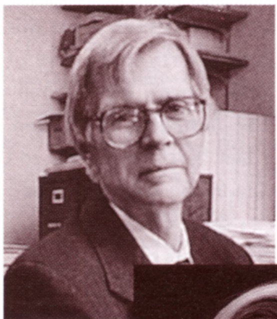
Family Law

Handling a Hague trial: the courts' perspective

by William M Hilton and Margaret H Bennett



William M Hilton

Margaret H Bennett

The central theme of the Hague Convention ('the convention') is a presumption favouring the immediate return of a child to his or her habitual residence. This presumption mandates that all conflicts arising at any point in a proceeding must be resolved in favour of returning the child. It arises from the very nature of the convention. When a country becomes a contracting state under the convention, it is assumed that its courts have equal dignity with the courts of all other contracting states and that it is the courts of the child's habitual residence which are in the best position to determine what is in the best interests of the child. If this were not so, the convention would fail.

One document that should be read, reviewed and consulted on a regular basis in an action under the convention is the *Explanatory Report* by E Perez-Vera, *Hague Conference on Private International Law, Actes et documents de la Quatorzième session*, vol. III, 1980, p. 426 (also available on the internet; see details on this page).

on the internet

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The Explanatory Report by E Perez-Vera, and other information relating to the convention and conflict with local laws is available on the Hilton House website.

Over the years there has been a steady flow of decisions in the courts of first instance and courts of appeal of the various countries that have acceded to the convention. These decisions are useful when presenting a case since they can often be used to explain the application of the convention. The US Supreme Court has held that the opinions of sister signatories to an international convention are entitled to significant weight (*Air France v Saks* (1985) 470 US 392).

When there is a conflict between the convention and the local law of the contracting state it is required that the terms of the convention prevail. In the US, for example, each of the 50 states has their own laws on custody. When these laws conflict with federal law, federal law must prevail (see *Swift & Co v Wickham* 382 US 111). This doctrine of federal pre-emption was specifically applied to conflicts between federal and state custody laws in *Martinez v Reed* (DCLa 1985) 623 F Supp 1050. The same principal applies to the Hague Convention: issues of the best interest of the child must be referred back to the state of the habitual residence of the child under the terms of the convention, notwithstanding any local laws to the contrary.

WHO CAN FILE?

An issue that may arise is *who* can file an action: can an applicant be either a petitioner or a respondent?

The convention appears to be worded in such a way as to address remedies for the benefit of the petitioner or applicant – which apply only to the parent or institution that has lost custody of the child and is seeking return of the child. This is in keeping with the purposes of the convention, in that the parent residing in the habitual residence of the minor at the time of the wrongful act, should have control over the forum that determines the custody issue.

When one considers that the underlying purpose of the convention is to cause the return of a child to his or her habitual residence, it logically follows that the convention exists for the benefit of the petitioner; an action by a respondent whose purpose would be to prevent the return of a child to his or her habitual residence would be contra to the convention. Accordingly only the person or agency requesting the return of the child to the habitual residence has the authority to bring an action under the convention.

Note that the definition of 'person' is broad and includes both individuals *and* institutions.

HOW TO FILE

A person wishing to institute judicial proceedings under the convention does so by filing a petition in the court whose venue includes the place where the child can be found. The petition, in order to give the court jurisdiction to hear the matter, must allege at least the following:

(1) the child was removed from his or her habitual residence;

(2) the petitioner had and was exercising, at the time of the removal, rights of custody under the law of the habitual residence;

(3) the child is under 16 years of age;

(4) the physical whereabouts of the child are in the venue of the court where the petition is filed.

The petition may be accompanied by various supporting documents and/or the petition may be verified by the party or by counsel for the petitioner.

Once the basic allegations are made, the petitioner has raised a prima facie case and, in the absence of any response, the court must order the return of the child to his or her habitual residence forthwith (art. 12).

HEARINGS

There are no special procedural rules prescribing the course of action for a court when a petition under the convention is filed. It can be said, however, that this is to be a speedy summary proceeding. The decisions made by courts of the contracting states have been in accordance with this concept of a summary procedure. As a general rule the matter should proceed on affidavits only, unless there is compelling reason for oral testimony.

OBJECTIONS TO RETURN

Once the petitioner has made out the prima facie case by establishing that there was a 'wrongful removal' or 'wrongful retention', by showing that the child was removed or withheld from his or her habitual residence, and that the petitioner has a right of custody under the law of the habitual residence, the burden of proof shifts to the respondent to raise any opposition to the return. Any objections to the return of the child have been generally held to be as follows:

(1) the petition for return was filed in the court system of the requested state after more than one year had passed since the wrongful removal or wrongful retention and '... it is demonstrated that the child is now settled in its new environment' (art. 12);

(2) the petitioner consented to the removal or retention from the habitual residence;

(3) the petitioner acquiesced to the removal or retention;

(4) the petitioner, at the time of the removal or retention, was not actually exercising his or her rights of custody under the law of the habitual residence;

(5) there is a grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation (the 13 (b) defence);

(6) 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 its views (the age and maturity defence).

There is one additional objection to return under art. 20, namely if it is objectionable on human rights grounds. This objection also requires clear and convincing evidence, but this is so intertwined with art. 13(b) that, when it is raised, it is usually considered part of a 13(b) defence.

Well-settled objection

When a proceeding has been commenced after the expiration of the period of one year after the wrongful removal or wrongful retention, the child shall be returned forthwith, unless the respondent demonstrates that the child is now settled in his or her new environment (art. 12).

Where the victim parent promptly makes a request for the return of the child to the appropriate central authority, and where there were diligent efforts to locate the child, then the period in which an action is to be filed in a court does not start to run until the whereabouts of the child are ascertained. The one-year period mentioned in art. 12 does not continue during any period of concealment of the child, provided that the requesting parent has acted expeditiously in trying to locate the child.

When a child has been sent to the requested state for a period agreed by the parents, or sent by a court for a period of access, and the child is retained past the due date of return by a party in the requested state, this is a wrongful retention. Since the wrongful act does not occur until the return date is passed, the one-year period mentioned in art. 12 does not start to run until after the return date has passed.

Consent/acquiescence objection

If a wrongful removal is claimed by the petitioner, the respondent may, under art. 13(a), claim that there was indeed a removal, but it was with the consent of the petitioner. Should this be shown to be true, although the court may still return the child, the mandatory return under art. 12 is no longer required.

This defence can be active (consent) or passive (acquiescence) or some mixture of the two. The respondent may sometimes argue that the petitioner has acquiesced by inaction and that there is passive acquiescence. Court decisions, however, require that a positive, specific act of consent be made and that act of consent is to be carried out with due formality. Consent by inference is rare to non-existent.

Based on a review of art. 12 and its one-year period, and further based on a reading of the applicable cases, it is suggested that if the passive period is less than one year, the burden should be on the respondent to show that this was acquiescence. If more than one year has passed, it is suggested that the burden now shifts to the petitioner to show that this was not acquiescence.

Exercising rights of custody objection

The convention includes no definition of 'actual exercise of custody', but this provision expressly refers to the care of the child and must be liberally interpreted. The Australian courts have held that the fact that the parent and child were living in the same household was sufficient to show that a parent was actually exercising rights of custody.

In keeping with the spirit of the convention, there is a presumption that findings will be made by the courts that will cause the child to be returned. The respondent therefore has the burden of showing that the petitioner was not actually exercising his or her rights of custody. Proof of the presence of the petitioner in the household at the time of the exercise of rights of custody is sufficient to rebut allegations by the respondent that the petitioner was not exercising rights of custody at the time.

Grave risk objection

This is the infamous 13(b) defence. The person who proffers art. 13(b) as a reason why the child should not be returned faces a very difficult task, for at least the following reasons:

- the art. 13(b) defence is to be applied narrowly and restrictively;
- the respondent must establish this defence with clear and convincing evidence.

A further factor to be considered is that even where it can be shown that the petitioner is unfit to care for the child, the child will still be returned to his or her habitual residence so long as the courts of the habitual residence can assure the courts of the requested state that the child will be protected (e.g. where a safe harbour is created in the habitual residence – see below.)

There is a tendency for a contracting state which has recently acceded to the convention, to uphold a 13(b) defence more often than countries that have had a significant track record on this point, with many decisions and well-developed law under the convention. A centralised system is one where a small number of courts in the same city as the central authority deals with Hague cases from all over the country. These cases are decided by a small group of judges and lawyers who have specialised skills in Hague cases. Where there is a centralised system, such as in the UK, this 13(b) defence is seldom allowed.

If it cannot be shown by clear and convincing evidence that a child cannot be safely returned to the country of his or her habitual residence (in contrast to the family home in that country), then the child must be returned. Such evidence that the child cannot be safely returned could only happen where the courts of the habitual residence cannot or will not take such steps as are ordinarily and normally taken by a legal system to provide protection for children.

THE WISH OF THE CHILD

The issue of age and maturity is not to be looked upon as an issue of the wish of the child to live with one parent or the other. The issue only relates to the child's objection to being returned to his or her habitual residence. The first step is to determine if the child has reached an age and degree of maturity where his or her opinion would even be considered, and then the wishes of the child must be considered in the light of all other relevant facts.

Even with the above strictures placed on the court's consideration of an art. 13(b) defence, courts still are tempted and do make rulings that purport to be under art. 13(b) but in reality are based on the considerations of what is in the best interests of the child. This is strictly forbidden by the convention.

Age and maturity objection

The final objection to return is the age and maturity test, where, in the words of the 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 its views.'

As with the other exceptions under art. 13, this one is to be used sparingly since, as noted above, the presumption is that the child will be returned to his or her habitual residence.

The issue of age and maturity is not to be looked upon as an issue of the wish of the child to live with one parent or the other. The issue only relates to the child's objection to being returned to his or her habitual residence. The first step is to determine if the child has reached an age and degree of maturity where his or her opinion would even be considered, and then the wishes of the child must be considered in the light of all other relevant facts: the length of time the child was concealed from the requesting parent, the amount of influence the abducting parent has brought to bear on the child, etc.

SAFE HARBOUR ORDERS AND UNDERTAKINGS

While undertakings and safe harbour orders are not mentioned in the convention, there is a growing body of law that has approved their use in cases that arise under the convention.

Safe harbour orders

A safe harbour order is an order made by the court of the child's habitual residence. These orders are designed to provide protection to the child when the child is returned to his or her habitual residence and the jurisdiction of the court of the requesting state. Safe harbour orders are orders that emanate from the court of the requesting state and are directed to the attention of the court of the requested state.

The advantage of the safe harbour order (also known as a request for assistance) is that it is issued by the court that will be bound by it and therefore there is no issue of potential conflict as there is no risk that it will not be enforced.

Undertakings

An undertaking is a statement given voluntarily by a party to the court of the requested state promising to do or not to do an act. The purpose of the undertaking is to ensure that the child is protected during and after the child has been returned to his or her habitual residence. For example, a father may promise the court that if an order is made to return the child to the child's habitual residence at his request, then he will provide a separate home for the mother and the child and provide support payments. Such an undertaking is effectively enforceable as a court order by the court to which the undertaking is given.

Because an undertaking is given to the court of the requested state it has no effect in the jurisdiction of the court of the child's habitual residence. For this reason an undertaking is not as satisfactory as a safe harbour order made by the requesting court in the child's habitual residence.

MIRROR ORDERS

Article 7 of the convention states, in part, that the central authorities and other competent officials of the contracting states shall co-operate with one another in furtherance of the goals of the convention. This co-operation has included direct contact between judges of the requesting and requested states. This direct contact has allowed the courts of the two countries involved in a decision about a child to put in place orders in both countries that can be enforced in those countries and that ensure the safe return to and interim care of the child in the child's habitual residence. This type of order is called a mirror order.

A typical example would be where the judges confer by telephone and then make mirror orders that the child is to be returned to the child's habitual residence in the care of the abducting parent, but that all orders that would have discouraged the return, made by the court of the child's habitual residence, are to be stayed. Such orders which might have discouraged the return of the child are, for example, custody orders in favour of the other party or criminal proceedings.

STAY ORDERS

Under art. 16 a court of the requested state, if it learns that an application is being sought for the return of the child, must stay any proceeding that has before it the merits of the custody dispute. Such a stay is automatic. It does not require any application to the court. The existence of a Hague case stops any other case proceeding until after the Hague case has been determined.

William M Hilton
Attorney at Law, Santa Clara, California

Margaret H Bennett
Solicitor, London