The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children

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1. Overview

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (“the Convention”) came into effect in the United Kingdom on 1 November 2012. The Convention addresses a wide range of private and public law issues relating to children and aims to create a more unified approach in line with the growing number of cross-border families. Whilst a significant handful of the provisions in the 1996 Convention will be familiar to EU family lawyers working within the framework of Brussels II bis, the application of the Convention in respect of countries outside the EU has far reaching consequences.

Scope

The Convention does not purport to harmonise or create universal substantive law on international child protection. It does, however, seek to clarify matters of jurisdiction and applicable law (including matters pertaining to parental responsibility), increase co-operation between authorities in Contracting States and to facilitate the recognition and enforcement of any measures of protection (Article 1) in respect of children from the moment they are born to the age of 18 (Article 2). Furthermore, the Preamble confirms the principle that the best interests of the child are to be a primary consideration. Article 3 gives a non-exhaustive list of the kind of issues which the Convention regulates and clearly demonstrates the wide breadth of the Convention’s scope:

<table>
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<th>Article 3</th>
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<td>The measures referred to in Article 1 may deal in particular with –</td>
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<td>a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;</td>
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<td>b) rights of custody, 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, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;</td>
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<td>c) guardianship, curatorship and analogous institutions;</td>
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d) the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child’s property.

The Revised Draft Practical Handbook on the operation of the 1996 Convention (“The Handbook”) envisaged that the Convention will assist in cases such as international parental disputes over custody or contact, international abduction (including cases not covered by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“1980 Child Abduction Convention”)), cross-border alternative care arrangements (which lie outside the scope of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), cross-border trafficking and other exploitation of children, and cases involving refugees or unaccompanied minors.

Nevertheless, there are certain matters which the Convention specifically excludes in Article 4:

**Article 4**

*The Convention does not apply to –*

a) the establishment or contesting of a parent-child relationship;

b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;

c) the name and forenames of the child;

d) emancipation;

e) maintenance obligations;

f) trusts or succession;

g) social security;

h) public measures of a general nature in matters of education or health;

i) measures taken as a result of penal offences committed by children;

j) decisions on the right of asylum and on immigration.
Contracting States

A full list of the Contracting States appears on the status table published by the Permanent Bureau of the Hague Conference on Private International Law (www.hcch.net) and is reproduced below. There are some notable exclusions including the United States of America and Italy. A map highlighting the Contracting States who have either ratified or acceded to the Convention as at 17 March 2014 follows on the next page.

Ratification or accession?

States who were Members of the Hague Conference on Private International Law on or before 19 October 1996 are able to ratify the Convention, whereas any other State may accede to the Convention. The main difference (other than the period of time before which the Convention starts to have effect in a Contracting State depending on whether it has ratified or acceded to the Convention; see Article 61) is that a ratifying State (“State A”) may object to the accession of another State (“State B”), either during the six month period following receipt of the notification of that accession or at the time of its ratification if State A ratifies the Convention after State B has acceded to it (see Articles 58 and 63). In this situation, the Convention will not affect relations between State A and State B.

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<tr>
<th>Ratifying States</th>
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<td>Australia</td>
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<td>Austria</td>
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<td>Croatia</td>
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<td>Uruguay</td>
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* Objection to accession raised by Denmark.
Contracting States to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children as at 17 March 2014
Implementation in England and Wales

Part 31 (with PD31A) of the Family Procedure Rules 2010 should be referred to in respect of proceedings for the recognition, non-recognition and registration of measures to which the 1996 Convention applies. Furthermore, the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 took effect on the day the Convention entered into force (Regulation 1(2)). The Regulation contains important provisions; by way of example, Regulation 8 specifies that the High Court will have jurisdiction to entertain an application under Article 24 in relation to a request for advanced recognition (discussed below).
2. Jurisdiction

The general rule

The general rule when determining which Contracting State has jurisdiction under the Convention appears in Article 5. This should be the starting point for practitioners:

<table>
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<th>Article 5</th>
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<td>(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.</td>
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<tr>
<td>(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.</td>
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‘Habitual residence’ is an autonomous concept which is not defined in the Convention. The Handbook suggests that guidance can be sought from cases in relation to the 1980 Child Abduction Convention. However, the Handbook adds that different considerations may apply as the concept should be interpreted in light of the 1996 Convention’s objectives. Article 5(2) makes it clear that if a child establishes a new habitual residence in another Contracting State, that State will have jurisdiction to take measures of protection in respect of that child.

Other grounds for jurisdiction

The Convention then gives various scenarios where a Contracting State can have jurisdiction. These include cases where a Contracting State will be vested with jurisdiction despite the fact that the child is not habitually resident in that State.

Refugees, displaced children and children without a habitual residence

Article 6 protects refugee children and children who have been internationally displaced due to disturbances in their country (including non-Contracting States where they were habitually resident). It also applies to cases where the child's habitual residence cannot be established (for example, where a child is constantly moving between different countries), although the Handbook suggests that the conclusion that a child's habitual residence cannot be established should not be reached lightly. In such cases, the Contracting States in which the child is present have jurisdiction.

Child abduction

Article 7 is an important jurisdictional ground for practitioners working in international child abduction. The starting position is that the country in which the child was habitually resident (“State A”) immediately before the wrongful removal or retention retains jurisdiction (rather than the State in which the child has been wrongfully removed to or retained in (“State B”)). The intention behind this provision is to prevent abductors from benefiting from their acts. The Handbook states that the definitions of wrongful removal or retention are the same as those used in 1980 Child Abduction cases.

The Convention is, however, also sensitive to situations where this rule ought not to apply. Article 7 gives two scenarios where, notwithstanding the wrongful removal or retention, State B may assume jurisdiction under the 1996 Convention.
Scenario 1 – Acquiescence

Where the child has acquired a habitual residence in State B and each person, institution or other body having rights of custody (attributable under the law of State A) has acquiesced in the removal or retention, State B will be vested with jurisdiction. This may occur where no application for return under the 1980 Child Abduction Convention has been made or, following such an application, State B has refused to return the child based upon the Applicant’s acquiescence.

Scenario 2 – Settlement

Where the child has acquired a habitual residence in State B, that State will have jurisdiction if the child has resided in State B for at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the child’s whereabouts. It must also be shown that no request for return lodged within that period is still pending and the child is settled in his or her new environment.

While this scenario echoes Article 12 of the 1980 Child Abduction Convention, there is a small but significant modification: unlike the 1996 Convention, the period of one year starts with the wrongful removal or retention in the 1980 Child Abduction Convention.

The Handbook explores the uncertainty over whether a request for return should be made in State A or State B. Whilst it may be the norm that a request is made under the 1980 Child Abduction Convention in State B, the argument that a request for return must be made in State B for the purposes of the 1996 Convention may cause injustice in cases where the 1980 Child Abduction Convention does not apply. In cases of urgency, State B may still be able to take necessary measures of protection under Article 11 (discussed further below) of the 1996 Convention, notwithstanding that it does not have jurisdiction under Article 7. However, State B is not permitted to take provisional measures under Article 12.

On the topic of child abduction, it is worth noting that there is no equivalent provision in the 1996 Convention of Article 11(6) to (8) in Brussels II bis (allowing an Order requiring the return of the child in the country the child was abducted from to take precedence over a judgement of non-return pursuant to Article 13 of the 1980 Child Abduction Convention made in the State the child was abducted to). Furthermore, Article 11(6) to (8) in Brussels II bis imposes an obligation on a court that has refused to order the return of a child under Article 13 of the 1980 Child Abduction Convention to transmit relevant documents to the State where the child was abducted from. No such obligation appears in the 1996 Convention, although the competent authorities may make a request for information under Article 34 (discussed below) where a measure of protection is being contemplated.

Transfer of jurisdiction

Articles 8 and 9 of the Convention applies to situations where the child is habitually resident in one Contracting State (“State A”), but it is considered that another Contracting State would be better placed to assess the child’s best interests (“State B”) where the child is not habitually resident but with which the child has a particular connection. Such a connection will be established if one of the criteria given in the exhaustive list in Article 8(2) has been fulfilled, namely that:

- a) The child is a national of State B.
- b) The child’s property is located in State B.
- c) State B’s authorities are seized of an application for divorce, legal separation or nullity of the child’s parents’ marriage.
- d) The child has a substantial connection with State B.

Articles 8 and 9 make provision for the transfer of jurisdiction from State A to State B, Article 8 dealing with requests by State A (which includes States who have jurisdiction under Article 6) and
Article 9 dealing with requests by State B. In both scenarios, the requesting authority must be satisfied that the transfer would allow for a better assessment of the child's best interests and the other State should be satisfied that the transfer is in the child's best interests (although this is not explicitly specified in Article 9). Both States must agree to the transfer. Where State A makes the request, agreement can be indicated by State B assuming jurisdiction. However, in relation to requests (or a decision to invite the parties to make a request themselves) made by State B under Article 9, State B will only be vested with jurisdiction where State A has expressly accepted the request.

Only when these conditions have been fulfilled can State B (where the child is not habitually resident) assume jurisdiction to take such measures of protection as it considers necessary. The Handbook highlights the fact that a transfer of jurisdiction under Articles 8 and 9 is not permanent and also suggests (although not expressly stated in the Convention itself) that the transfer can relate to an entire case or for a specific part of a case only.

**Divorce, legal separation or annulment**

The Convention realises through Article 10 that in some circumstances it may be preferable for a Contracting State which is dealing with a divorce, legal separation or annulment (“State B”) to have jurisdiction to deal with measures in respect of the parties’ child, notwithstanding that the child may be habitually resident in another Contracting State (“State A”).

In order for Article 10 to apply, State B’s law must allow the authorities in that State to take such measures in the circumstances and that, at the point the proceedings commence, at least one of the parents habitually resides in State B and at least one of the parents has parental responsibility for the child. In addition, the parents and any other person with parental responsibility must accept the jurisdiction of the authorities in State B. Lastly, it must be shown that exercising jurisdiction on this basis is in the child's best interests. Jurisdiction in State B under Article 10 will cease when the proceedings for divorce, legal separation or annulment end.

**Cases of urgency**

Due to the need to act swiftly in many cases involving child protection, the Convention specifically caters for cases where Contracting States do not have general jurisdiction under Articles 5 to 10 but nevertheless need to take necessary measures of protection for a child (including a child who is habitually resident in a non-Contracting State). This may arise, for example, where a child is present in a Contracting State on a short school holiday and requires urgent medical treatment in the absence of parental consent.

Under Article 11, such a State may take ‘necessary’ measures of protection where the child or his or her property is present in that State, providing the case is urgent. Urgency is not defined in the Convention although the Handbook adopts the suggestion that the test for urgency should be: were a State not to take necessary measures, irreparable harm might be caused to the child, or the protection of the child or interests of the child might be compromised.

Practitioners should bear in mind that jurisdiction under Article 11, as with Article 12 discussed below, is a **concurrent** and **subordinate** jurisdiction (thus setting it apart from the general jurisdictional rules in Articles 5 to 10). It is **concurrent** in the sense that it runs parallel to the State’s jurisdiction which is founded upon Articles 5 to 10. It is **subordinate** in that any necessary measures of protection taken under Article 11 is temporary and limited which will lapse once a Contracting State having general jurisdiction have taken their own measures required by the case. For subsequent measures taken in non-Contracting States, see Article 11(3).
**Provisional measures**

Article 12 similarly permits Contracting States to take measures of protection notwithstanding that they do not have general jurisdiction under Articles 5 to 10. Where the situation is not urgent (and Article 11 therefore does not apply), a Contracting State may be able to take provisional measures as long as they are not incompatible with any measures already taken by authorities having jurisdiction under Article 5 to 10. As with Article 11, the child (including children habitually resident in a non-Contracting State) or his/her property must be present in the State taking the provisional measures.

No definition of ‘provisional measures’ is provided in the Convention itself. The Handbook suggests, by way of example, that the Article may be invoked where there is a need for a child to be placed in alternative care under State supervision and where the child is staying for a short period of schooling with a family who have subsequently become overburdened. As with Article 11, jurisdiction under Article 12 is both concurrent and subordinate.

**Conflicts of jurisdiction**

Article 13 deals with situations where one Contracting State (“State A”) takes a measure under Article 5 to 10, i.e. under its general jurisdiction, and further down the line, another Contracting State (“State B”) is asked to take a measure of protection and which also has jurisdiction under Articles 5 to 10. In such a situation, the Convention makes it clear that State B must abstain from exercising jurisdiction if it is asked to take measures which are the same or similar in substance to the measures already taken in State A and are still under consideration at the time the request for measures in State B is made. State B may not need to abstain from exercising its jurisdiction therefore where, as the Handbook suggests, State A is dealing with custody issues and State B if asked to deal with the administration of the child's property.

The requirement to abstain from exercising jurisdiction will not apply where State A has declined jurisdiction. This may occur where State A considers that State B is the more appropriate forum. This process must be strictly distinguished with the transfer of jurisdiction provisions in Articles 8 and 9 discussed above, where only one State has general jurisdiction and the decision to decline jurisdiction cannot be the result of a unilateral decision.

Where a Contracting State wishes to decline jurisdiction on the basis that the other Contracting State is the more appropriate forum, the Handbook suggests that discussions should ideally take place between the States (either through their Central Authorities or via judicial communications) to ensure the continued protection of the child. The rule in Article 13 does not apply to urgent measures taken under Article 11 or to provisional measures granted under Article 12.

**Continuation**

In order to ensure continuity in the measures taken in one Contracting State to protect a child where the child subsequently moves and establishes a new habitual residence in another Contracting State, Article 14 guarantees that those measures will remain in force until such time as the authorities in the new State modifies, replaces or terminates those measures. Article 14 applies to all cases where the ground of jurisdiction under Articles 5 to 10 has ceased to exist due to a change of circumstances (so, for example, it ensures the continuity of measures made alongside divorce proceedings under Article 10 following the conclusion of those proceedings). Practitioners should bear in mind, however, that any measure will not continue beyond the terms specified in that particular measure.

**Final comments on jurisdiction**

Where a child is habitually resident in a Contracting State, the jurisdictional rules discussed above form a complete and closed system. A Contracting State will then only be able to exercise jurisdiction where it is based on one of the jurisdictional grounds in the Convention (although this
does not affect any other agreement, such as Brussels II bis, made between Contracting States; see Article 52). For children habitually resident in a non-Contracting State, authorities of a Contracting State may exercise jurisdiction either under the jurisdictional grounds in the 1996 Convention, where possible, or using their own rules of jurisdiction which lie outside the Convention’s remit. The Handbook points out that, where a Contracting State is presented with such an option, such States should consider exercising jurisdiction on a ground given in the Convention on the basis that the measure will avoid the discretionary grounds for non-recognition found in Article 23(2)(a) (discussed below).
3. Applicable Law

Chapter 3 of the Convention deals with applicable law. Article 15(1) adopts the basic position that Contracting States, in exercising their jurisdiction under the Convention, shall apply their own law. The Handbook suggests that the phrase ‘In exercising their jurisdiction under the provisions of Chapter II’ should not be interpreted narrowly. Thus, for example, where one of two Contracting States which are also party to Brussels II bis has exercised jurisdiction according to that Regulation on a ground that is also specified under the 1996 Convention, the provisions for applicable law ought to apply.

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<tr>
<td>(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.</td>
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<tr>
<td>(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.</td>
</tr>
<tr>
<td>(3) If the child’s habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence.</td>
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Article 15(2) makes it clear that the basic position may be departed from in exceptional cases. Given that the Convention aims to provide clarity and certainty of outcome in cross-border cases, the exception should not be relied upon too regularly. The Handbook adds that the relevant authorities should be satisfied that an application or consideration of foreign law under Article 15(2) will be in the best interests of the child. The application or consideration of another Contracting State’s laws should not include its choice of law rules; although see Article 21(2) in relation to non-Contracting States.

The Handbook cites examples of where the consideration of another State’s laws (including non-Contracting States) may be beneficial. For instance, in relocation cases involving a proposed move from one Contracting State (“State A”) to another Contracting State (“State B”); a court in State A, in exercising its jurisdiction, may decide to frame an Order regarding custody and contact in line with the terminology used in State B to ensure the smooth continuation of that measure. Taking this route also circumvents the more burdensome process of seeking a transfer under Articles 8 or 9. Another example might involve a court in one Contracting State (“State C”) hearing a case regarding the selling of a child’s property in another non-Contracting State (“State D”). It may be that State C wish to apply the law of the country where the property is situated (in State D) in circumstances where it is known that the Guardian would require authorisation to sell the property in State D (and where, under State C’s laws, no such authorisation is required).

Change of child’s habitual residence

Article 15(3) specifies that where a child changes his or her habitual residence from one Contracting State (“State A”) to another Contracting State (“State B”), the law of State B, from the time of the change, will govern the ‘conditions of application’ of any measures taken in State A (which by virtue of Article 14 will subsist following such a change).

The terms ‘conditions of application’ are undefined in the Convention. The Handbook suggests that the terms relate to the way the measure is to be exercised in State B. However, it also makes
reference to the difficulty of distinguishing between the subsistence of a measure of protection taken in State A under Article 14 and applying the ‘conditions of application’ of that measure under the law of State B.

The Handbook gives the example of a measure made in State A that clearly specifies that it will have effect until the child is 18 but, according to State B’s laws, such a measure would cease to exist when the child turns 16. The answer referred to in the Handbook is that questions regarding this difficult distinction can only be answered on a case-by-case basis. It suggests that it may be more practical for State B to adapt or take a new measure (on the basis that the change of habitual residence will give State B jurisdiction under Article 5) if the measure made in State A appears to be impracticable or undermined in its application in State B. This may occur, as the Handbook suggests, where a measure is made in State A giving their public authorities power to enter unannounced into a family home while, under the rules of State B, public authorities are only permitted to meet with the parents on a regular basis with their consent.

**Parental responsibility**

Article 16 seeks to avoid situations where parents suddenly find that they have lost their parental responsibility when they relocate or temporarily stay abroad. In this respect the Convention is vast in its scope and applies equally to parental responsibility (see Article 1(2) for the definition of ‘parental responsibility’) obtained in non-Contracting States.

Article 16(1) and (2) covers situations where parental responsibility has been attributed or terminated by operation of law (Article 16(1)) or by agreement or a unilateral act (such as a Will; see Article 16(2)) in any State providing that there has been no intervention by a judicial or administrative authority (in which case it would be treated as a measure of protection and fall under the material scope of the Convention). The Handbook suggests that where such intervention is purely passive (such as the only involvement being merely to register a declaration), Article 16(1) and (2) should still apply.

In these cases, the attribution or extinction of parental responsibility will be governed by the law of the State where the child is habitually resident (although note the wording in Article 16(2): ‘at the time when the agreement or unilateral act takes effect’). Even where the child's habitual residence shifts from one State to another, parental responsibility existing under the law of the former State will subsist in the new State notwithstanding that, in the new State, parental responsibility would not have been provided for (Article 16(3)). Any person who wishes to obtain parental responsibility (if they do not already have it) in the new State may then be attributed parental responsibility in accordance with the law of the new State rather than the former State (Article 16(4)).

**Other provisions**

Article 17 makes it clear that the exercise of parental responsibility is governed by the law of the State of the child's habitual residence. Article 19 deals with the protection of third parties who have entered into a transaction with a person who they falsely believed had parental responsibility and Article 21, referred to above, regards the application or consideration of a foreign State’s choice of law rules.

**Public policy**

Any designation of a particular legal system provided for by the applicable law rules in the Convention may be refused on the grounds that it would be manifestly contrary to public policy. Such a refusal must take into account the child's best interests (Article 22).
4. Recognition and Enforcement

Recognition

In accordance with the spirit of the Convention’s aim to create a more unified approach to recognition and to reduce the need for fresh proceedings in relation to cases already decided in another Contracting State, Article 23(1) clearly states that measures taken in one Contracting State (“State A”) will be recognisable by operation of law in another Contracting State (“State B”).

The Convention is silent as to the practical formalities required in relation to recognition. The Handbook suggests that the production of the written document containing the measure will be sufficient, although also considers that, in urgent cases, a telephone call (followed by the written document as a matter of good practice) between authorities in State A and State B may be acceptable.

Recognition under Article 23 ensures that measures made in State A will have effect in State B, unless recognition is refused under Article 23(2). If the measure is not voluntarily complied with or the measure is opposed, enforcement would need to be sought under Article 26 (discussed below).

Refusal of recognition

Article 23(2) gives an exhaustive list of circumstances where State B may refuse to recognise a measure made in State A:

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<td>(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.</td>
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<td>(2) Recognition may however be refused –</td>
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<td>a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;</td>
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<tr>
<td>b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;</td>
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<tr>
<td>c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;</td>
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<td>d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;</td>
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<td>e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;</td>
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<td>f) if the procedure provided in Article 33 has not been complied with.</td>
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Importantly, Article 23(2) does not compel the authorities in State B to refuse recognition where one of the circumstances listed above has been met. In accordance with the spirit of the Convention, a restrictive approach to non-recognition is prescribed: State B is bound by State A’s findings of fact in relation to jurisdiction (Article 25) and there is to be no review of the merits beyond what is necessary in the determination of the measure’s recognition (Article 27). It is worth briefly exploring each of the grounds for non-recognition:

Article 23(2)(a): Jurisdiction under the Convention

This may occur where State A takes measures under their own domestic laws of jurisdiction that do not match one of the jurisdictional grounds under the Convention (for example, where State A exercises jurisdiction on the basis of a child's nationality who is habitually resident elsewhere). The Handbook points out that State B is implicitly given the role of verifying what the ground of jurisdiction was. However, it is bound, under Article 25, by any findings of fact on which State A based its jurisdiction.

Article 23(2)(b): Child’s opportunity to be heard

This exception caters for the situation where State B believes that its fundamental principles would be compromised were it to recognise a measure made in State A which did not give a child the opportunity to be heard. Such a situation may arise, for example, where the child’s wishes and feelings have not been ascertained (although State B may nevertheless agree that such an omission is not contrary to its fundamental principles as the child is very young). This exception does not apply where the case was urgent.

Article 23(2)(c): Party with parental responsibility – opportunity to be heard

This Article covers situations where a person’s parental responsibility has been infringed upon (for example, where a court discharges a Parental Responsibility Order), without giving that party an opportunity to be heard. This ground does not apply in cases of urgency.

Article 23(2)(d): Manifestly contrary to public policy

The Handbook reminds us that the public policy exception is raised rarely in private international law cases and there is a need for recognition to be manifestly contrary to public policy. It cites the example of a custody order being made in a Contracting State that was not based on an assessment of the child's interests but purely on a parent’s responsibility in the breakdown of the parents’ marriage. Refusal to recognise a measure under this ground must take into account the best interests of the child.

Article 23(2)(e): Incompatibility with subsequent measure made in non-Contracting State

Contracting State B may refuse to recognise a measure made in Contracting State A on the basis that a subsequent measure has been made by a non-Contracting State (“State C”) where the child was then habitual resident (providing that the subsequent measure is recognisable under State B’s laws).

Article 23(2)(f): Procedure in Article 33

This provision refers to the cross-border placements of children which is discussed further below.

Advanced Recognition

Article 24 provides us with a useful tool for addressing any anticipated uncertainty as to whether a measure will be recognised in another Contracting State. This may assist, for example, a father who is granted contact rights in one Contracting State (“State A”) and who wants to ensure that the measure giving him those rights will be recognised in another Contracting State (“State B”) where the
mother, the primary carer, proposes to relocate. In this situation, the father may make an application before the competent authorities in Contracting State B for a decision on the recognition or non-recognition (under one of the exhaustive grounds given in Article 23(2)) of that measure.

The Handbook cites, by way of example, the scenario where State B makes it clear that they will not recognise that measure. In such a case, the father may seek ways of remedying the measure so that it will be recognised in State B. The procedure for advanced recognition will be in accordance with State B’s laws and it is open to any interested person to make such an application. Advanced recognition may be an indispensible factor in the father’s decision whether or not to enter into a Consent Order agreeing to the child’s relocation with the mother. It will also reduce the possibility of any future dispute in State B following the child’s relocation.

**Enforcement**

Despite the provisions for recognition in the Convention, there will be cases where a measure taken in one Contracting State (“State A”) is not complied with in another Contracting State (“State B”). In these cases, an interested party can apply for that measure to be enforced in State B under Article 26. State B is then obliged to grant a declaration of enforceability or to register the measure for the purpose of enforcement via a simple and rapid procedure, unless one of the grounds in the exhaustive list in Article 23(2) apply.

Since the same grounds for non-recognition apply to the grounds for refusing to enforce a measure, a parent may be well advised to seek advanced recognition under Article 24 in anticipation of any future dispute regarding recognition or enforcement.

The procedure for enforcement in State B should be in accordance with the procedure provided in State B’s laws. Article 28 makes it clear that enforcement should be executed in accordance with State B’s laws (taking into consideration the child’s best interests) and as if the measure had been taken by State B.
Chapter 5 of the Convention deals with co-operation between Central Authorities in Contracting States, including public authorities or other bodies. Effective co-operation is essential in ensuring that the Convention operates effectively on the ground. Article 29(1) places an obligation on each Contracting State to designate a Central Authority to discharge the duties imposed by the Convention. The Handbook adds that States may wish to use the same Central Authority which deals with cases under the 1980 Child Abduction Convention.

For the United Kingdom, the Central Authority’s functions under the Convention are discharged by:

<table>
<thead>
<tr>
<th>Country</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>England</td>
<td>The Lord Chancellor</td>
</tr>
<tr>
<td>Wales</td>
<td>The Welsh Ministers</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>The Department of Justice</td>
</tr>
<tr>
<td>Scotland</td>
<td>The Scottish Ministers</td>
</tr>
</tbody>
</table>

In England, the Lord Chancellor delegates his day to day duties to the International Child Abduction and Contact Unit.

Article 30 contains the duties which Central Authorities are bound by:

**Article 30**

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

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

The Convention also allows Contracting States to enter into their own agreements with one or more other Contracting States which a view to improving the application of Chapter 5 (Article 39).

Article 30(2) provides a useful mechanism in redressing any unfamiliarity with another State’s laws and practices. By way of example, a father of a child living in one Contracting State (“State A”), whose mother is proposing to relocate with that child to another Contracting State (“State B”), may wish to ascertain information about the contact arrangements that can be put in place in State B.

Article 31 deals with specific duties which can be exercised either directly or indirectly through public authorities or other bodies:
Article 31

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

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

b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;

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

Thus the Central Authorities, public authorities or other bodies have a duty to facilitate communication regarding transfer of jurisdiction (discussed above) and in relation to the co-operation provisions in the Convention. They also have a duty to facilitate agreed solutions through alternative dispute resolution.

The provision in Article 31(c) may prove to be of great assistance in cases involving child abduction or runaway children as it places a specific duty to assist in discovering the whereabouts of a child. The Handbook cites the example of a teenager who fleas from his home in a Contracting State (“State A”) after suffering bullying at school. The mother suspects he may be attempting to see a friend in Contracting State B (“State B”). Since Article 31(c) imposes a specific duty where it appears that a child may be in need of protection and is present in State B, the Central Authority in that State (either directly or through public authorities or other bodies) will then come under an obligation to provide assistance in locating the child.

Obligatory co-operation / communication between authorities

Chapter 5 gives two situations where authorities are obliged to cooperate and communicate with each other.

Article 33 – cross-border placements

Article 33 sets down strict requirements which a Contracting State must follow in cases where it is contemplating the placement of a child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution. Where a Contracting State exercising general jurisdiction under Articles 5 to 10 (“State A”) is considering such a placement in another Contracting State (“State B”), an authority (though not necessarily a Central Authority) in State A has an obligation to transmit to the Central Authority or other competent authority in State B: (a) a report on the child and (b) the reasons for the proposed placement or provision of care.

Importantly, the placement may be made in State B only where the relevant authority in that State has consented to it (taking into account the best interests of the child). The Handbook adds that if Article 33 is not complied with, such a measure may be refused recognition under Article 23(2)(f).
Article 36 – provision of information when child is in serious danger

Where the competent authorities of a Contracting State, in which measures of protection for a child have been taken or in which such measures are under consideration, consider that the child is exposed to a serious danger and they are informed of that child’s presence or change of residence to another Contracting State, those authorities come under the obligation under Article 36 to inform the other State about the danger involved and the measures taken or under consideration. This also applies to cases where a child changes residence or is present in a non-Contracting State.

The Handbook advances scenarios where such an obligation may arise, namely, where a child requires constant medical treatment or is exposed to drugs. However, Article 37 gives the important exception to the rule and makes it clear that such information should not be communicated if it is likely to place the child’s person or property in danger or constitute a serious threat to the liberty or life of a member of the child’s family.

Non-mandatory instances of co-operation

The Convention gives four situations where co-operation is envisaged, but, unlike Articles 33 and 36 discussed above, are not mandatory. These are summarised briefly below:

Article 32

This covers situations where a Contracting State (“State A”) with which a child has a substantial connection makes a request to a Central Authority in another Contracting State in which the child is habitually resident and present (“State B”) (a) for a report on the child’s situation and (b) that State B considers taking measures in respect of that child or his or her property. In such a situation, State B may fulfil that request.

Article 34

This provision allows the competent authorities in a Contracting State when contemplating taking a measure of protection to make a request for information from an authority of another Contracting State. The authorities of the requesting State must consider that the child’s situation requires such a request to be made.

Article 35(1)

This provision allows the authorities in one Contracting State to ask the authorities in another Contracting State to provide assistance with the implementation of any measures of protection taken under the Convention. Article 35(1) deals in particular with rights of access and the maintenance of regular direct contact.

Article 35

Article 35 supports parents who reside in a Contracting State and who seek to obtain or maintain access to a child who is habitually resident in another Contracting State. The Handbook explains that Article 35 allows such a parent to make a request to the authorities in the Contracting State where that parent resides to (a) gather information or evidence and (b) make a finding on how suitable that parent is in relation to exercising access and on the conditions under which access is to be exercised. Furthermore, Article 35(2) places an obligation on an authority exercising general jurisdiction under Articles 5 to 10 who are dealing with access issues to admit and consider such information, evidence and finding.
**Article 40**

This provision allows authorities in a Contracting State where a child is habitually resident or where a measure of protection has been taken, to deliver a ‘certificate’ to a person with parental responsibility or a person entrusted with protection of the child's person or property, following a request by that person. Article 40 specifies that such a certificate should indicate the capacity in which that person is entitled to act and the powers conferred upon that person. As with the other Articles discussed in this section, the provision of such a certificate is *not* mandatory.

**Confidentiality**

Articles 41 and 42 provide that any personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted and that the authorities to whom information is transmitted shall ensure its confidentiality in accordance with the law of their State.

**Central Authority / public authority costs**

The starting position is that Central Authorities and other public authorities shall bear their own costs (Article 38). However, Article 38(1) permits such authorities to impose reasonable charges for their services and Article 38(2) allows Contracting States to agree with one or more other Contracting States how charges should be allocated between them.