Siehr,* The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in German Practice, N.Y.U. J. Int. L. & Pol. 33 (2000) 207 et seq.- Cf. also *Dutta*/*Scherpe*, Die Durchsetzung von Rückführungsansprüchen nach dem Haager Kindesentführungsübereinkommen durch deutsche Gerichte, FamRZ 2006, 901 et seq.

[276] See *Lowe,* Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland, FamRZ 1998, 1073 et seq.; *Id.,* In the Best Interests of the Child? Handling The Problem of International Parental Child Abduction, in: Maurauhn (ed.), Internationaler Kinderschutz (2005) 73 (83 et seq.); *Wolfe* (supra note 52) 285 et seq.

[277] Cf. *Carl/Copin/Ripke,* Das deutsch-französische Modellprojekt professioneller Mediation, Kind-Prax Spezial 2004, 25 et seq.

primary criticisms have included the inappropriate use by German courts of certain provisions of the Hague Convention to justify retaining an abducted child in Germany, the length of time it has taken to adjudicate cases, and the failure to enforce return orders and the access rights of left-behind parents. As a result, Germany enacted procedural reforms in 1999 and 2005 which have solved at least parts of the problem[278].

A series of cases dealt with the relationship of the Constitution and the Hague Convention and clarified some issues[279]. Art. 6 para. 1 of the Basic Law states that marriage and family shall enjoy the special protection of the State. "Family" includes the relationship between parents and their children, whether legitimate or illegitimate. According to Art. 6 para. 2 Basic Law, the care and rearing of children is the parents' natural right and foremost obligation. This is considered to be not only the constitutional basis for the principle that the best interest of the child is paramount, but also a barrier to State intervention. In the past there was concern that constitutional arguments could block the proper application of the Hague Convention. In one case, a decade ago, the Hague Conference itself participated in the litigation by filing an amicus brief on an issue that arose in a case in the German constitutional court280. However, the Federal Constitutional Court has subsequently held that the Convention does not conflict with the German Constitution[281].

Of crucial importance is the interpretation of Art. 13 of the Hague Abduction Convention. According to this provision, the judicial or administrative authority of the requested State is not bound to order the return of the child if certain criteria can be established. Under Art. 13 para. 1 lit. a, an obstacle to return results when the other parent was not actually exercising custody rights at the time of removal or retention, or had consented to the removal or retention. According to German case law, the removal or retention is nonetheless unlawful where joint custody in the first state was not being respected. The second justification for a non-return is that there is a grave risk that his or her return would expose the child to physical or

[278] See in more detail *Wolfe* (supra note 52) 318 et seq.

[279] Cf. *Pirrung* (supra note 5) 349 et seq.; *Wolfe* (supra note 52) 324 et seq.

[280] See *Dyer* and The Permanent Bureau of the Hague Conference on Private International Law, Germany: Constitutional Court Decision in Case Concerning the Hague Convention on the Civil Aspects of International Child Abduction, Including Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court, ILM 35 (1996) 529 et seq.; Groves v. Groves, BvR 982/95 and 2 BvR 983/95 (F.R.G. Oct. 10, 1995).

[281] Fed. Const. Court 29 Oct. 1998, BVerfGE 99, 145 (158 et seq.); 18 July 2006, FamRZ 2006, 1261.

psychological harm or otherwise place the child in an intolerable situation (lit. b). What constitutes harm for the child has to be interpreted by the courts. A narrow interpretation which accepts that return as such is not a grave risk of harm, but is generally in the child's best interests, ensures that the functioning of the Convention cannot be blocked by invoking this ground[282].

According to Art. 13 para. 2 Hague Abduction Convention, the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. According to German case law, the age of maturity is approximately seven to nine years[283]. Also in this respect, the dominant interpretation is in line with the general approach taken in other jurisdictions.

However, despite this interpretation, several actions taken by Germany in order to reform its handling of international parental child abduction cases were necessary. In the past, one reason for difficulties was that judges were not adequately trained or specialized. Today there is a special rule on jurisdiction ratione loci. Initial jurisdiction is given to the family court (Familien-/Amtsgericht) of the location where a Court of Appeal (Oberlandesgericht) is situated (§§ 10, 11 Int. Fam. L. Proceedings Act). Unless there are special needs, the child's or the respondent's residence determines jurisdiction. In practice, this means that jurisdiction in Hague Convention cases is restricted to twenty-four first-instance and twenty-four appellate courts.

The convention requires that cases be heard expeditiously and there is a special German provision for an expedited procedure (§ 38 Int. Fam. L. Proceedings Act). Many cases in Germany take a few months to resolve and, at least in the past, there were also serious delays[284]. The length of time required depends on the circumstances of each individual case (known or unknown location of the child and the abducting parent; consent or objections to return the child voluntarily, etc.). Children need not, as a rule, be heard in Hague proceedings; however, special circumstances such as re-abduction of the children may create an exception. Then, the court is under an obligation to ascertain the wishes of the child and has to hear the child in person[285]. It can also be necessary to appoint a special custodian ad litem

[282] Cf. *Wolfe* (supra note 52) 331 et seq.
[283] See *Wolfe* (supra note 52) 335 et seq.
[284] See in more detail *Wolfe* (supra note 52) 337 ff.; *Lowe* (supra note 66) 83 et seq.
[285] Fed. Const. Court 29 Oct. 1998, BVerfGE 99, 145.

(Ergänzungspfleger) in the sense of § 50 Act on Non-Contentious Proceedings to represent the interests of the child in the German return proceedings.[286] Under German law the parties and the child will, as far as possible, be heard in person and their attorney or the court officer representing the child in the proceedings will be heard as a minimum.

The German Federal Supreme Court clarified that Art. 16 of the 1980 Convention also prevents the courts in the State where the return proceedings are taking place from giving an order on the merits of custody where the return proceedings have already been concluded, with an order of return, but the order has not yet been enforced[287]. The Court discussed an interpretation of Art. 16 of the Hague Abduction Convention under which the courts would be allowed to make a decision on the merits of custody in cases where enforcement is delayed. However, the court rejected such an interpretation, at least in cases where the delay is caused by the abducting parent or by delayed treatment by the enforcement agencies.

Decisions on applications for return under the Hague Convention may be appealed by either party. The request for an appeal must be filed within two weeks of the initial decision[288]. The two-week period begins immediately after the local family court has served its decision on the legal representatives of each party. After an appeal is filed with the competent Court of Appeal, proceedings start with the transfer of the files from the local court to the Court of Appeal. After receiving the records and the pleading of the appellant and deliberating upon the case, the Court of Appeal decides on the measures to be taken for the purposes of reaching a final decision. The court can make a decision on the documents submitted alone, or it can schedule a hearing. A decision by the Court of Appeal is usually final.

German courts do issue return or access orders based upon Hague applications. However, the actual enforcement of those orders can be difficult if the parent with the child refuses to comply with the court's decision. In 2005, Germany changed its legislation governing the enforcement of Hague return orders to make enforcement more effective. The general provisions on enforcement of decisions in non-contentious

[286] Fed. Const. Court 18 July 2006, FamRZ 2006, 1261.

[287] Fed. Supreme Court 16 Aug. 2000, BGHZ 145, 97 = NJW 2000, 3349 = IPRax 2002, 215 Annot. *Pirrung* (197).

[288] See § 40 para. 2 Int. Fam. L. Proceedings Act in conjunction with § 22 para. 1 Act on Non-Contentious Proceedings.

matters[289] are no longer applicable; rather, some special rules governing the enforcement of Hague return orders in § 44 of the Int. Fam. L. Proceedings Act were introduced. However, the Act on Non-Contentious Proceedings still governs the regime of legal challenges where the Act does not make specific provision.

A first instance return order has to be final in order to be enforceable; the court cannot order an earlier enforcement. If an appeal is filed, however, the Court of Appeal has to examine ex officio whether to order immediate enforceability. According to the relevant provisions, this should be done where the legal challenge is obviously ill-founded or where the return of the child before a decision on appeal is in line with the child's best interests, taking into account the justified interests of the parties.

The return is ordered under a penalty of fine or imprisonment in the case of non-compliance[290]. This penalty shall be included in the original order[291]. Also, physical force can now be used to enforce court orders in convention cases[292]. If the return order is not complied with, the actual sanction then has to be ordered. The penalty can only be challenged together with the return order, which speeds up enforcement[293].

In Germany, under the general legislation applicable to non-contentious matters, a judgment debtor has to be notified first that non-compliance with an order is under penalty of a particular coercive measure (fine or imprisonment, physical force). Then the particular measure subsequently has to be ordered. Now, where the first instance order granting return is challenged by an appeal and the Court of Appeal confirms the return order, the appellate court is responsible for the institution ex officio as well as the supervision of and coercive enforcement of the return order[294]. In the past, enforcement was always under the responsibility of the court of first instance, and a request by the applicant was necessary.

It is expected that the new legislation will speed up enforcement because the Court of Appeal is closest to the most current state of facts and thus best placed to order the appropriate enforcement measures[295]. The German

[289] See § 33 of the Act on Non-Contentious Proceedings.
[290] See § 44 para. 1 of the Int. Fam. L. Proceedings Act.
[291] See § 44 para. 2 of the Int. Fam. L. Proceedings Act.
[292] See § 44 para. 3 of the Int. Fam. L. Proceedings Act.
[293] Cf. § 44 para. 2, 4 of the Int. Fam. L. Proceedings Act.
[294] See § 44 para. 6 of the Int. Fam. L. Proceedings Act.
[295] *Schulz*, Enforcement of orders made under the 1980 Convention – A comparative legal study (Provisional version) (2006) no. 61. - http://hcch.e-vision.nl/upload/wop/abd_pd06e2006.pdf.

Federal Ministry of Justice and other institutions have organized seminars for enforcement officers (bailiffs) on the enforcement of Hague return orders. At those seminars, the bailiffs have been trained and a checklist was developed for each type of order; the checklist is supposed to assist the bailiffs in making the necessary arrangements[296].

Despite all these efforts, the U.S. Department of State still found that Germany demonstrated patterns of non-compliance in fiscal years 2006 and 2007[297]. Specifically, Germany's non-compliance related to the unwillingness of some courts to enforce orders for the return of children or access to children under the Convention. Left-behind parents were unable to secure prompt enforcement of a final return or access order. Abducting parents could, and did, thwart court-ordered returns and access.

The Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) tries to protect children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This Convention, which also operates through a system of national central authorities, seeks to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights and to prevent the abduction, sale, or trafficking of children.

In Germany, which is mainly a receiving state for children from foreign countries, several statutes implement the Convention. One of them specifically deals with the implementation of the Convention[298]. The procedure of adoption placement is governed by a special Law on Adoption Placement[299]. There is also a specialised authority for foreign adoptions which is the central authority in the sense of the Hague Convention[300]. Its function, however, is mainly restricted to coordination. There is also a

[296] See with more details *Schulz* (supra note 85) no. 56.

[297] See U.S. Dept. of State 2007 Compliance Report for the 1980 Hague Convention on the Civil Aspects of International Child Abduction; 2008 Compliance Report, http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf.

[298] Act Implementing the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Gesetz zur Ausführung des Haager Übereinkommens vom 29. Mai 1993 über den Schutz von Kindern und die Zusammenarbeit auf dem Gebiet der internationalen Adoption; AdÜbAG) of 5 Nov. 2001, Federal Gazette 2001 I p. 2950, as amended.

[299] Act on Adoption Placement (Adoptionsvermittlungsgesetz; AdVermiG) of 2 July 1976, as amended 22 Dec. 2001, Federal Gazette 2002 I p. 354.

[300] Bundeszentralstelle für Auslandsadoption. – Cf. *Weitzel*, Das Haager Adoptionsübereinkommen vom 29.5.1993: zur Interaktion der zentralen Behörden, NJW 2008, 186 et seq.; *Weitzel/Marx/Reinhardt/Radke* Rechtslage und Verfahrensgang bei Auslandsadoptionen,.in: Harald Paulitz (ed.), Adoption (2nd ed. 2006) 271 (306 et seq.).

Central Authority of the Youth Welfare Office (Landesjugendamt) of each German state (Bundesland)301. These are responsible for adoption placements within their jurisdiction. There is a Youth Welfare Office (Jugendamt) of each district/major city.

The ratification led to a reform of the adoption placement procedure under German law. It generally secures that there are decisions taken in accordance with the best interests of the child.

GREECE

As mentioned before, Greece has not yet adopted the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption. Therefore this report is confined to cite case law applying to the 1980 Convention on child abduction.

Greek law concerning the Convention can be found at the website http://hagueconventions.law.uoa.gr[302] . Bearing in mind these jurisprudence precedents, it can be observed that the child's return was ordered by the Greek courts in one third (moreover) of the cases trialed, while in the other two thirds (approx.) the application was rejected. To justify the refusal to return the child, the Greek courts have often appealed to Article 13 of the Convention and, more particularly, to the risk of exposing the child to psychological danger (and sometimes physical) or to be placed in an intolerable situation[303]. They have sometimes relied on the fact that the applicant who had the personal care of the child was not actually excersicing the right of custody[304] or that he had consented to the move[305].

Often the child himself has reached a certain age and sufficient maturity so that his opinion can be taken into account, so when he opposes his return, the judge is allowed to refuse the return order[306]. The Court of Salonika has

[301] Zentrale Adoptionsstellen der Landesjugendämter. - Cf. *Weitzel/Marx/Reinhardt/Radke* (supra note 90) 293 et seq.

[302] The cases referred to in the following without other indication than their number can be found in the mentioned internet site.

[303] See Areopage no 1003/1998, no 809/2000 et no 63/2001; Court of Thessalonique no 3662/1996 ; Court of Thrace no 61/2001, referred also by Io. Thoma, « Bilan de la jurisprudence hellénique dans le domaine du droit international privé (années 1999-2001) », *RHDI* 54 [2001], p. 564 ; Court of Dodékanèse no 68/2005 ; Court of Patras no 206/2005 ; Trib. gr. inst. of Corfou no 1087/2004.

[304] Aréopage no 1003/1998 ; Court of Thessalonique no 3662/1996

[305] Trib. gr. inst. de Thessalonique no 881/1995.

[306] Aréopage no 63/2001, also referred to by Io. Thoma, « Bilan de la jurisprudence hellénique dans le domaine du droit international privé (années 1999-2001) », *RHDI* 54 [2001], pp. 563-564 ; Court of Thessalonique no 3662/1996 and no 998/1997 ; Court of Dodécanèse no 68/2005 ; Court of Patras no

even ordered a psychiatric examination of the child, to see if his desire to remain in Greece and not return to Hungary was sincere and real or was duly influenced by his father. [307]

The request to return the child in accordance with the Convention must be considered on an urgent procedure, meaning provisional measures[308]. Nevertheless, it is not considered a measure itself; litigation (which differs markedly from the one concerning the right of custody) is settled permanently, so that the judgement is likely to be appealed, despite the prohibition in Article 699 of the Code proc.civ. Greek, which only concerns provisional measures[309].

The competent place is the High Court (composed of a single judge) where the child is located or the one of the domicile or habitual residence of the parent from whom the child has been removed[310]. The defendant in a lawsuit concerning the return of the child may make a request regarding custody[311].

Even if the judicial or administrative authority takes knowledge of the case after the expiry date of one year from the removal or non-return of the child, it must order the return, unless it is established that the child is settled in its new environment (Article 12, paragraph 2 of the Convention)[312].

In a case where the mother to whom custody was awarded on the basis of the law of Ontario, and who had brought their child to Greece, despite the fact that the Canadian courts had forbidden the removal of the child outside the territory province based on reasons having to do with the right to visit of the father, the Court of Thessaloniki ruled that custody was precedent in relation to access and (therefore) refused to return the child to Canada[313].

The Greek courts seek in each case what is in the best interests of the child, to give satisfaction, and have not failed to point out that the child must be treated as a distinct personality with its own rights and needs and should not

206/2005 ; Trib.gr.inst. d'Amaliade no 248/2007. However, despite the opposition of the child, the return was ordered in one case because the court had considered that the child was not mature enough to decide over the matter, see Trib. gr.inst. Kos No 1201/2001.

[307] Arrêt no 1255/2005

[308] Court of Macedonia no 119/1994 *Armenopoulos* 49 [1995], p. 355.

[309] Court of Macédonia d'Ouest no 119/1994 *Armenopoulos* 49 [1995], p. 355 ; Court of Thessalonique no 1587 /1996 and no 722/2003 ; *contra* Court of Corfou no 135/1994 *Elliniki Dikaiossini* 36 [1995], p. 1295.

[310] Trib. gr. inst. de Yiannitsa no 274/1995 *Armenopoulos* 49 [1995], p. 1041

[311] Trib.gr.inst. de Corfou no 1087/2004

[312] Trib. gr. inst. de Yiannitsa no 274/1995 *Armenopoulos* 49 [1995], p. 1041.

[313] Arrêt no 998/1997

be transferred from one country to another just because of custody rights exercised by a parent[314].

JAPAN

Because Japan has ratified neither the 1980 Convention on Child Abduction nor the 1993 Convention on Protection of Children, there is no jurisprudence applying these Conventions rendered by the Japanese courts.

NEW ZEALAND

In this section aspects of the above Conventions that have been the subject of jurisprudence in New Zealand will be identified and briefly explained within the context of the relevant legislative framework before turning to applicable case law.

CONVENTION ON THE CIVIL ASPECT OF INTERNATIONAL CHILD ABDUCTION: PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The norms underlying the Convention and New Zealand domestic law in regard to the protection of human rights and fundamental freedoms are largely similar. More specifically, s 106 of the Child Care Act 2004 enacts art 20 of the Convention, in terms of which the return of a child may be refused if it would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. S 106(1)(e) incorporates art 20, but goes further by stating that the Court may, within this context, consider

whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum;

whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

[314] Cour de Larissa no 613/2001 ; Cour de Dodécanèse no 68/2005.

In interpreting this ground of refusal to return a child, within the specific fact scenario before the Court in S v M [1993] NZFLR 584, MacCormick J said that it was the situation in a particular overseas country or in particular overseas countries that was crucial, rather than the situation in a particular home or household. Since the Convention was a treaty between state parties, it related to the responsibilities of those state parties. As a representative and official organisation of a state party (New Zealand), the Court could refuse to return the children in the particular circumstances of a case in order to protect them from the illicit/unlawful use of drugs or involvement in the production or trafficking of drugs, provided there was sufficient evidence to support such a finding.

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: RIGHTS OF CUSTODY AND ACCESS

The interpretation of the concepts "rights of custody" and "rights of access" in Convention cases by the New Zealand Courts has generated differences with other jurisdictions, notably the English Courts, on the international level. Presumably, the interpretation of these concepts has been informed by domestic norms that are at variance with the norms of the Convention as perceived by other jurisdictions.

As stated in art 1 of the Convention, the objects of the Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".

It is clear, therefore, that the Convention draws a clear distinction between rights of custody and rights of access. Art 5 stipulates that "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", while "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".

Art 3 of the Convention deals specifically with wrongful removal or retention of children in relation to the prompt return of abducted children to the country of their habitual residence. Within this context, removal or retention is wrongful if it is in breach of existing rights of custody, actually exercised at the time or bound to have been exercised but for the removal or retention. It is clear that art 3 deals with abduction in the sense of a breach of

custody rights by the taking parent, which will trigger the return mechanism provided for in the Convention.

Rights of access are dealt with in art 21, which aims to organise and secure the effective exercise of rights of access, focusing, amongst other things, on "the removal of obstacles to the exercise of such rights". S 21 does not provide for an order for return.

When the Convention was implemented in New Zealand the Minister of Justice made it clear that the Convention was intended to provide only for the return of a child in the event of a breach of custody rights and that the Convention should not be invoked to require the return of a child in order to enforce access rights.

In New Zealand, the original definition of "rights of custody" in s 4 of the Guardianship Amendment Act 1991, which first implemented the Convention, required an applicant to show that he/she had both the right to the possession and care of the child and the right to determine where the child shall live. This seemed to be at odds with the Convention, which included rights relating to the care of the person of the child and the right to determine the child's place of residence within its definition of custody rights. S 4 of the Act was subsequently repealed and replaced with a new definition to bring it in line with art 5(a) of the Convention. In Gross v Boda [1995] 1 NZLR 569, McKay J had commented that (574): "It is unfortunate that for reasons which are not readily discernible the Act [in the original s 4] has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries." The amended s 4 defined rights of custody as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. The current s 97 of the Care of Children Act 2004 defines rights of custody as "rights relating to the care of the person of the child (for example, the role of providing day-to-day care for the child); and … in particular, the right to determine the child's place of residence".

In their interpretation of custody rights within the context of the Convention, the New Zealand Courts have accorded a wider scope to custody rights than their English counterparts and have not drawn a sharp distinction between custody rights and access rights. In Gross v Boda [1995] 1 NZLR 569 Cooke P said that the definitions of "rights of custody" and "rights of access" were not mutually exclusive. A right of intermittent possession and care of a child could fall under rights of custody, but it could also fall under rights of access, so there was a possibility of overlap (571). According to Hardie

Boys J, there was no reason to differentiate between the so-called "primary care giver" (who had rights of custody) and the parent who only had "visiting rights". That would defeat the objective of the Convention, namely "to ensure that questions of residence along with other questions affecting the child's welfare are normally to be dealt with by the Courts of the child's habitual residence" (574; see also Dellabarca v Christie [1999] NZFLR 97).

The difference in approach between the New Zealand Courts and the English Courts came to a head in Hunter v Murrow [2005] EWCA Civ 976 (CA) where the English Court of Appeal reached a different conclusion from that reached by the New Zealand High Court on the same set of facts in M v H [2006] NZFLR 623. The New Zealand Court had decided that the regular exercising of access by a father to his son over a period of some years, as well as the existence of a defined and committed relationship with his son, constituted substantial intermittent possession and care of the child and therefore the father had rights of custody in respect of his son. The English Court of Appeal decided that that was wrong and that the father had not enjoyed rights of custody. Lloyd LJ lamented the lack of comity between the English and New Zealand Courts (para [66]) and Dyson LJ was of the opinion that the New Zealand Courts' interpretation, based on a failure to distinguish sharply between custody rights and access rights, was wrong (para [58]; see also In Re D (a child) [2006] UKHL 51 paras [35], [42], [43] and [44]; para 19). The need for international uniformity in the interpretation of "rights of custody" was endorsed in a recent New Zealand case: in Fairfax v Ireton (HC Auckland, CIV-2008-404-4279, 24 November 2008) Priestly and Cooper JJ stated that it was undesirable for New Zealand law to be out of step with the law of other signatory states, pointing out that the expansive interpretation of "rights of custody" (with reference to the decision in M v H) ran counter to the jurisprudence of other significant Convention signatories (para 107).

THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: HABITUAL RESIDENCE

"Habitual residence" is employed as a connecting factor in both Conventions, but the concept is not defined in these or any other Hague Convention. Habitual residence is a new concept in New Zealand law.

Traditionally, New Zealand, like other Anglo-Common law jurisdictions, used domicile as the primary connecting factor for private-law status related matters as well as other child and family related issues. However, habitual residence appears to be "particularly suited to the family law context as it is a factual concept and thus has the flexibility to respond to modern conditions, which is lacking in the concepts of domicile or nationalities" (SK v KP [2005] 3 NZLR 590 para [71], per Glazebrook J).

Since habitual residence is not the same as domicile, New Zealand courts have had to interpret and define the concept of habitual residence themselves. This is mainly done in a comparative vein with reference to jurisprudence from other countries, as evidenced by, for example, the extensive reference to both Anglo-Common law and Civilian jurisdictions in Punter v Secretary for Justice [2007] 1 NZLR 40. In that case it was also emphasised that the Hague Convention was an international agreement and therefore there should not be any differences between civil and common law jurisdictions in regard to the interpretation of the concept of "habitual residence" (paras [171], [172]). Particularly within the context of international conventions, international consistency in the interpretation of habitual residence will promote certainty, predictability and uniformity of result.

According to New Zealand case law, habitual residence is essentially a matter of fact. Policy considerations relevant to the acquisition or retention of habitual residence (for example the policy of deterring retention of children and the policy in favour of upholding parental agreements) cannot override the factual nature of the inquiry, and should only be considered in borderline cases (Punter v Secretary for Justice [2007] 1 NZLR 40 paras [176] - [187]). Despite habitual residence being a matter of fact, an appeal may be granted (with leave) on matters of fact and law (Punter v Secretary for Justice [2007] 1 NZLR 40 para [49]; see also s 145(1)(b) of the Care of Children Act).

Habitual residence is determined with reference to the circumstances of each case: SK v KP [2005] 3 NZLR 590 (para [71]). The following principles for the determination of habitual residence have been developed, mainly within the context of international child abduction:

A new habitual residence is established through actual residence for an appreciable period in a place coupled with a settled purpose to remain there (SK v KP [2005] 3 NZLR 590 para [73]).

For purposes of the Convention on the Civil Aspects of International Child Abduction, it is the habitual residence of the child that is crucial, which will, in turn, depend on that of the child's parent(s). According to Ingerson v Johnston (District Court, Hamilton FP 476/94, 16 September 1994), it is accepted that the habitual residence of young children whose parents are living together is the same as the habitual residence of those parents. Within the context of married persons living together, habitual residence refers to their home in a particular country, which they have adopted voluntarily and for settled purposes as part of the regular order of their lives for the time being. "Settled purpose" requires that the parents' shared intentions in living where they do should have a sufficient degree of continuity so as to be described as settled. This cannot be changed unilaterally by one of the parents (SK v KP [2005] 3 NZLR 590 paras [74] and [76]).

In regard to intercountry adoption, the settled purpose factor may be of less importance, because the biological parents of the child may remain in the host country. Also, the requirement in art 2, that the child will be or has been moved for the purposes of adoption, takes account of much of what would otherwise be considered under a settled purpose criteria: Re Adoption Application by KGC and TGC [2007] NZFLR 851 (para [50], per Hikaka J).

It is possible for a child to be without a habitual residence, for example where the previous habitual residence has been lost, but a new one has not been established yet: Basingstoke v Groot [2007] NZFLR 363 (para [12]).

Duration of residence is not necessarily decisive (Smith v Chief Executive of the Department of Courts (High Court, Christchurch AP 36/96, 2 March 1999) and neither is "indefinite residence" in a country essential to establish a habitual residence (Secretary for Justice v Whenuaroa (Family Court, Hastings FP 020/017/00, 19 July 2000). A limited period of residence with a sufficient degree of continuity may suffice (SK v KP [2005] 3 NZLR 590para [77]). However, the length of stay in a place, the purpose of the stay and the strength of ties to the existing place are all relevant considerations to be taken into account when establishing a habitual residence: SK v KP para [80].

Cases involving shuttle custody agreements have provided a unique challenge for the determination of a child's habitual residence. In these situations the parents agree to the child residing with one parent for a

specified period of time (usually relatively lengthy), followed by a specified period of time with the other parent, and this arrangement is intended to continue until, for example, the child reaches a certain age. In Punter v Secretary for Justice [2007] 1 NZLR 40 it was stated that, in these shuttle custody situations, considerations of parental purpose and parental rights did not outweigh a factual, child-centred approach based on a consideration of all the relevant factors (paras [108], [109], [123]). Within this context there is the possibility of serial habitual residences in the sense of alternating habitual residences and this is the position in both Anglo-Common Law and Civilian jurisdictions. However, this does not follow automatically from an arrangement that is in the nature of a shuttle custody agreement; any conclusion as to habitual residence will depend on the combination of circumstances in the particular case (Punter para [169]).

THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: WELFARE AND BEST INTERESTS OF CHILDREN

Abduction:

The Convention on the Civil Aspects of International Child Abduction states that the interests of children are of paramount importance in matters relating to custody. This is echoed in s 4 of the Care of Children Act 2004, which states that the welfare and best interests of the child must be the first and paramount consideration in matters regarding children.

However, the primary purpose of the Hague Convention to promptly return children who have been wrongfully removed from or retained away from the state of their habitual residence to that state, since it is in the best interests of the child that that state decides custody and access disputes related to that child. This has been endorsed in New Zealand case law: the decision is not about what is in the best interests of the child, but where their best interest should be determined (A v A [1996] 2 NZLR 517). Although the best interests of the child may also be paramount in the state of habitual residence, New Zealand Courts may not question the competence of other states' courts (KS v LS [2003] NZFLR 817).

Adoption:

Within the context of adoption, it has been argued that welfare and best interests mean the same thing: in Director-General of Social Welfare v L [1989] 2 NZLR 315, Richardson P was of the opinion that "welfare" was a broad expression and that "and interests" (in s 11(b) of the Adoption Act 1955) were merely added words of emphasis. In the same case, Bisson J said that there was a distinction between the terms. Welfare concerned the nurturing of a child, including the provision of shelter, clothing, food, love and affection, which demanded close physical and emotional involvement with the child. "Interests" of the child could, for example, pertain to the consequences for the child of the termination of the parent/child relationship. There could, therefore, be a conflict between the welfare and best interests of the child in the sense that current welfare demands are met (by a foster parent), but not the long-term interests of the child (for example, to have a relationship with a natural parent).

NORWAY

Rt is the abbreviation for Norsk Retstidende, a journal in which Supreme Court decisions are published. HR is the abbreviation for the Norwegian Supreme Court, and provides a reference to Supreme Court decisions not published in Rt. Norwegian decisions are also published on the internet, see http://www.lovdata.no. To my knowledge there is no jurisprudence applying the Hague Convention of 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption. The reason for this is probably that the Convention did not give rise to changes in the legislation. As for Jurisprudence on the Hague Convention of 1980, only Supreme Court decisions will be cited:

Rt-2007-350. Rt-2006-1702. Rt-2002-715. HR-2001-1101. Rt-2000-710. Rt-1998-1910. Rt-1998-1642. Rt-1998-491. Rt-1997-1879. Rt-1997-506. Rt-1996-808. Rt-1994-1352. Rt-1994-1343. Rt-1993-1082. Rt-1993-881. Rt-1992-1526. HR-1991 703-k. Rt-1991-1513. Rt-1991-1506. HR-1991-690-k. Rt-1991-1410. Rt-1991-1051. Rt-1990-1189. HR-2007-1741-U. HR-2004-1857-U. HR-1992-40-k. HR-1991 665 k.

In addition there are 64 decisions from the courts of first instance and the appeal courts where the 1980 Convention was applied.

POLAND

The Polish jurisprudence concerning the 1980 Convention on the Civil Aspects of International Child Abduction is still rather limited. Although the Convention entered into force for Poland on 1 November 1992, its text was not published in the Polish Official Journal until as late as 25 September 1995 (Dz.U. Nr 108, item 528) and only from that point in time the Convention could be applied by the courts.

Additionally, it needs to be underlined that, following the change of the Code of civil procedure in the year 2000, the judgments concerning the international child abduction delivered on the basis of the 1980 Convention, are generally precluded from the control exercised by the Polish Supreme Court. That is because after the said procedural reform there is no right of cassation in such type of cases. This was confirmed by the decision of the Supreme Court of 17 August 2001 (I CKN 236/2001, Lex nr 52475) and by the judgment of 8 November 2001 (II CZ 126/2001, OSNC 2002/7-8/95). Thus, the access to jurisprudence under the 1980 Convention has become more difficult since the case law of lower courts (especially those of first instance) is reported far less extensively.

Still, one important case concerning the international child abduction was decided by the Polish Supreme Court before the change of the procedural rules. The judgment in question was handed down on 16 January 1998 (II CKN 855/1997, OSNC 1998/9/142) and the facts of the case were as follows:

Janusz L. and Anna L. – married since 1983 – had dual nationality (Polish and Canadian) and they lived in Canada with their two sons: Konrad (born 1990) and Mateusz (born 1995). In 1995 the parents stopped living together. According to the decision of the Canadian court dated 1 August 1996, both parents were entrusted with the care of their children but it was the mother with whom the children were supposed to stay. Additionally, the court decided that the mother was not allowed to take the children outside the borders of the Canadian province of Ontario for a period exceeding 6 weeks without the consent of the father.

On October 16, 1996, Anna L. left Canada and, without informing the father, kreturned to Poland with her two sons. The Polish Ministry of Justice, being a Central Authority according to art. 6 of the 1980 Hague Convention, upon receiving the motion of Janusz L., instituted appropriate proceedings in front

of the Polish courts with regard to the suspected abduction of children from Canada without the consent of their father.

In the course of judicial proceedings, Anna L. put forward a number of defenses based on art. 13 of the Convention, claiming in particular that the father enjoyed no custody rights at the time of removal, that children were obtaining medical treatment in Poland which was absolutely necessary and to which the father objected in Canada, and finally that children expressed strong emotional ties with the mother, they were happy staying in Poland and that they did not want to return to Canada at all.

In its decision of 3 April 1997, the court of first instance in Cracow confirmed that the case was that of wrongful removal, according to art. 3 of the 1980 Convention, and ordered the immediate return of children to their father on the basis of art. 12. The judgment was upheld by the regional court on 5 September 1997. The courts did not find the mother's defence persuasive. In their view the father did enjoy the right of custody as defined in art. 5 of the Convention, which was confirmed by the decision of a Canadian court of 1 August 1996. The medical treatment of children could just as well be continued in Canada where standards of health care are not lower than in Poland. Also, the return travel would not expose children to any grave risks. Furthermore, in view of the courts, the children did not attain the age and level of maturity that would justify taking account of their opinion on the issue of return.

The dissatisfied mother lodged a final appeal for cassation with the Supreme Court, which resulted in quashing the decisions of lower courts with the case being sent for reconsideration. In the written motives supporting the Supreme Court's judgment several legal points of the 1980 Convention were touched upon.

Firstly, the Supreme Court did not find it an example of a wrongful removal case. In the light of the decision of the Canadian court of 1 August 1996, the mother was not totally prohibited from taking the children out of the province of Ontario. All she was required to do was obtain the father's consent for any stay that would exceed 6 weeks. Consequently, the leaving of Canada on October 16, 1996, should not be considered wrongful. The case in question was rather that of wrongful retention and so the trial courts should have determined the circumstances of Anna L. remaining with her children in Poland after the end of November 1996 when the 6-week period expired.

Secondly, the Supreme Court paid special attention to art. 13 of the Convention. The findings of the trial courts appeared superficial in this respect. The Supreme Court pointed out that art. 13 letter b) allows preventing the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The adequate level of health care in Canada is not enough in a situation when there is a serious dispute between the parents whether children ought to undergo health treatment at all. Moreover, there should be a detailed analysis of the conditions in which the children would stay in Canada after their potential return (the father claimed that they would stay in school or preschool for most of the day) in comparison with the conditions actually offered to children in Poland.

Finally, the Supreme Court challenged as arbitrary the conclusion that the older son's views could not be taken into account. In the case of a 6-year boy, such determination should not be made by the courts themselves, but should be based on the opinions of competent experts. Consequently, the rejection of the mother's motion asking for such opinions was found unjustified. The Court invoked also art. 12 of the United Nations Convention of 20 November 1989 on the Rights of the Child, to which Poland is a party, and which should be applied alongside the 1980 Hague Convention. The said art. 12 introduces a general rule that every child capable of forming its views should have the right to express those views freely in all matters affecting the child and the views of the child should be given due weight in accordance with the child's age and maturity.

For the above reasons, the appeal was successful and the case was returned to the trial court for reconsideration.

There is no officially reported case law in Poland concerning the 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, which was ratified by Poland in 1995 and whose application commenced locally in the year 2000 (following the publication in the Polish Official Journal).

QUÉBEC

Hague Convention on Civil Aspects of International Child Abduction (1980)

The question of the implementation of the Convention was addressed by the highest court in the country in W. (V.) v. S. (D.). In this case, the parties divorced in 1988 and a court of Maryland entrusted the father with the

custody of the child and provided supervised visit rights to the mother. In November 1989 the father moved to Michigan with the child. The mother then presented in Maryland various requests to modify and enforce her rights of access to the child. Meanwhile in February 1990, the father moved to Québec with the child, without consulting or telling the mother. On 8 May 1990, following a new request from the mother, a court in Maryland gave her ex parte the custody of the child "until there are further proceedings on the question of custody or visitation rights at the request of either party ". A year later, the father filed before the Québec Superior Court a request for custody of the child .The mother by counterclaim asked for the return of the child to the United States according to the Law. The parties recognized that this law, which ratifies the Convention on the Civil Aspects of International Child Abduction, applies to the dispute. The Superior Court rejected the petition of the father and ordered the child's return to the United States. The Court of Appeal upheld the order of return based on the Act.

At the Supreme Court, the appeal was rejected. The Court considered that the Superior Court and the Court of Appeal erred in applying the Act to the circumstances of the case. The relocation of the child of Michigan in Québec was not wrongful within the meaning of art. 3 of the Act since at that date the father had custody under the Act. The situation did not qualify as an "unlawful non-return" within the meaning of this article. The custody order obtained ex parte by the mother in the United States after the removal of the child did not confer a right of custody making the retention of the child in Québec illegal. Article 4 was also unenforceable because the proceedings pending at the time of removal of the child were about the access rights of the mother and not the custody of the father.

However, the Court confirmed the decision of the first instance judge for the following reasons: firstly, the deference should have been filed before the first instance judge, who had heard all interested parties and also a long list of experts; secondly, the concept of custody within the meaning of the Civil Code of Québec being similar to that prevailing under the Convention, the same conclusions are reached whatever law is applied. And finally, the best interests of the child effectively guided the trial judge to dismiss the appellant's motion and order the child's return to the USA.

In the opinion of Judge Claire L'Heureux-Dube, to which other judges concurred:

“[…] two independent systems cannot coexist in Québec. On the contrary, the interdependence of the Convention and the Act is recognized both by the

preamble of the Act, which states that "the Québec subscribes to the principles and rules set forth in the Convention". Furthermore, the Act adopts verbatim the Convention's definitions of rights of custody and rights of access. Thus, like the Convention, the Act, by authorizing the prompt return of children to the place of their habitual residence only if they are removed or retained in breach of custody rights, reserves a form of protection for custody rights distinct from that for rights of access. The interdependence of the Convention and the Act accordingly suggests an interpretation that gives full effect to the objective of the Convention while taking into account the guidelines set out in Thomson.

Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

Two decisions have been made since the entry into force of the law but one relates to an adoption order in a state that is not a party to the Convention, and the other to parents and a child residing in Québec.

Adoption (In terms of), (CQ, 2006-11-02), 2006 QCCQ 11567, SOQUIJ AZ-50398659, JE 2007-16, [2007] RDF 195 res., Para. 10: "South Korea where the child was born has not adhered to the Convention". The Tribunal can recognize an administrative decision of adoption from a foreign country provided that it is a genuine decisionof adoption in accordance with the laws of the country in question and not a simple statement that one condition of the adoption has been encountered, which is the case here. The Tribunal can not, therefore, recognize this decision as requested.

Adoption (In terms of), [2006] R.J.Q. 2286. The complainant (A), while he was a resident in Algeria, had been given the legal guardianship of a child under Kafala. The complainants had moved to Québec in 2002 and now wished to legally adopt the child . At first glance, one might think that the demand for adoption of the child (NT) is a matter of international adoption because the child is from Algeria. But Kafala has had the effect of giving the child a domicile in Québec. Only the domicile abroad of either party enables the application of rules of private international law. In Family Law - 3403, [2000] RJQ 2252, the adoptive parents lived in Québec and had obtained a Kafala in respect of a Moroccan child. The facts were different but they led to a similar conclusion, a Kafala is not recognized as an adoption, but had the effect of changing the domicile of children at the home of their guardian hence, the domestic rules of adoption of Québec were found to be applicable.

TUNISIA

Since Tunisia has not been a party of the said conventions, there is no jurisprudence applicable.-

VENEZUELA

Hague Convention of 1980 on the Civil Aspects of International Child Abduction

Mariana Capriles[315]

Summary of the sentence:

A Venezuelan mother of two American children, domiciled in the United States of America, illegally subtracted them and brought them to Venezuela. The father asked for a judiciary order of return of the children based on the Convention on the Civil aspects of international child abduction. A Venezuelan tribunal issued such order without notifying the mother. The mother and the children were not heard by the tribunal.

The mother sued the tribunal in the Constitutional chamber of the Venezuelan Supreme Court of Justice. Her allegations included violation of due process. The Supreme Court ruled in favor of the mother. The motivation of the sentence included the fact that the tribunal had wrongfully applied the Convention on the Civil aspects of international child abduction, because:

a) The requirement of expeditious procedure, included in its article 2, did not mandate to overrule the basic principle of due procedure.

b) It was necessary to open a period of probations in order to demonstrate that the children were domiciled in a country that wasn't Venezuela (Article 4 of the Convention).

c) From article 12, it can be derived that a probation period was necessary to verify if children were settled in their new environment and therefore they could not be returned.

[315] Sentence of the Venezuelan Supreme Court of Justice, applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction: Supreme Court of Justice, Sentence Nº: 579, File Nº: 00-0325, *Mariana Capriles,* 06/20/2000

d) The tribunal did not secure the voluntary return of the children or an amicable resolution of the issues, as article 7.c provides.

e) The tribunal did not accomplish its duty to find out if the children objected to being returned, as established in article 13.

The magistrate ended its sentence stating that, taking into account the best interests of the children, the request of return based on the Convention shall be decided. However, such decision shall comply with the due process principle.

Aurillely Josefina Betancourt v. José de Jesús Sánchez[316]

Summary of the sentence:

A Venezuelan mother illegally subtracted her daughter from the United States of America, breaching the rights of custody attributed to the father. The father submitted a request of return to the American Central Authority. The Venezuelan Tribunal competent to decide on this matter ruled in favor of the mother, based on article 13 of the Convention on the Civil aspects of international child abduction. However, the father had opposed a preliminary question, regarding Venezuela's jurisdiction.

The Venezuelan Supreme Court of Justice had to decide about the preliminary question. This Court stated in its decision that the Convention granted jurisdiction to the Venezuelan tribunals and, considering that it has the same rank as the Constitution and that it is of immediate application, the Supreme Court disregarded the preliminary question and confirmed the tribunal competence.

It is important to stress that there is a mistake in this sentence. When it refers to the constitutional rank of the Convention, it makes reference to the Interamerican Convention instead of the Hague Convention. We believe this is a material mistake. The Tribunal meant to refer to the Hague Convention. We believe so because it had based its reasoning on this last Convention, and because the Interamerican Convention is not applicable to this case because the United States did not sign it. Therefore, it is of no use in this particular case.

Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption:

[316] Tribunal: Supreme Court of Justice, Sentence Nº: 01560, File Nº: 16293, *Aurillely Josefina Betancourt v. José de Jesús Sánchez,* 07/04/2000

Augusties Reinhold Yannikis y Claudia Helene Margherita Spohn de Yannikis [317]

A Swiss couple wanted to adopt a Venezuelan child. Following the Venezuelan Adoption Statute, they obtained the mother's permission for the adoption two days before the birth of the child. However it was an international case. Therefore article 4 of the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption was applicable. Such article establishes that the mother's permission shall be given after the birth of the child. Considering it was given before the birth, it was declared invalid.

Tribunal: Circuit Court of the 1st Judicial Circuit in and for Caracas, Family and Minors Division.

Bruce Robert Kraft y Yolanda Terrero Montero de Kraft[318]

An American diplomat, while domiciled in Venezuela, decided to adopt a Venezuelan child. There was controversy regarding the international character of the adoption, and therefore, the applicable law to it. If the adoption was domestic, then the applicable law was the Venezuelan Adoption Statute. On the contrary, if it was international, the applicable law depended on the article 1 of the Venezuelan Private International Statute.

The said article states that the applicable law for international cases is to be determined in the first instance by the application of international treaties, which was, in this case, the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

In order to determine the internationality of the case, article 14[319] of the Private International Statute was capital. It demonstrated that the solicitants were not domiciled in Venezuela, because they were in the country developing diplomatic functions.

The tribunal decided that the adoption was international and applied the Hague convention and the Venezuelan Private International Law Statute.

[317] Tribunal: Supreme Court of Justice, Sentence Nº: 53, File Nº: 97-392, *Augusties Reinhold Yannikis y Claudia Helene Margherita Spohn de Yannikis,* 02/19/1998.

[318] Tribunal: Circuit Court of the 1st Judicial Circuit in and for Caracas, Family and Minors Division, File Nº: 11.258, *Bruce Robert Kraft y Yolanda Terrero Montero de Kraft*, 09/27/1999

[319] Article 14. When the regular residence in the territory of a State should be the exclusive results of functions conferred by a national, foreign or international public body, such will not produce the effects provided in the former articles.

CITE JURISPRUDENCE APPLYING TO THE CIDIP III CONVENTION OF 1984 ON CONFLICTS OF LAW IN ADOPTION OF MINORS AND THE CIDIP IV CONVENTION OF 1989 ON INTERNATIONAL RESTITUTION OF MINORS.

ARGENTINA

CIDIP III Convention of 1984 on Conflicts of Law in Adoption of Minors.

Argentina is not a party of this Convention

CIDIP IV Convention of 1989 on International Traffic of Minors.

SCBA, 09/02/05, B. de S., D. c. T., E. v. Rogatory letter[320]

The case starts with a rogatory letter from a judge from Brazil requesting the restitution of a girl who had been allegedly abducted by her mother and was living in Villa Gessel, Buenos Aires.

The judge decided to listen to the girl before executing the rogatory letter. After hearing her, considering many psychological and technical exams and taking into account different rules of international private law, decided to reject the request for restitution and established that the girl was to remain with her mother with flexible rights of access for the father.

The Court of Appeal reversed this decision based on the principle that international cooperation should prevail and that the judge who receives a rogatory letter from a foreign judge should limit his duty to check the formal requirements of the proceedings without revising the substantive reasons of the request and case.

The Supreme Court of Buenos Aires had to decide whether it was a case of restitution in the terms of the CIDIP Convention and whether the Argentine judge could reject the restitution request from the judge from Brazil based on a revision of the substantive aspects of the case.

In a divided decision the majority of the judges decided that the mother had a right of custody and guardianship over the girl and therefore had not violated the CIDIP Convention, article 4. The Supreme Court of the Province decided that the girl was to remain in Argentina with her mother and the restitution request was thus rejected.

[320] LLBA 2006, 36; LLBA 2005, 283.

CANADA

Since Canada is not a party of the said conventions there is no jurisprudence applicable.

CROATIA

Since Croatia is not a party of the said conventions there is no pertinent case law.

CZECH REPUBLIC

Since Czech Republic is not a party of the said conventions there is no jurisprudence applicable.

GERMANY

Since Germany is not a party of the said conventions there is no jurisprudence applicable.

GREECE

Since Greece is not a party of the said conventions there is no jurisprudence to cite hereby.

JAPAN

Since Japan is not a party of the said conventions there is no jurisprudence applicable.

NEW ZEALAND

Since New Zealand is not a party of the said conventio ns there is no jurisprudence applicable.

NORWAY

Since Norway is not a party of the said conventions there is no jurisprudence applicable.

POLAND

Since Poland is not a party of the said conventions there is no jurisprudence applicable.

QUÉBEC

Since Québec is not a party of the said conventions there is no jurisprudence applicable.

TUNISIA

Since Tunisia is not a party of the said conventions there is no jurisprudence applicable.

VENEZUELA

CIDIP IV Convention of 1989 on International Restitution of Minors:

Daniel Porras Nucete[321]

An Ecuatorian mother took her daughter to Ecuador for vacations with the father permission. However, they never came back to Venezuela and the father submitted a request of return to a Venezuelan Family Court. Such Court stated that it did not have jurisdiction because the girl was domiciled in Ecuador.

Procedural Venezuelan law establishes that in cases of denial of jurisdiction, the Supreme Court of Justice shall revise –in all cases- such decision. In this opportunity, the Supreme Court decided that Venezuela has jurisdiction based on the Interamerican Convention on International Restitution of Minors (article 6). Nevertheless, this controversy was decided in 2001, and

[321] Sentence Nº: 108, File Nº: 01-598, *Daniel Porras Nucete,* 11/13/2001

Ecuador ratified it in 2002, therefore, it wasn't applicable as a treaty but as a general principle of Private International Law, as provides by article 1 of the Venezuelan Statute.

CONCLUSION

The Hague and CIDIP Conventions have established a minimum global standard and represent the universal trend of a consensus in the development of private international law. For this reason, their impact on domestic law has to be acknowledged and is gradually and constantly expanding, as evidenced by the national reports.