



# GOOD PRACTICE REPORT



**GOOD PRACTICE**  
**IN HANDLING**  
**HAGUE ABDUCTION CONVENTION**  
**RETURN APPLICATIONS**

By

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## ACKNOWLEDGMENTS

With grateful thanks to the National Center for Missing & Exploited Children for their generous financial support and assistance and the participating Central Authorities for their invaluable help. In addition, we particularly thank the following individuals.

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LAURA MCPOLIN, NORTHERN IRISH CENTRAL AUTHORITY  
LADY MEYER, PRESIDENT AND CEO, PARENTS & ABDUCTED CHILDREN TOGETHER (PACT), USA/UK  
PAUL MURPHY, NORTHERN IRISH CENTRAL AUTHORITY  
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THE HONOURABLE MR JUSTICE PETER SINGER, HIGH COURT, LONDON, UK  
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SANDRA ZED FINLESS, CANADIAN FEDERAL CENTRAL AUTHORITY

## FOREWORD

Over the past 22 years, the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) has become an increasingly necessary treaty. As the world grows more globally connected, the potential for international child abduction also grows. The continued importance of this treaty is evident. While the objectives of the Hague Convention are well defined, the treaty lacks clear procedural requirements, which leads to problems on a practical level. The result of these complications is two-fold: a lack of uniformity among states in applying the treaty and too many children whose relationship with their extended family is unacceptably delayed or ultimately denied.

To examine the practical problems of the Hague Convention, the National Center for Missing & Exploited Children (NCMEC) hosted two international forums, convening professionals and experts in international child abduction to analyze the Hague Convention and explore ways to improve operations of the treaty. The participants at both forums affirmed their overwhelming commitment to the Hague Convention. Yet, they also concluded that more effort must be made to support and assist signatory nations and help ensure that the true intent of the Hague Convention is realized. The forums resulted in extensive research on “good practices” in relation to the procedures and practices adopted by Contracting States finalized in this document.

The report that follows is based on the research and findings of Professor Nigel Lowe and his staff at the Centre for International Family Law Studies at Cardiff Law School, Cardiff University. This *Good Practice* report is meant to be an objective analysis of the procedures and systems of seven of the states with the highest Hague Convention caseloads, namely, Australia, Canada, France, Germany, Mexico, the United Kingdom, and the United States of America. The report aims to assess the strengths and weaknesses of each State, offer practical recommendations for reform in the countries investigated, and offer possible models to those States considering accession to the Hague Convention.

This *Good Practice* report is designed for use by Central Authorities, legal professionals, judges, and Contracting States as a guide for improved practice; newly Contracting states as a guide for establishing good practices; and legislators, parents, and interested parties to enact and implement improvements within their own countries. The idea of researching good practice was also encouraged and adopted by the Fourth Special Commission of The Hague in their final Conclusions and Recommendations in March 2001. The Hague Permanent Bureau has expressed interest in distributing this guide to member nations, and we are encouraged by their interest in this issue.

It is important to emphasize that this report is not about criticism. Rather, it is about each country assessing its strengths and weaknesses and learning from one another. It is clear that laws and policies are dynamic. In order for the Hague Convention to be a useful tool, we must evaluate the implementation process within each individual system. As international child abduction cases continue to increase and evolve, there is no doubt that the Hague Convention is still a relevant and useful instrument. We have come far over the past two decades in improving the Hague Convention process and ensuring its effectiveness. We are hopeful that this report on good practice will increase global awareness and concern and that its recommendations benefit children and their families worldwide.



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## EXECUTIVE SUMMARY

### 1. INTRODUCTION

The National Center for Missing & Exploited Children funded this research into good practice in handling applications under the Hague Convention on the Civil Aspects of International Child Abduction of 1980. The aim of the project was to investigate procedures and systems in seven individual States, namely, Australia, Canada, France, Germany, Mexico, the United Kingdom and the United States of America with a view to extrapolating overall good practice. The country reports on the seven States and an additional report on Ireland are available separately. However, this report draws from these country reports and aims to make suggestions both for reform, so as to improve the practice of handling abduction cases in the countries investigated, and to offer possible models to those States considering whether to accede to the Convention.

### 2. IMPLEMENTATION ISSUES

This chapter discusses the implementation of the Convention in the seven States and also the States' attitude to the acceptance of new acceding States. It also describes other methods that have been employed by these States to ensure that the Convention has wide application, including bilateral agreements based on the Convention with Contracting and non-Contracting States.

- Contracting States should ensure that there is appropriate legislation for the establishment of Central Authorities and other necessary structures.
- Contracting States should make copies of their implementing legislation available, either on their Central Authority web sites or in a brochure or booklet.
- Contracting States should not seek to re-write the Convention in implementing legislation.
- Contracting States should look upon implementation as a continuing process of development and improvement.
- Contracting States should notify the Permanent Bureau as soon as they have accepted an accession so that this information can be deposited on the web site.
- Contracting States should give serious consideration to accepting accessions where the necessary implementing legislation has entered into force in the acceding State.
- Contracting States should conduct meetings with a view to encouraging further ratifications and accessions to the Convention.
- Contracting States should conduct regional and bi-national meetings where specific difficulties arise between States as regards the operation of the Convention.
- Contracting States should seek to encourage the development of bilateral agreements with non-Contracting States who are unlikely to ratify or accede to the Convention, in order to create systems and mechanisms for allowing access with children abducted to these States.

### 3. CENTRAL AUTHORITIES – STRUCTURE, RESOURCES, PERSONNEL AND COMMUNICATION

While the creation of a Central Authority is mandatory under Article 6, and some of the duties imposed on these authorities are mentioned in Article 7, the structure of Central Authorities is not specifically defined by the Convention. This lack of definition was deliberate as the delegates drafting the Convention recognised that the internal organisation of States differs greatly and therefore it would be beneficial to leave the structure and capacity of Central Authorities undefined.<sup>1</sup> As a consequence, there are huge diversities in Central Authorities across the globe in terms of their structure, the personnel who work in them and the resources with which they work.

In this chapter we discuss the varying structure of Central Authorities, their personnel and resources and finally the availability of information about the Authorities.

- Where Contracting States have designated more than one Central Authority, there should be a *central* Central Authority which can keep track of cases, for the purposes of collecting statistics and advising and providing information to State Central Authorities.
- Where Contracting States have designated more than one Central Authority, details of a *central* Central Authority to which applicants and applicant Central Authorities can address applications for transmission to the appropriate Central Authority within that State, should be made available.
- Where Contracting States have designated more than one Central Authority, there must be good communication between the different Central Authorities within the State to enable the Convention to operate efficiently.
- Central Authorities should have a member of staff able to deal with queries at all times, and outside of office hours should provide emergency contact details. These should be entered onto the Hague web site and the Central Authority's own web site.
- Where contact details or personnel in Central Authorities change, these changes should be *rapidly* entered onto the Hague web site and the Central Authority's own web site.
- Where Central Authorities have a significant number of cases with a Contracting State which speaks another language, staff should be employed who possess the relevant language skills.
- Contracting States should employ at least one member of Central Authority staff who can speak English and / or French (depending on whether a reservation has been made under Article 24).
- Personnel in Central Authorities should undergo training and in this regard, quick turn-over of staff is not to be recommended.
- New employees must receive training prior to taking up posts in the Central Authorities.
- Central Authorities should be adequately resourced, and equipment should be provided to allow for instant communication wherever possible.

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<sup>1</sup> See Explanatory Report by Elisa Pérez-Vera - <http://www.hcch.net/e/conventions/exp128e.html>, para. 45. (Hereafter 'Explanatory Report').

- Central Authorities should produce a web site detailing information relating to the procedure used in Convention proceedings. This should be kept up to date.
- Central Authorities should produce a brochure or booklet which should be widely available detailing information relating to the procedure used in Convention proceedings. This should be kept up to date.

#### 4. THE JUDICIAL AUTHORITIES DESIGNATED UNDER THE CONVENTION

A major means of determining applications under the Convention is by adjudication before the judicial authorities in the relevant Contracting State. Indeed by Article 7 (f) Central Authorities are obliged where appropriate to take all measures –

“to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access”.

In most States it is judicial authorities and not administrative authorities who are likely to be utilised.<sup>ii</sup>

The Convention is silent on which courts or authorities should be used in Convention proceedings. Some States, however, have limited jurisdiction to particular courts as a means of ensuring that expertise is developed and the speed and prioritisation called upon in Articles 2 and 11 is honoured.<sup>iii</sup> At the Fourth Special Commission<sup>iv</sup> Contracting States were urged “to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts”.<sup>v</sup> It was further stated that, “where a concentration of jurisdiction is not possible, it is particularly important that judges concerned in proceedings be offered appropriate training or briefing”.<sup>vi</sup>

In this chapter we discuss which courts and judges are empowered to hear Convention applications and the issue of judicial training.

- Contracting States should limit jurisdiction to a small number of judges to whatever extent possible in their jurisdiction.
- There should also be a limited number of judges involved in hearing appeals.
- Convention cases should be heard by high level courts where possible.
- Judges involved in hearing Convention cases should receive training.

<sup>ii</sup> Although in Denmark, for instance, administrative authorities are called upon to deal with access applications.

<sup>iii</sup> See post at 6.

<sup>iv</sup> Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001) at para. 3.1. (Hereafter ‘Conclusions and Recommendations’).

<sup>v</sup> In the questionnaire sent out prior to the Fourth Special Commission, 26 States supported the recommendation relating to concentration of jurisdiction and 5 States did not support it. See Checklist of issues raised and recommendations made in response to the Questionnaire concerning the practical operation of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction at p. 15.

<sup>vi</sup> Conclusions and Recommendations, op. cit., n. iv, para. 3.2.

- International Judicial conferences are to be encouraged as a means of improving knowledge and facilitating the development of suitable networks.
- Judges involved in hearing Convention cases should be made aware of the existence of INCADAT and the Judge's Newsletter.
- Liaison judges should be appointed to disseminate information and act as a point of reference for other judges in their jurisdiction.
- Direct communication between judges should be encouraged whenever it can help expedite resolution of cases.

## 5. INITIAL PROCESSING OF APPLICATIONS

This chapter considers the initial processing of applications under the Convention including their transmission to the relevant authority, procedures and agencies able to assist in locating children and efforts made to seek a voluntary return or amicable resolution of the issues. Of primary importance in this context, are the Central Authorities. According to the Conclusions and Recommendations of the Fourth Special Commission, “[t]he Central Authorities designated by the Contracting States play a key role in making the Convention function”.<sup>vii</sup> Article 7 “sets out an overall duty of co-operation” and lists “some of the principal functions which the Central authorities have to discharge”. Central Authorities have a duty to co-operate with each other, and to “promote co-operation amongst the competent authorities in their respective State”, which means they have a duty to utilise relevant authorities which may help them to fulfil their obligations. In addition to utilising relevant authorities, Central Authorities are permitted by Article 7 to use “any intermediary” to undertake the functions listed in that Article. As a consequence, the procedures outlined in this chapter are not limited to those operated exclusively by the Central Authorities. Instead, the chapter considers certain aspects of procedure which may be carried out by Central Authorities or initiated by Central Authorities but carried out by other authorities on their behalf.

- It is vital that applications are processed with maximum speed.
- Contracting States should have a standard application form which seeks the information required by Article 8 and any other information necessary in the particular Contracting State.
- Where possible, and necessary, Central Authorities should provide bilingual application forms in order to expedite proceedings.
- Copies of custody legislation of the requesting State should be provided. Where appropriate this legislation should be translated into the language of the requested State.
- Central Authorities should reply promptly to all communication and should rapidly acknowledge receipt of an application.
- Central Authorities should be aware of organisations who are able to help locate missing children in their State and should include such information on their web sites or in their brochures.

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<sup>vii</sup> Ibid., para. 1.1.

- Central Authorities and courts attempting to locate missing children should be given access to appropriate government and other records.
- Contracting States should work with police to help locate missing children.
- Web sites containing photos of missing children should be utilised to aid location.
- Contracting States should be prepared to use powers vested in domestic legislation or the inherent jurisdiction of the courts in order to locate and recover missing children.
- The Central Authority or an intermediary acting on their behalf (such as a lawyer or mediator) should attempt to seek a voluntary resolution in all appropriate cases.
- Procedures to ensure the safety of the child must be put in force where it is felt that seeking voluntary return may jeopardise the safety of the child or cause the abductor to flee with the child.
- Attempts at seeking voluntary resolution should not unduly delay proceedings.

## 6. JUDICIAL PROCESSING OF APPLICATIONS

This chapter considers the judicial process in Convention applications, including legal representation, legal aid and the court procedure itself, both at first instance and appellate levels. Article 7 (f) obliges Central Authorities to “take all appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child”. Generally, Contracting States refer cases to the judicial authorities in their State. However, in certain States administrative authorities may be utilised.<sup>viii</sup> There is an obligation upon Central Authorities in Article 7 (c) and Article 10 to seek a voluntary resolution, but where this fails, or is inappropriate, judicial proceedings will be necessary. Of all cases commenced in 1999 that had concluded, other than by rejection or withdrawal, by 30 June 2001, 70% were the result of judicial proceedings, the remaining 30% being resolved voluntarily.<sup>ix</sup> In other words, a considerable proportion of applications are resolved in the courts of the Contracting States and it is, therefore, important to analyse the court procedures in Convention cases when considering good practice.

- Contracting States should use the most expeditious court procedures available.
- Central Authorities should have a monitoring system to track the speed and outcome of each case.
- A concentrated number of suitably trained legal practitioners should be involved in handling Convention cases in order that expertise can develop, and Central Authorities should maintain a list of such lawyers.
- Where possible, legal advice and representation should be free to applicants and in any event, no fee should be charged.

<sup>viii</sup> For example, access applications made to Denmark are dealt with by administrative bodies.

<sup>ix</sup> See *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* – drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias - Preliminary Document No. 3 of March 2001 for the attention of the Special Commission of March 2001. (Hereafter ‘Preliminary Document No. 3’).

- Where there is no comprehensive system of legal aid in a State, attempts should be made to establish a network of lawyers willing to offer free or reduced fee representation and advice to applicants and respondents.
- Where possible costs associated with the application such as translation should be provided free of charge to the applicant.
- Central Authorities should publish on their web site or in their brochure information relating to the availability of legal aid and how to obtain it.
- Legal aid applications must be dealt with expeditiously or emergency procedures must be used to ensure that the application for legal aid does not unduly delay the Convention application.
- Where possible Central Authorities or other relevant authorities should attempt to organise free travel and accommodation for returning children, and where appropriate, for those seeking the return of children. (See Australian and Canadian models).
- Remembering that a Convention hearing is a forum and not a hearing on the merits of the case, oral evidence and necessary documentation should be limited to that which is essential.
- Courts at trial and appellate levels should set and adhere to timetables that ensure the speedy determination of return applications.
- Appeals should not be used to delay enforcement of decisions and in this regard it is recommended that Contracting States limit the availability of appeal in Convention cases.
- Judges at both trial and appellate levels should firmly manage the progress of proceedings.
- Courts should ensure that where exceptions to return are raised, these are interpreted narrowly.
- Where it is necessary to obtain a report on the child, this should be undertaken expeditiously so as not to delay proceedings.
- Contracting States should have an effective mechanism for the immediate enforcement of court orders.

## 1. INTRODUCTION

### 1.1 BACKGROUND TO THE RESEARCH

The Hague Convention on the Civil Aspects of International Child Abduction of 1980, has proved to be an important instrument for dealing with the problem of international child abduction. Its simple to understand objectives have brought much needed certainty and principle to an area which can otherwise rapidly descend into international mayhem. Indeed the general conclusion at the Fourth Special Commission in March 2001 stated that “the Convention in general continues to work well in the interests of children and broadly meets the needs for which it was drafted”.<sup>1</sup>

The Convention has been in force since 1983 and as of 1 January 2002, boasts 70 Contracting States. Membership of the Convention is still increasing with seven States ratifying or acceding to it in 2001.<sup>2</sup> The growing number of Contracting States is indicative of the Convention’s success. In part this success is due to the fact that the Convention sets out broad objectives whilst not defining procedural requirements. This makes it an adaptable instrument capable of being implemented in a diverse range of cultures.

The flexibility of the Convention and the number of Contracting States now operating it has led to a growing realisation that improvements need to be made if the Convention is to work uniformly well. In this respect, the notion of ‘best practices’ has been discussed in relation to the procedures and practices adopted by Contracting States. The need for a paper on ‘best practices’ was recognised by the First International Forum hosted by the National Center for Missing & Exploited Children (NCMEC), held in Washington, DC, in September 1998. This idea was pursued and developed at the inaugural meeting of the International Child Abduction Steering Committee of the newly established International Centre for Missing & Exploited Children (ICMEC), held in London in October 1999. After further meetings it was resolved that the research reported upon in this paper would be conducted under the Directorship of Professor Nigel Lowe, Director of the Centre for International Family Law Studies at Cardiff Law School.

This research aimed to investigate procedures and systems in seven individual States, namely, Australia, Canada, France, Germany, Mexico, the United Kingdom (UK) and the United States of America (USA) with a view to extrapolating overall good practice. The aim of this paper is to make suggestions both for reform, so as to improve the practice of handling abduction cases in the countries investigated, and to offer possible models to those States considering whether to accede to the Convention.

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<sup>1</sup> Conclusions and Recommendations, *op. cit.*, n. iv, p. 14.

<sup>2</sup> Namely, Slovakia as a ratifying State and El Salvador, Estonia, Latvia, Nicaragua, Peru and Sri Lanka as acceding States.

## 1.2 BACKGROUND TO GOOD PRACTICE

At the Second International Child Abduction Forum held in Alexandria, Virginia, USA, in November 2000 and at judicial conferences in De Ruwenberg<sup>3</sup> in June 2000 and Washington, DC,<sup>4</sup> in September 2000, it was recommended that ‘best practice’ be discussed at the Fourth Special Commission of the Convention held in The Hague in March 2001. Discussion at this Commission stressed the need to adapt vocabulary and focus on ‘good’ practice as opposed to ‘best’ practice.<sup>5</sup> Given the diversity of cultures and legal systems within which the Convention is operating, the idea of any one practice being a ‘best’ practice seemed incongruous, as no one model could have universal application. Certainly, our research in the early stages of this project had led us to realise just how different jurisdictions are in terms of the way they operate the Convention.

The idea of researching good practice was welcomed at the Fourth Special Commission, being the subject of two Working Documents.<sup>6</sup> In the final Conclusions and Recommendations it was stated that:

“Contracting States to the Convention should co-operate with each other and with the Permanent Bureau to develop a good practice guide which expands on Article 7 of the Convention. This guide would be a practical, “how-to” guide, to help implement the Convention. It would concentrate on operational issues and be targeted particularly at new Contracting States...”<sup>7</sup>

The guide is stated to apply “particularly”, (and therefore not exclusively) to newly Contracting States. The emphasis in the Conclusions and Recommendations may be on new States to the Convention, but it is clear that this is not the exclusive purpose, and it is important to recognise that ‘good practice’ is also something which can be considered in relation to Contracting States of long standing. Indeed, it is on these States which this paper particularly focuses.

## 1.3 BACKGROUND TO THIS PAPER

It is not the intention of this paper to suggest a model format for handling applications. It is not a paper on minimum standards required for newly Contracting States, although new Contracting States may find the information useful. Rather, it aims to consider different points of good practice extrapolated from the experience of busy jurisdictions with diverse legal and social cultures. In the Conclusions and Recommendations of the Fourth Special Commission it was stated that “[e]stablished Central Authorities are encouraged to explore ways of sharing their expertise and experiences with other Central Authorities

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<sup>3</sup> Judicial Seminar on the International Protection of the Child – De Ruwenberg, 3-6 June 2000.

<sup>4</sup> Common Law Judicial Conference on International Child Custody – Washington, DC, 17-21 September 2000.

<sup>5</sup> See Report of Meeting No. 3 of the Fourth Special Commission, The Hague, 23 March 2001, p. 4.

<sup>6</sup> See Working Document No. 2 prepared by ICMEC and Working Document No. 4 prepared by the UK Delegation presented at the Fourth Special Commission, The Hague, March 2001.

<sup>7</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.16.

when requested to do so”.<sup>8</sup> It is hoped that this paper will be a means of sharing the expertise of the established Central Authorities of the Contracting States analysed. Additionally, it is hoped that this paper will go beyond Central Authorities and be a means of sharing the experience that these States have with regard to implementation and procedure.

Five of the States analysed are Federal nations, namely, Australia, Canada, Germany, Mexico and the USA. The UK whilst not being a Federal nation also comprises a number of different jurisdictions. Three of the seven States, France, Germany and Mexico operate civil law systems whilst the remaining four States are essentially Common law based, with the exception of one Canadian State, (Quebec), and one American State, (Louisiana), which operate civil law systems.

The 7 States selected for this research each have vast experience with regards to the operation of the Convention all having been Contracting States for at least 10 years. They all have large caseloads being 7 of the busiest 10 Contracting States in terms of the number of applications they received and made in 1999.<sup>9</sup> In total, these States handled 66% of all new incoming return and 69% of all new incoming access applications in that year. Indeed applications *between* these seven States accounted for 39% of all new incoming applications under the Convention in 1999. As a consequence, it is important to consider good practices in these States in order to ensure that the Convention is operating as efficiently as possible for what is a large proportion of cases.

This paper is the result of extensive research, meetings having been held with personnel in Central Authorities in Australia, England and Wales, France, Germany, Mexico and the USA. We have also been in close email correspondence with Central Authorities in other areas. We have attended relevant international conferences and meetings and have worked in close consultation with NCMEC. We should like to record our deep appreciation of the unhesitating co-operation and help given by Central Authority personnel to this project.

This paper discusses good practice relating to the important areas of implementation, Central Authorities, Courts and Judges, legal representation, procedures and enforcement of orders. Each chapter concludes with recommendations of good practice. While diversity is encouraged and necessary differences are acknowledged, it is hoped that some good practices drawn from these States will be able to be applied in these and other Contracting States.

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<sup>8</sup> Ibid., para. 2.7.

<sup>9</sup> Preliminary Document No. 3, op. cit., n. ix.

## 2. IMPLEMENTATION ISSUES

### 2.1 RATIFICATION AND ACCESSION TO THE CONVENTION

Article 37 of the Convention declares that it “shall be open for signature by the States which were Member States of the Hague Conference on Private International Law at the time of its Fourteenth Session” which was the time the Convention was negotiated. All countries which were Member States at this time are entitled to ratify the Convention and all Contracting States, present and future are obliged to accept all ratifying States. By Article 38, all States which were not Member States of the Hague Conference at the time of the Fourteenth Session are entitled to accede to the Convention.

Articles 37 and 38 are part of the “final clauses” and these were not drafted by the Special Commission as all draft Conventions constructed during a Session of the Conference are subject to uniform treatment with regard to the final clauses.<sup>10</sup> The Special Commission did, however, favour the idea that any State should have the “opportunity to accede to the Convention, but the accession will take effect only in the relations between the acceding State and the Contracting States that have raised no objections to it within a certain period of time”.<sup>11</sup> This was considered to be a “balance between the desire for universality and the conviction that a system of co-operation is only effective when there is between the parties a sufficient degree of mutual trust”.<sup>12</sup> This construct was not, however, adopted for Conventions arising out of the Fourteenth Session as under Article 38, “accession[s] will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession”.

Consequently, Contracting States must formally accept accessions in order for the Convention to enter into force between the newly acceding State and the existing Contracting State. Merely not objecting to the accession is not sufficient to bring the Convention into force between the two States. Interestingly, this construct differs from other Hague Conventions concerning children, which require a positive veto.<sup>13</sup> Diplomatically, however, it is more convenient to have to positively agree to each individual accession rather than having to positively object.

Australia, Canada, France, Germany, the UK and the USA were all Member States of the Hague Conference at the time of the Fourteenth Session and as such were entitled to ratify the Child Abduction Convention. Conversely, Mexico was not a Member State at that time and therefore was not entitled to ratify, but acceded to the Convention under Article 38. The six ratifying States have each accepted the accession of Mexico and consequently the Convention is in force between each of the seven States.

<sup>10</sup> See *Actes et documents de la Quatorzième session Tome III Enlèvement d'enfants / Child abduction*, The Hague, 1980.

<sup>11</sup> See Explanatory Report, op. cit., n. i, para. 49.

<sup>12</sup> Ibid.

<sup>13</sup> See the “Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993” and the “Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996”. In these Conventions, the original preference of the Fourteenth Session was accepted, and these Conventions enter into force automatically between States, provided an objection has not been raised within a specified period of time.

To some extent the fact that existing Contracting States, be they acceding or ratifying States have to positively accept newly acceding States may cause confusion with regard to the scope of the Convention. While as of 1 January 2002, there were 70 Contracting States, the Convention is not in force between all 70 States due to the fact that many States have not accepted certain accessions. The Hague web site keeps a record of the current status of the Convention which is useful for Central Authorities and individuals to see if the Convention is in force between themselves and the relevant foreign State. Details of new acceptances should be deposited with the Permanent Bureau as a matter of urgency so that Central Authorities can keep up to date. This should also be followed through in internal legislation where this is necessary. In this regard it is to be noted that internal legislation in the UK stating the Contracting States with whom the Convention is in force with the UK, was only altered in December 2001, to include the ratifications of Turkey in 2000 and Slovakia in 2001.<sup>14</sup>

This chapter discusses the implementation of the Convention in the seven States and also the States' attitude to the acceptance of new acceding States. It also describes other methods that have been employed by these States to ensure that the Convention has wide application, including bilateral agreements based on the Convention with Contracting and non-Contracting States.

## 2.2 IMPLEMENTING THE CONVENTION

In most States, implementing legislation is needed to give effect to the Convention. However, in other States international treaties are automatically internally binding without the need for implementation as such. Implementing legislation of some description may however be required to give effect to the objects of the Convention such as establishing Central Authorities and to lay down procedures and courts which can be utilised in Convention cases.

At the Fourth Special Commission the idea of creating a questionnaire for newly Contracting States, was mentioned in the Conclusions and Recommendations. Specific questions on implementation were approved:

- “(a) Is implementing legislation necessary to bring the Convention into force in domestic law?
- (b) If so, has the necessary legislation been enacted, and is it in force?”

As these questions are considered important for newly Contracting States, they are also questions that current Contracting States should ask themselves. Provision of copies of implementing legislation may be useful to help foreign States to understand how the Convention has been implemented in the relevant State. These could be attached to contact details on the Hague web site, or posted on individual Central Authority web sites. Some Central Authority web sites do already contain this information.

France and Canada were two of the original three ratifying States<sup>15</sup> bringing the Convention into force in 1983. However, in Canada, family law falls under the constitutional jurisdiction of the individual Provinces and Territories and

<sup>14</sup> Child Abduction and Custody (Parties to Conventions) (Amendment) Order 2001 SI 2001/3923.

<sup>15</sup> The third State being Portugal.

therefore it had to be implemented at a Provincial level, which process was completed throughout Canada by 1988. Some of these jurisdictions implemented the Convention by including it into existing legislation while others created separate Acts. In 1999 Nunavut was formed as a new Canadian Territory and the laws of the Northwest Territories which were in force on the date that Nunavut became a separate Territory applied to Nunavut.<sup>16</sup> Consequently, the Convention was always in force for Nunavut since the moment of its creation, but a separate Central Authority was only established in 2001.<sup>17</sup>

In France, which includes the mainland and the Overseas Departments and Territories, international Conventions are directly applicable upon the publication of a decree of ratification in the Official Journal, "*Journal Officiel*" and there is no need for separate implementing legislation. Consequently, the Convention entered into force for France in December 1983, the date of its publication in the *Journal Officiel*.

The UK was the fifth Contracting State to the Convention, implementing it by means of an Act of Parliament, the Child Abduction and Custody Act 1985, which came into force in 1986. The USA also implemented the Convention by means of legislation, the International Child Abduction Remedies Act of 1988, which came into force in the same year. The USA was the 10<sup>th</sup> Contracting State to the Convention and this Convention was the first Hague Convention on family law to which the USA became a party.

In Germany, provided a Convention is self-executing, there is no need to incorporate it word for word into a national statute. It is sufficient that a statute is passed formally approving the Convention subject to any reservations that may have been made. It is, however, necessary to legislate specifically to create any necessary competent authorities under a Convention. Germany's implementing legislation for this Convention, *Gesetz zur Ausführung von Sorgerechtsübereinkommen und zur Änderung des Gesetzes über die Angelegenheiten der freiwilligen Gerichtsbarkeit sowie anderer Gesetze 1990* ('SorgeRückAG'), came into force in 1990, and Germany was the 16<sup>th</sup> Contracting State to the Convention. Although enacted in April 1990 this Federal piece of legislation applies throughout the Federal Republic of Germany and therefore applies both to the former West and East Germany which had become united in October 1990. As the Convention was self-executing, it became internally directly applicable once the implementing statute had been passed. Accordingly, the statute deals with four broad matters, namely setting up and regulations concerning the Central Authority, determining which courts have jurisdiction, laying down procedure for dealing with incoming applications and finally determining between the Convention and questions of costs and legal aid.

Australia implemented the Convention by means of Regulations, the Family Law (Child Abduction Convention) Regulations 1986, authority for which was given by the Family Law Act 1975 (Cth) s 111B. These Regulations came into force in 1987 making Australia the seventh Contracting State to the Convention. The use of Regulations has the benefit of allowing for flexibility and making it easy to alter the Regulations in the light of judicial decisions and they have, for

<sup>16</sup> See Nunavut Act S.C., ch. 28 ss 3, 29 (1993).

<sup>17</sup> See Hague web site at <http://www.hcch.net/authorities/caabduct.html#ca>

example, recently been amended by the Family Law Amendment Act 2000. Unusually, (though the same has been done in the Province of Quebec in Canada), the Australian Regulations do not always embody the exact wording of the Convention,<sup>18</sup> which has the obvious danger that judicial decisions are based on the wording of the Regulations and not on the Convention itself.

In Mexico, the method of implementation was different again. The Senate, “*la Cámara de Senadores del Congreso de la Unión*” authorised the Convention and this authorisation was published in the Official Diary of the Federation, “*Diario Oficial de la Federación*” in 1991. The Convention entered into force for Mexico in 1991, making it the 20<sup>th</sup> Contracting State to the Convention, and only the 4<sup>th</sup> State to accede.

While the Convention leaves open the means the method of implementation and States must conform with their domestic law in the way in which they implement international Conventions, there are some good practice points to consider. Where there has been implementation via Regulations or an Act, subsequent legislation may be able to reform areas that need modification. Mention has already been made of Australia’s recent amendments to their implementing Regulations. Notably in this regard, the German implementing Act of 1990 has since been amended by an Act of 1999 (*Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens Ausführungsgesetz*) which concentrates jurisdiction in just 24 district courts. Further procedural reform relating to the institution of court proceedings and the application for legal aid was introduced in Germany in October 2000. Absence of implementing legislation does not mean of course that subsequent changes cannot be made. Indeed, this is demonstrated by France where by means of fresh legislation the number of courts empowered to hear Hague cases has been limited.<sup>19</sup>

The Conclusions and Recommendations of the Fourth Special Commission suggested that as “national and regional legal frameworks, ... are subject to sometimes significant changes”, “implementation, whether national or regional, should always be seen as a continuing process of development and improvement, even if the text of the Convention itself remains unchanged”. As a result it is suggested that States continually consider how the Convention is implemented into their domestic law, and where necessary or appropriate change methods or means of implementation to fit with changes in legal frameworks. Implementation should not be considered as a one off event, but improvement should constantly be sought. In this respect, it is to be noted that Germany has, more than any other State, amended and improved its initial implementing legislation in order to improve the workings of the Convention. While it may be too early to say what effect these reforms are having, the German model of reform seems to be acting as a catalyst for other States.<sup>20</sup>

<sup>18</sup> For example, the second paragraph of Article 12 states that “[t]he judicial or administrative authorities ... shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment”. The corresponding Regulation in Australia, (Regulation 16 (1) (b)), states that “a court must make an order for the return of the child ... unless the court is satisfied that the child is settled in his or her new environment”. This omits the word “now” from the text of the Convention.

<sup>19</sup> See Articles 20 and 21 of *la loi du 4 Mars 2002*.

<sup>20</sup> With regard to the reforms which concentrate jurisdiction in a limited number of courts, France, as stated above, has followed the German example. Additionally, it is understood that Austria is currently thinking of limiting jurisdiction and Denmark and Portugal are also actively considering it.

### 2.3 ACCEPTANCE OF ACCEDING STATES

The States analysed in this paper have taken different approaches to the acceptance of accessions and as a result there is great divergence in the number of States with whom the Convention is operative for these seven States. At one end of the spectrum, as of 1 January 2002, the Convention is in force between Australia and 63 other States, while at the other end of the spectrum, the Convention is in force between France and just 42 other States. Consequently, the Convention is in force between Australia and 21 more States than with France.

Four of the seven Contracting States, namely, Australia, Canada, Germany and Mexico have accepted accessions in 2001. Australia, accepting five<sup>21</sup> new acceding States in May 2001, Canada accepting four<sup>22</sup> new acceding States in January 2001, Germany accepting two<sup>23</sup> new acceding States in December 2001 and Mexico accepting eight<sup>24</sup> new acceding States in June 2001.

The UK having previously accepted no accessions since May 1998 when it accepted Turkmenistan, has accepted the accession of Malta. The Convention entered into force between the two States in March 2002. However, the seven States which acceded to the Convention between Turkmenistan and Malta have not been accepted by the UK, neither have the eight States which have acceded since Malta.

In contrast France and the USA have not accepted any accessions in recent years. In part the lack of acceptance of accessions is due to concerns about the acceding States' ability to implement the Convention effectively. It is of obvious importance that an acceding State has the necessary procedures and authorities in place to operate the Convention before the Convention can enter into force for the State. Therefore, genuine concerns about a lack of ability to implement the Convention may be a valid reason for failing to accept an accession. Conversely, it does appear that certain Contracting States have recently adopted an attitude of not accepting any accessions. The USA has not accepted an accession since that of South Africa in November 1997, and as a result there are 18 States who have acceded to the Convention since that date who are not recognised by the USA. The last accession accepted by France was that of Chile in February 1996, but with many other accessions prior to this date not having been accepted. In fact France has not accepted 27 acceding States.

It is essential for a Convention based largely on co-operation that Contracting States feel able to work together effectively with the relevant acceding State, and there is something to be said for accepting an accession with caution. However, as individuals are entitled to apply directly to the courts<sup>25</sup> if an accession has been accepted, and provided the Convention has been validly implemented in the State, an individual may have a remedy under the Convention despite the lack of administrative bodies such as Central Authorities. In other words, even

<sup>21</sup> Brazil, Malta, Trinidad and Tobago, Uruguay, Uzbekistan.

<sup>22</sup> Fiji, Republic of Moldova, Paraguay, Turkmenistan.

<sup>23</sup> Estonia and Paraguay.

<sup>24</sup> Brazil, Colombia, Costa Rica, Iceland, Nicaragua, Paraguay, South Africa, Uruguay.

<sup>25</sup> See Article 29 of the Hague Convention found at <http://www.hcch.net/e/conventions/text28e.html>.

in the absence of Central Authorities, there may still be some point in accepting an accession. In any event the apparent trend in recent years of non-acceptance at any rate by France, the USA and to a certain extent the UK, is not to be encouraged. The Convention provides a mechanism by which co-operation in international custody and access issues can hopefully be achieved and as such Contracting States should welcome new accessions. Having established that these States have the appropriate bodies to deal with applications, accessions should be quickly accepted for the mutual benefit of both States. Indeed the Conclusions and Recommendations of the Fourth Special Commission stated that: “Endeavours should continue to be made to encourage ratifications of, and accessions to, the 1980 Convention by States willing and able to undertake the Convention obligations”.<sup>26</sup>

When a Contracting State does accept an accession this should be notified to the Permanent Bureau so that notification can be deposited on the Hague web site. In the Conclusions and Recommendations of the Fourth Special Commission it was also stated that Central Authorities should be encouraged to produce a web site or publish a brochure detailing various information including, “the other Contracting States in relation to whom the Convention is in effect”.<sup>27</sup>

## 2.4 BILATERAL AND OTHER AGREEMENTS

In the Conclusions and Recommendations of the Fourth Special Commission, Central Authorities were encouraged, “in addressing any practical problems concerning the proper functioning of the Convention, to engage in dialogue with one another”.<sup>28</sup> It was also suggested that, “[w]here a group of Central Authorities share a common problem, consideration should be given to joint meetings which might in some cases be facilitated by the Hague Conference”.<sup>29</sup> Many Central Authorities have instigated such meetings in order to deal with particular problems they have encountered with particular States. There is a Franco-German committee which discusses problematic Franco-German cases and a bi-national group of experts has also been established to deal with issues arising between Germany and the USA.

There have been a number of meetings between officials in Mexico and the USA to help to improve the operation of the Convention between these States. These have included bi-national meetings between judges and authorities from Southern California in the USA and Baja California in Mexico. We are also aware of various meetings between Central Authority personnel in relation to particularly difficult cases or in relation to more general problems. Such meetings are to be encouraged where they improve the operation of the Convention.

As well as meetings and agreements between Contracting States in order to improve the operation of the Convention, many States have conducted meetings with non-Contracting States. The Conclusions and Recommendations of the Fourth Special Commission encouraged Contracting States to encourage further ratifications and accessions and to “arrange meetings at the regional level for

<sup>26</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 7.2.

<sup>27</sup> *Ibid.*, para. 1.8.

<sup>28</sup> *Ibid.*, para. 2.9.

<sup>29</sup> *Ibid.*

this purpose”.<sup>30</sup> Some States have taken this one stage further and have convened meetings with States, who for reasons of incompatible values are unlikely to accede to or ratify the Convention, notably Shari’a law States. A number of bilateral agreements have been negotiated between Muslim States and Convention States, often modelled on the Convention. France was a pioneer in negotiating these agreements and currently has bilateral agreements with five non-Convention States.<sup>31</sup> Canada and Australia have also been particularly prominent in considering bilateral agreements. Canada has a bilateral agreement with Egypt, and has signed an agreement with Lebanon which has not yet entered into force, Canada is also considering negotiating an agreement with Jordan. Australia has negotiated an agreement with Egypt based on the Canadian agreement which has not yet entered into force and Australia is also in the process of negotiating an agreement with Lebanon. The UK is similarly considering a bilateral agreement with Egypt by way of a Memorandum of Understanding.

## 2.5 RECOMMENDATIONS OF GOOD PRACTICE

- Contracting States should ensure that there is appropriate legislation for the establishment of Central Authorities and other necessary structures.
- Contracting States should make copies of their implementing legislation available, either on their Central Authority web sites or in a brochure or booklet.
- Contracting States should not seek to re-write the Convention in implementing legislation.
- Contracting States should look upon implementation as a continuing process of development and improvement.
- Contracting States should notify the Permanent Bureau as soon as they have accepted an accession so that this information can be deposited on the web site.
- Contracting States should give serious consideration to accepting accessions where the necessary implementing legislation has entered into force in the acceding State.
- Contracting States should conduct meetings with a view to encouraging further ratifications and accessions to the Convention.
- Contracting States should conduct regional and bi-national meetings where specific difficulties arise between States as regards the operation of the Convention.
- Contracting States should seek to encourage the development of bilateral agreements with non-Contracting States who are unlikely to ratify or accede to the Convention, in order to create systems and mechanisms for allowing access with children abducted to these States.

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<sup>30</sup> Ibid., para. 7.2.

<sup>31</sup> Namely, Morocco since 1981, Tunisia and Egypt since 1982, Algeria since 1988, and Lebanon since 1999.

### 3. CENTRAL AUTHORITIES – STRUCTURE, RESOURCES, PERSONNEL AND COMMUNICATION

#### 3.1 INTRODUCTION

The Convention entitles individuals to apply directly<sup>32</sup> to the judicial or administrative authorities which have power to apply the Convention.<sup>33</sup> However, it favours the use of Central Authorities,<sup>34</sup> and as a result the “system adopted by the Convention could be characterised as a ‘mixed system’”.<sup>35</sup> Nevertheless, the creation of Central Authorities is mandatory, Article 6 (1) providing that Contracting States “*shall* designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities”.<sup>36</sup> Additionally by Article 6 (2), Contracting States which are “Federal States, States with more than one system of law or States having autonomous territorial organisations” are permitted to “appoint more than one Central Authority and specify the territorial extent of their powers”. As a result, there may be more than one Central Authority operating in a single Contracting State.

While the creation of a Central Authority is mandatory under Article 6, and some of the duties imposed on these authorities are mentioned in Article 7, the structure of Central Authorities is not specifically defined by the Convention. This lack of definition was deliberate as the delegates drafting the Convention recognised that the internal organisation of States differs greatly and therefore it would be beneficial to leave the structure and capacity of Central Authorities undefined.<sup>37</sup> As a consequence, there are considerable diversities in Central Authorities across the globe in terms of their structure, the personnel who work in them and the resources with which they work.

#### 3.2 STRUCTURE OF CENTRAL AUTHORITIES

At the outset, it is to be noted that each Contracting State has taken a different approach to structuring Central Authorities. In the 7 States analysed there are 36 Central Authorities and 1 organisation operating the responsibilities of a Central Authority. Three of the seven States considered in this report have designated more than one Central Authority, namely Australia, Canada and the UK. Australia and Canada have designated a Central Authority in each State, Province<sup>38</sup> or Territory and have also established a Federal Central Authority. However, the functions performed by these bodies are different. The Convention in Canada is implemented and operated at a Provincial level and therefore, the Provincial and Territorial Central Authorities handle individual cases. The Federal Central Authority provides information and training but does not deal directly

<sup>32</sup> See Article 29 of the Hague Convention, *op. cit.*, n. 25.

<sup>33</sup> Consequently, the Convention places some obligations on judicial and administrative authorities as well as Central Authorities, see post at 4.

<sup>34</sup> See Explanatory Report, *op. cit.*, n. i, para. 42.

<sup>35</sup> See *ibid.*, para. 43.

<sup>36</sup> Emphasis added.

<sup>37</sup> See Explanatory Report, *op. cit.*, n. i, para. 45.

<sup>38</sup> In fact, the Canadian Province of Alberta has two Central Authorities, one based in Calgary and the other in Edmonton.

with cases, unless the precise whereabouts of the child within Canada are not known. Conversely, in Australia the Convention is implemented and operated at a Federal level and all applications are transmitted through the Federal Central Authority, known as the Commonwealth Central Authority. Although cases are instigated at State and Territorial level, the regional Central Authorities essentially do this on behalf of the Commonwealth Central Authority.<sup>39</sup>

While both structures appear to work effectively in these States, the system in Australia is arguably more straightforward with foreign Central Authorities and applicants dealing with one body, the Commonwealth Central Authority. However, while foreign Central Authorities may find a single Central Authority easier to deal with, regional Central Authorities may feel isolated in this system. Conversely, where applications are handled at a Provincial level, as in Canada, there is always the possibility that the Federal Central Authority may feel somewhat isolated. In addition, Article 6 (2) of the Convention, while permitting Contracting States to designate more than one Central Authority, also directs States to “designate *the* Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State”.<sup>40</sup> This implies that Contracting States should have one single Central Authority with whom the outside world can communicate and then this Central Authority, where appropriate, transmits the application to a regional Central Authority, something like the Australian model. Indeed, the Pérez-Vera report speaks of a “sort of ‘hierarchy’ of Central Authorities”.<sup>41</sup> Certainly, there are advantages to this kind of system. As outsiders we have found the Australian model much easier to understand than the Canadian model. However, it must be stated that we have heard no criticism of the Canadian model by any other Central Authorities. In fact as the Convention in Canada operates at a Provincial level, (unlike in Australia, where the Convention operates at a Federal level), insisting that applications must be transmitted via the Federal Central Authority would waste time by adding an extra administrative level.

According to the Pérez-Vera report, the designation of one single Central Authority who can then transmit applications to the appropriate body within the State is important,

“because the Convention imposes a time-limit upon the duty of judicial or administrative authorities in the requested State for the prompt return of the child; a mistaken choice as to the requested Central Authority could therefore have decisive consequences for the claims of the parties”.<sup>42</sup>

It is also important that one body within each Contracting State is aware of all cases for the purpose of completing statistical returns and recognising patterns. A central Central Authority may also be useful for the provision of training and information, as in Canada, to create harmonisation across a Contracting State.

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<sup>39</sup> In Australia part 1 of the implementing Regulations, the Family Law (Child Abduction Convention) Regulations 1986, establish the State and Commonwealth Central Authorities.

<sup>40</sup> Emphasis added.

<sup>41</sup> Explanatory Report, op. cit., n. i, para. 46.

<sup>42</sup> Ibid., para. 47.

The UK whilst not being a Federal nation does comprise three distinct jurisdictions,<sup>43</sup> namely, England and Wales, Northern Ireland and Scotland. Consequently, as a Contracting State operating “more than one system of law”,<sup>44</sup> the UK is entitled to designate more than one Central Authority. Under the implementing legislation, the Child Abduction and Custody Act 1985, the Lord Chancellor is the Central Authority for England and Wales and for Northern Ireland,<sup>45</sup> although in practice there is an administrative body in both these jurisdictions which has been created to undertake the functions of the Central Authority. In England and Wales it is the Child Abduction Unit, and in Northern Ireland, the Northern Ireland Court Service. In Scotland, the Minister of Justice is the Central Authority<sup>46</sup> and an administrative body situated in the Civil Justice and International Division of the Scottish Executive Justice Department, operates the functions of the Central Authority for Scotland.

In addition, the UK has also extended its ratification to certain Dependent Territories, namely, Bermuda, the Cayman Islands, the Falkland Islands, the Isle of Man and Montserrat, each of which has a separate Central Authority.

While the Convention is operated on a regional level within the UK, the Central Authority for England and Wales has been designated as the one Central Authority to whom all applications can be passed for transmission to the appropriate State. In practice applications to the UK are made to the relevant regional authority. In effect, therefore the Convention operates on a regional level in a similar way to Canada.

The three States analysed above have created more than one Central Authority, but the remaining four States have opted to operate the Convention through one centralised authority. France is non-Federated and consequently operates the Convention through one single Central Authority for the whole of the territory of the French Republic, which includes the mainland (*France Métropolitaine*), the overseas Departments (*Départments d’Outre-Mer*),<sup>47</sup> and the overseas Territories (*Territoires d’Outre Mer*).<sup>48</sup> As a consequence, the Central Authority in Paris is the Central Authority for all applications being made to any part of the French Republic. This may cause problems where the time zones are radically different between places such as French Polynésia and mainland France.

The remaining three States, Germany, Mexico and the USA are Federal nations and while cases are processed in the local courts in the State in which the child is located, there is a single Central Authority. In Germany it is the Federal Prosecutor General at the Federal Court of Justice who is responsible for carrying out the duties of the Central Authority.<sup>49</sup> In Mexico, the Central Authority is located in the Legal Consultancy Division “*Consultoría Jurídica*”, in the Foreign Office. At a regional level, the Central Authority greatly relies upon an organisation called the *Desarrollo Integral de la Familia (DIF)*, which is a national entity

<sup>43</sup> Interpretation Act 1978 Sch. 1.

<sup>44</sup> See Article 6 (2) of the Hague Convention, op. cit., n. 25.

<sup>45</sup> Child Abduction and Custody Act 1985 s 3 (1) (a).

<sup>46</sup> Although the Child Abduction and Custody Act 1985 s 3 (1) (b) refers to the Scottish Central Authority as the Secretary of State, by reason of the Scotland Act 1998 s 53, the Minister of Justice is the Central Authority.

<sup>47</sup> Namely, Martinique, Guyane, Guadeloupe, Reunion, Saint-Pierre-et-Miquelon.

<sup>48</sup> Namely, Nouvelle-Calédonie, Wallis et Futuna, Polynésie Française, Mayotte.

<sup>49</sup> See the 1990 implementing Act, *SorgeRÜbkAG*, at s 1.

administered by Federal, State and Municipal Governments.<sup>50</sup> The *DIF* is responsible for the social and economic development of the family, providing free legal and other assistance and the Mexican Central Authority has signed an agreement with the majority of State *DIFs*<sup>51</sup> to act in Hague proceedings. Although the Hague web site refers to the *DIFs* as State Central Authorities this is not strictly the case. However, they do operate some of the functions of the Central Authority at a regional level.

In the USA there is a single centralised Central Authority, the State Department Office of Children's Issues.<sup>52</sup> However, under a Co-operative Agreement signed in 1995,<sup>53</sup> the National Center for Missing & Exploited Children (NCMEC) acts as the Central Authority for incoming cases to the USA although it essentially does so on behalf of the State Department which remains the Central Authority. As far as we are aware, this split between bodies dealing with incoming and outgoing applications is an arrangement unique to the USA.<sup>54</sup> The use of NCMEC as a specialised missing children's organisation with vast experience of locating missing children within the USA has been effective for the operation of the Convention. Nevertheless, this split of responsibility between two different organisations has also been criticised. Foreign Central Authorities have commented that it can be difficult to work with the two separate bodies as they may each require or expect different things. It has also been commented that it is hard to establish working relationships with the two bodies, as one is always asking for the return of children and the other is always being asked to return children.

This paper does not suggest that either a single centralised Central Authority or a number of regional bodies is the better model. On the contrary, as the States analysed show, both structures can work well. The use of regional Central Authorities may be advantageous where they reduce the overall caseload of a Central Authority in busy jurisdictions. On the other hand, multiple Central Authorities within a Contracting State often leads to many authorities having few, or even no cases and therefore less experience, while centralised systems may have the advantage of allowing expertise to develop as fewer people and fewer authorities handle all cases. The Canadian experience in this regard is instructive. Overall, the Canadian Central Authorities handled 106 new applications in 1999, and although the overall caseload of the country places it in the busiest 10 global jurisdictions,<sup>55</sup> no individual Central Authority dealt with more than 31 new cases. In fact, six Central Authorities handled no new applications at all in that year. The system in Australia of filtering all applications through a single Central Authority whilst recognising State autonomy through the implementation of State Central Authorities may be a useful mechanism for Federal States.

<sup>50</sup> <http://www.dif.gob.mx/web/informacion/dif/index.html>

<sup>51</sup> But not with the State *DIFs* in the States of Baja California Sur and Sonora.

<sup>52</sup> The USA Central Authority was established by Executive Order No. 12648, 11 August 1988.

<sup>53</sup> This Agreement took effect from 5 September 1995.

<sup>54</sup> While Article 6 of the Hague Convention, *op. cit.*, n. 25., does not specifically allow Contracting States to designate differing bodies to act as Central Authorities in relation to incoming and outgoing cases, Article 7 does allow Central Authorities to act through "any intermediary" to carry out their functions. Since the coming into force of the Memorandum of Understanding, the USA State Department Office of Children's Issues remains as the Central Authority and NCMEC merely operates certain functions on their behalf. As such there is no question that this arrangement is anything but a legitimate application of Article 6 (2).

<sup>55</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

If a State does decide to create more than one Central Authority or utilises a different organisation to perform some of the duties of the Central Authority, there must be good communication between the different bodies to enable the Convention to operate efficiently.

While, with regard to models of Central Authority structure, no one model is necessarily better than any other, there are nevertheless some general good practice points regarding the structure of Central Authorities, which can be made. First, it is essential that applicants and foreign Central Authorities know where to address an application and therefore contact details for the Central Authorities and the relevant personnel should be posted on The Hague web site. In addition “Central Authorities should promptly inform the Permanent Bureau of any changes in these details”.<sup>56</sup> In this respect it is to be noted that some of the contact details given on The Hague web site with regard to the seven States analysed, are not up to date.<sup>57</sup> Where there are a number of regional Central Authorities operating in one Contracting State and applications can be made directly to these authorities, contact details for all authorities, including any central body who will receive applications where the precise whereabouts of the child are not known, must be made available. In this regard, it is to be noted that The Hague web site only contains a telephone contact number for NCMEC and no other contact details such as a fax number, a postal address or an email address. As applications can be made directly to NCMEC it is important that more contact information is readily available.

### 3.3 PERSONNEL AND RESOURCES IN CENTRAL AUTHORITIES

Some Central Authorities comprise numerous personnel and are generously resourced while others comprise essentially an individual commissioned to undertake the responsibilities of the Central Authority in addition to other roles which they perform. Some Central Authorities have been established solely to work on The Hague (and possibly European)<sup>58</sup> Convention(s), while others concentrate little of their manpower and resources on international child abduction. Research undertaken by the American Bar Association in 1995<sup>59</sup> found that Central Authorities at that time were generally small comprising about three persons who spent less than half their time on Convention applications. In reality, the differences between Central Authorities are considerable, with large well-resourced offices and full-time staff at one end of the spectrum, as in Germany and the USA, and an individual who works part-time on applications at the other end.

No doubt, in part, the differences in the number of people working in a Central Authority are connected with caseload. In 1999 Central Authorities handled

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<sup>56</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.2.

<sup>57</sup> The telephone number given for the Central Authority for England and Wales, for example, is not up to date.

<sup>58</sup> The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children of 1980 (also known as the Luxembourg Convention of 1980).

<sup>59</sup> Chiancone, J and Girdner, L. *Issues in Resolving Cases of International Child Abduction*. Final Report to the Office of Juvenile Justice and Delinquency Prevention. Washington, DC: American Bar Association Center on Children and the Law, 2000.

between 0 and 329 new applications.<sup>60</sup> Of the seven States, the USA handled the most new applications in that year with 466, and Canada handled the least with 106. However, the most applications handled by a single Central Authority was 329 in England and Wales, but several regional Central Authorities in these seven States handled no new applications in that year.<sup>61</sup> Therefore, even within these seven busy States, the number of personnel who staff the different Central Authorities obviously differs greatly.

While caseload affects the number of personnel needed to operate a Central Authority, whether people are able to work full or part time on abduction cases is also an important factor when determining the number of staff needed. As stated, England and Wales was the single busiest Central Authority in 1999 in terms of new cases handled in that year. This Central Authority comprises just two caseworkers, both of whom are able to work full time on abduction under the Hague and European Conventions. The Australian Central Authority handled just less than half of the number of applications with 172 but employs twice as many caseworkers, although none of them deal solely with Convention applications.

Having a small staff has led to great experience in the Central Authority for England and Wales, and the speed and efficiency with which applications are handled in the jurisdiction bears testimony to the use of a specialist staff who deal only with abduction issues. It is, however, essential that the staff is not so small that illness or holiday leave may effectively mean that the Central Authority ceases to exist. It should also be noted that many Central Authorities with a larger number of personnel who deal with other issues as well as abduction may be equally as efficient and effective.

In Central Authorities where staff do not work full time on Hague Convention cases, it is essential that someone is available at all times to deal with queries and applications. Even in small regional Central Authorities, there must be a trained member of staff who can be called upon at any time to handle applications which arise under the Convention. It is equally important that appropriate contact details are posted on The Hague web site and the Central Authority's own web site if they have one. Given that by its very nature, international child abduction involves crossing international boundaries and often time zones, it is important that there is an out-of-hours contact number for emergency applications, which is also made publicly available.

In addition to differences from one Central Authority to another with regard to the number of personnel and the amount of time they spend on Convention issues, there are also differences with regard to the status of the personnel in the Central Authorities. Lawyers, judges, administrative personnel, civil servants and police officers are all involved in working in Central Authorities. However, we have not found any evidence that any of these professionals are more capable or less capable of operating an effective Central Authority. On the other hand, in some systems, the abilities of a particular professional have been of great help.

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<sup>60</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>61</sup> Four of the UK Central Authorities and six of the Canadian Central Authorities handled no new applications in that year.

In Mexico, for example, the existence of a lawyer working in the Central Authority has reduced the possibility of applicants filing *Amparo* proceedings. An *Amparo* is a procedure that may be taken to review the constitutionality of an action of an executive agency, a court or a judgment itself. The filing of an *Amparo* suspends the proceedings until the constitutionality has been reviewed. This may take a considerable period of time. The use of a lawyer in the Central Authority who is familiar with *Amparo*'s has helped to ensure that as far as possible applications and proceedings in Hague cases are "*Amparo* proof".

In Australia where the Central Authority acts as the applicant in court,<sup>62</sup> it is again necessary that there are some lawyers employed to work within the Central Authority to fulfil this function. Conversely, the Central Authority in England and Wales is headed by a lawyer who is on hand to deal with specific issues, but cases are handled in the Central Authority by administrative personnel who refer applicants to a specific panel of private lawyers.

While the status of the staff in Central Authorities appears not to affect the efficient operation of the Convention, it is important that staff undergo training. In the USA particularly, it is not unusual for caseworkers to move on relatively rapidly. This may mean training is constantly required and a quick turn-around of staff may also hinder the ability to build reasonable communication between these workers and foreign Central Authorities. Additionally, it is important that new members of staff receive adequate training prior to taking up a position in the Central Authority. In the Conclusions and Recommendations of the Fourth Special Commission it was stated that "Central Authorities should have a regular staff, able to develop expertise in the operation of the Convention".<sup>63</sup> In the questionnaire that was approved for newly Contracting States at the Fourth Special Commission, the idea of training was considered important. States are asked to declare "[w]hat measures are being taken to ensure that persons responsible for implementing the Convention (e.g. judges and *Central Authority personnel*) have received appropriate information and training?"<sup>64</sup> In our view these points are equally important for established Central Authorities.

Language ability in the Central Authority is also important especially where English or French (the official languages of the Convention) are not the first languages of the State. Where States acknowledge that they accept applications in English or French or both, personnel should be available in the Central Authority who can speak these languages, or a translation service should be provided by the Central Authority. Recent practice in the USA Central Authority in employing a Spanish speaker to deal with Mexican cases has greatly improved communication between the two nations with regards to Convention issues. Where a member of Central Authority staff is going to be working exclusively or mainly with applications from or to a foreign language nation, it is a point of good practice to ensure that wherever possible that language is spoken by the relevant member of staff.

Language may be an important factor when considering the efficiency of the Convention. According to our analysis of cases commenced in 1999,<sup>65</sup> applications

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<sup>62</sup> See post at 6.

<sup>63</sup> Conclusions and Recommendations, op. cit., n. iv, para. 1.1.

<sup>64</sup> Ibid., para. 2.3VIII (Emphasis added).

<sup>65</sup> See Preliminary Document No. 3, op. cit., n. ix.

may be handled more expeditiously as between nations having a common first language. For example, as between English speaking nations and Spanish speaking nations. In 1999 42% of applications received by English speaking nations, from other English speaking nations, resulted in a judicial return. Conversely, in applications to these nations from non-English speaking States, the judicial return rate was 28%. Applications from the former States were also generally handled more expeditiously with voluntary returns taking a mean average of 81 days from application to conclusion, judicial returns taking a mean average of 92 days and judicial refusals taking a mean average of 158 days. Applications from the latter States took 129 days for voluntary returns, 124 days for judicial returns, but surprisingly 132 days for judicial refusals. There were also less pending cases in relation to applications between English speaking States. Three percent of applications from these States were still pending 1 ½ years after the last possible application was made in 1999, whereas 9% of applications from the non-English speaking States were still pending at this time.<sup>66</sup>

Additionally, an analysis of applications to Spanish speaking States from other Spanish speaking States, shows that these were also handled more expeditiously than applications to Spanish speaking States from non-Spanish speaking States. In the former cases, judicial returns took a mean average of 86 days from application to conclusion and judicial refusals took a mean average of 160 days. Conversely, in the latter cases, judicial returns took a mean average of 126 days from application to conclusion and judicial refusals took a mean average of 185 days. However, there may be other issues of relevance when looking at this data. The figures regarding Spanish speaking States must be viewed with caution as there were much fewer applications made from Spanish speaking nations than from non-Spanish speaking nations and there were proportionally more pending cases between the former States than between the latter States. With regard to the data on English speaking nations, many such nations, namely, Australia, Canada, Ireland, New Zealand, the UK and the USA, operate similar systems of law, being common law jurisdictions and factors such as this may be as important as language.

The Conclusions and Recommendations of the Fourth Special Commission stated that Central Authorities should “as far as possible, use modern rapid means of communication in order to expedite proceedings, bearing in mind the requirements of confidentiality”.<sup>67</sup> Methods of instant communications such as faxes and emails may be more beneficial than postal systems, which can take a long time. In this regard it is important that Central Authorities inform the Permanent Bureau of all possible contact details, so that these details can be entered onto The Hague web site. Many Central Authorities that are on email, have not given information regarding their email addresses, and while it is important that development of the use of email is under the proviso of the importance of confidentiality, and security, it is a useful means of communication which could be more widely used.

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<sup>66</sup> Analysis taken from our database of all cases commenced in 1999. See Preliminary Document No. 3, op. cit., n. ix.

<sup>67</sup> Conclusions and Recommendations, op. cit., n. iv, para. 1.4.

### 3.4 INFORMATION ABOUT THE CENTRAL AUTHORITY

As well as having a well structured, well resourced Central Authority, it is equally important that people are aware of the Central Authority's existence and its purpose. In this regard, Central Authorities should do all they can to publicise their existence, including using the Internet and providing booklets or brochures. The Conclusions and Recommendations of the Fourth Special Commission encouraged each Central Authority "to establish and regularly update a web site".<sup>68</sup> It was also recommended that information about the Central Authority and the procedure for operating the Convention in the State be published on the "web site if possible and / or by other means, such as a brochure or flyer".<sup>69</sup> This is an important recommendation as it is essential that people are aware of the existence of the Central Authority in order to utilise it. In this regard Central Authorities should be given the necessary funds to produce at least a brochure and preferably a web site. Non-governmental organisations also have a vital role to play and should have contact details for the Central Authority in order to direct potential applicants who have come to them for support.

Australia,<sup>70</sup> Canada,<sup>71</sup> the UK – England and Wales<sup>72</sup> and the USA<sup>73</sup> have each produced Central Authority web sites which provide information about the Central Authority and the operation of the Convention. However, as Canada operates the Convention at a regional level, it could be argued that each Province and Territory should produce a web site or attach details to the Federal Central Authority web site. To date we are only aware of regional Central Authority web sites in the Provinces of Manitoba<sup>74</sup> and Quebec.<sup>75</sup>

France, Germany and Mexico do not at present have a web site. However, in Germany a web site is currently under construction which will contain all the information on the Convention which is currently available in printed form. In France, the Ministry of Justice is expected to develop a web site relating to its Franco-German Mediation Mission and the French Central Authority may attach some pages to this site. In Mexico, the amount of information available on the Internet has significantly improved, and while there is no Central Authority web site, there is a Central Government web site which has a link to sites relating to missing children.<sup>76</sup>

Booklets and brochures detailing information on the Central Authorities and the procedures available are also useful. Australia, Canada, Germany, the UK – England and Wales and Scotland and the USA have all produced Central Authority brochures. The Australian brochure is particularly useful as it details procedure in foreign States for Australian applicants as well as information on procedures in Australia for foreign applicants. The Canadian booklet is detailed and importantly

<sup>68</sup> See *ibid.*, para. 1.7.

<sup>69</sup> See *ibid.*, para. 1.8.

<sup>70</sup> <http://law.gov.au/childabduction/>

<sup>71</sup> [http://www.voyage.dfait-maeci.gc.ca/consular/child\\_abductions-e.htm](http://www.voyage.dfait-maeci.gc.ca/consular/child_abductions-e.htm)

<sup>72</sup> <http://www.offsol.demon.co.uk/caunitfm.htm>

<sup>73</sup> See <http://www.missingkids.com> and [http://travel.state.gov/children's\\_issues.html](http://travel.state.gov/children's_issues.html)

<sup>74</sup> <http://www.gov.mb.ca/justice/family/family.htm>

<sup>75</sup> <http://www.justice.gouv.qc.ca>

<sup>76</sup> <http://www.precisa.gob.mx>

is regularly updated. Another advantage is that it is available in both English and French.

The German Central Authority has published an information booklet on the Convention available to anyone on request. The booklet contains the relevant application forms and is available in German. The booklets and brochures produced by England and Wales<sup>77</sup> and Scotland<sup>78</sup> are relatively dated, being produced in 1996, and as such may be out of date with regard to certain procedures. In France, a Central Authority booklet, entitled “what to do in the event of child abduction”, is being printed. However, there is a strong feeling in France that distribution of such a publication must be well thought out so as not to appear racist or discourage bi-national marriages.

Overall it would appear that the number of staff in a Central Authority and the professional roles of those members of staff are not of themselves decisive issues in establishing good practice. On the other hand, it seems that language ability and the ability to communicate effectively are indicators of good performance, as language and communication are key to the Convention’s success. Additionally, access to information is important for the effective operation of the Convention. The Conclusions and Recommendations of the Fourth Special Commission stated that Central Authorities “should be given ... the qualified personnel and the resources ... necessary to act dynamically and carry out their functions effectively”.<sup>79</sup>

### 3.5 RECOMMENDATIONS OF GOOD PRACTICE

- Where Contracting States have designated more than one Central Authority, there should be a *central* Central Authority which can keep track of cases, for the purposes of collecting statistics and advising and providing information to State Central Authorities.
- Where Contracting States have designated more than one Central Authority, details of a *central* Central Authority to which applicants and applicant Central Authorities can address applications for transmission to the appropriate Central Authority within that State, should be made available.
- Where Contracting States have designated more than one Central Authority, there must be good communication between the different Central Authorities within the State to enable the Convention to operate efficiently.
- Central Authorities should have a member of staff able to deal with queries at all times, and outside of office hours should provide emergency contact details. These should be entered onto the Hague web site and the Central Authority’s own web site.
- Where contact details or personnel in Central Authorities change, these changes should be *rapidly* entered onto the Hague web site and the Central Authority’s own web site.

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<sup>77</sup> *Child Abduction-Advice to Parents*, Child Abduction Unit, London, 1996.

<sup>78</sup> *Child Abduction from Scotland* Scottish Courts Administration, Edinburgh, November 1996.

<sup>79</sup> Conclusions and Recommendations, op. cit., n. iv, para. 1.1.

- Where Central Authorities have a significant number of cases with a Contracting State which speaks another language, staff should be employed who possess the relevant language skills.
- Contracting States should employ at least one member of Central Authority staff who can speak English and / or French (depending on whether a reservation has been made under Article 24).
- Personnel in Central Authorities should undergo training and in this regard, quick turn-over of staff is not to be recommended.
- New employees must receive training prior to taking up posts in the Central Authorities.
- Central Authorities should be adequately resourced, and equipment should be provided to allow for instant communication wherever possible.
- Central Authorities should produce a web site detailing information relating to the procedure used in Convention proceedings. This should be kept up to date.
- Central Authorities should produce a brochure or booklet which should be widely available detailing information relating to the procedure used in Convention proceedings. This should be kept up to date.

## 4. THE JUDICIAL AUTHORITIES DESIGNATED UNDER THE CONVENTION

### 4.1 INTRODUCTION

A major means of determining applications under the Convention is by adjudication before the judicial authorities in the relevant Contracting State. Indeed by Article 7 (f) Central Authorities are obliged where appropriate to take all measures –

“to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access”.

In most States it is judicial authorities and not administrative authorities who are likely to be utilised.<sup>80</sup>

The Convention is silent on which courts or authorities should be used in Convention proceedings. Some States, however, have limited jurisdiction to particular courts as a means of ensuring that expertise is developed and the speed and prioritisation called upon in Articles 2 and 11 is honoured.<sup>81</sup> At the Fourth Special Commission<sup>82</sup> Contracting States were urged “to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts”.<sup>83</sup> It was

<sup>80</sup> Although in Denmark, for instance, administrative authorities are called upon to deal with access applications.

<sup>81</sup> See post at 6.

<sup>82</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 3.1.

<sup>83</sup> In the questionnaire sent out prior to the Fourth Special Commission, 26 States supported the recommendation relating to concentration of jurisdiction and 5 States did not support it. See Checklist of issues raised and recommendations made in response to the Questionnaire concerning the practical operation of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, p. 15. (Hereafter ‘Preliminary Document No. 5’).

further stated that, “where a concentration of jurisdiction is not possible, it is particularly important that judges concerned in proceedings be offered appropriate training or briefing”.<sup>84</sup>

#### 4.2 THE COURTS AND JUDGES

With respect to the number of courts and judges empowered to operate the Convention two of the seven States analysed in this report represent opposing extremes. In each of the UK jurisdictions there is one high level court with a limited number of judges entitled to hear Convention applications at first instance. At appeal levels the number of judges empowered to hear cases is also small. Conversely, in the USA there are over 30,800<sup>85</sup> judges entitled to hear Convention cases in numerous Federal and State courts across the country, 2,000<sup>86</sup> of whom can hear appeal cases. The other Contracting States analysed in this report fall somewhere between the two extremes. Australia,<sup>87</sup> and Germany<sup>88</sup> having concentrated jurisdiction in a limited number of courts and France and Mexico operating the Convention using a vast number of courts. Canada is unique in that as the Convention operates at a regional level procedure differs depending on the Province or Territory, some of which have limited jurisdiction while others have not.

The Contracting States which have limited jurisdiction to a concentrated number of judges, have done this in different ways. Each of the UK jurisdictions designated the courts entitled to hear Convention cases when they implemented the Convention.<sup>89</sup> In each jurisdiction, one court can hear cases at first instance and this court is situated in the same city as the Central Authority. Consequently, not only is jurisdiction limited but it is also highly centralised. In England and Wales, all Convention cases are heard at first instance in a specialised Family Court – the Family Division of the High Court<sup>90</sup> in London where there are 18 judges empowered to hear cases. In Scotland applications are limited to the Court of Session<sup>91</sup> in Edinburgh where there are up to 27 judges who have jurisdiction to hear cases, but who do not necessarily have family law expertise. In Northern Ireland all first instance cases are heard by the Family Division of the High Court<sup>92</sup> in Belfast, and there are seven judges empowered to hear proceedings in this court. There are also a limited number of judges entitled to hear Convention cases at appeal levels in all three jurisdictions.<sup>93</sup>

<sup>84</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 3.2.

<sup>85</sup> See National Report for the USA – Common Law Judicial Conference on International Parental Child Abduction, Washington, DC, September 2000. (Hereafter ‘National Report for the USA’).

<sup>86</sup> See US response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter ‘USA Response to Hague Questionnaire’).

<sup>87</sup> Australia’s concentration of jurisdiction is not legislative but operates in practice, with Central Authority lawyers taking all cases and selecting a limited number of courts within which to operate.

<sup>88</sup> In contrast to Australia, (see Preliminary Document No. 3, *op. cit.*, n. ix), Germany’s concentration of jurisdiction was achieved by legislative reform, limiting the original number of courts empowered to operate the Convention.

<sup>89</sup> See the Child Abduction and Custody Act 1985 s 4.

<sup>90</sup> Child Abduction and Custody Act 1985 s 4 (a).

<sup>91</sup> Child Abduction and Custody Act 1985 s 4 (b).

<sup>92</sup> Child Abduction and Custody Act 1985 s 4 (a).

<sup>93</sup> The Court of Appeal in England and Wales currently comprises 35 Lords Justices of Appeal, and the appeal court in Scotland comprises 19 judges.

This specialisation has led to greater expertise in Convention proceedings particularly in England and Wales where a vast number of cases are handled by one court. Expertise has ensured that because the Convention objectives are understood, cases are prioritised wherever possible.

While the limitation of jurisdiction to a single centralised court may not be possible in other States, particularly where the State is constituted as a Federation and covers a larger geographic area, concentration of jurisdiction can still be achieved. Germany has recently limited the number of courts (and therefore judges) empowered to hear Convention applications. Upon ratification in 1990,<sup>94</sup> jurisdiction at first instance in Convention cases was vested in a single judge sitting in the local court (*Amtsgericht*) of which there are about 600. Appeals were frequent and lay to a higher regional court (*Oberlandesgericht*) which comprises a panel of three judges. Not surprisingly, given the large number of courts involved, judges generally lacked experience of Hague cases. Indeed, according to research undertaken by Lowe and Perry<sup>95</sup> it was rare for an *Amtsgericht* to have heard more than one Hague application and relatively unusual even for an *Oberlandesgericht*.<sup>96</sup> It is to be noted, however, that the implementing Act did limit Hague cases to two court levels rather than the usual three,<sup>97</sup> in that there is no further right of appeal from an *Oberlandesgericht* to the Federal Court of Justice (*Bundesgerichtshof*), the supreme court for civil and criminal matters.<sup>98</sup>

Sensitive to the need to improve the system for dealing with Hague Convention applications, new legislation came into force on 1 July 1999<sup>99</sup> concentrating jurisdiction at first instance, in just 24 *Amtsgerichte* and similarly restricted the number of *Oberlandesgerichte* competent to hear appeals to 24. Indeed the *Amtsgerichte* were selected upon the basis that they are situated in the district in which the *Oberlandesgericht* has jurisdiction. All the designated *Amtsgerichte* have specialist Family Courts attached to them.<sup>100</sup> As one of the former Referents of the Central Authority, explained:<sup>101</sup>

<sup>94</sup> See the implementing Act of 1990, SorgeRÜbkAG.

<sup>95</sup> Lowe, N and Perry A. "The Operation of the Hague and European Conventions on International Child Abduction between England and Germany, Part II" [1998] IFL 52.

<sup>96</sup> According to Lowe and Perry, *ibid.*, when analysing German cases notified to the Permanent Bureau no *Oberlandesgericht* had heard more than three Hague applications between 1993 and 1996.

<sup>97</sup> See s 8 (2) of the 1990 Implementing Act.

<sup>98</sup> However, any individual addressee of a court order can lodge a *Verfassungsbeschwerde* (constitutional complaint) within a month of the service of the order claiming that this court order violates his or her constitutionally guaranteed basic rights. Although many complaints are lodged each year the Federal Constitutional Court (*Bundesverfassungsgericht*) rejects the vast majority of these as either not founded or inadmissible.

<sup>99</sup> *Viz. Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz* which amended s 5 of the 1990 Act.

<sup>100</sup> Clearly, the number of judges competent to hear Hague return applications was substantially reduced following the 1999 reform. Even so, it is thought that currently some 200 judges are now competent though consideration is being given to reducing even this number. It has been suggested, for instance, that, at any rate in the larger courts, special units that exclusively hear abduction cases might be created.

<sup>101</sup> Weitzel, 'Description of the Procedure in Proceedings to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' August 2000.

“It was intended that this concentration of jurisdiction make it easier for the courts dealing with international child abduction cases to obtain a deeper knowledge of the field and gather greater experience. In contrast to Great Britain, where jurisdiction for Hague Convention cases has been reduced to one single court, the new arrangement constitutes a compromise which also takes into consideration the interests of citizens concerned in having proceedings conducted at a court which is as local as possible.”<sup>102</sup>

The German system has been discussed in detail because it was the first Contracting State that has not only recognised the need for improvement but has, in consequence, radically reformed its system. The German decision to limit the number of courts empowered to hear Convention cases seems to be acting as a catalyst for other States. By a law of 4 March 2002, France has also limited the number of courts at first instance empowered to hear Convention cases to one court per appeal court region.

In Australia, jurisdiction at first instance is vested in both Federal and State courts. The main court dealing with Convention applications is the Family Court of Australia. This court has original jurisdiction throughout Australia except in Western Australia where jurisdiction is vested in the Family Court of Western Australia. Although courts of summary jurisdiction and magistrates courts are empowered to hear Convention applications, in practice all cases are heard by the relevant Family Court. The Commonwealth Central Authority in Australia brings applications in its own name and as such Central Authority lawyers act in all cases and are therefore able to restrict themselves to the Family Court. Consequently, although there is no formal legislation restricting jurisdiction, as for example in the UK and Germany, in practice there are a limited number of judges who hear a Convention application. In total, there are about 54 judges who can hear Hague cases at first instance. Appeals from the Family Court are heard by the Full Court of the Family Court of Australia. Including the Chief Justice there are seven judges who sit in this court, usually as a bench of three.<sup>103</sup>

In Canada, Mexico and the USA there are numerous courts entitled to hear Convention cases. Some Canadian Provinces and Territories have limited jurisdiction to specific specialised courts with a limited number of judges. In 1999 no Province or Territory received more than 14 new incoming cases,<sup>104</sup> of which no more than 6 went to court.<sup>105</sup> Due to the small number of cases it is

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<sup>102</sup> Jurisdiction is determined at the date when the request for return was received by the Central Authority. It is not affected by subsequent moves by the abducting parent.

<sup>103</sup> Appeals from the Full Court are heard by the High Court of Australia although special leave of the High Court or a certificate from the Family Court that the matter involves an important question of law or of public interest is required to appeal to this level. To date, there has only been one certificate granted by the Family court in respect of a Hague matter and special leave has only been granted twice.

<sup>104</sup> Quebec received 14 cases in 1999. See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>105</sup> Three return applications and three access applications received by Alberta in 1999 went to court.

harder to develop expertise and therefore, concentrating jurisdiction in a limited number of courts and judges may be even more important in countries or regions with a smaller caseload.

In Mexico, although there is one Central Authority, cases are heard in the State or regional courts where the child is located. Again as in Canada, this means that some courts are likely to be quite inexperienced in handling applications as they are unlikely to receive many cases in a year. Mexico comprises 31 States and the Federal District and in total 41 applications were received in 1999.<sup>106</sup> As at 31 May 2001, only six of these applications had resulted in court hearings.<sup>107</sup>

In the USA, the Federal and State courts have concurrent jurisdiction in Convention cases,<sup>108</sup> which is unusual as family matters are normally restricted to State courts. However, in Convention proceedings an advantage of being able to bring a case at a Federal level is that it may prevent any perceived “home State” bias. As both the Federal and State courts can hear Convention applications it is perhaps not surprising that there are so many judges entitled to hear Convention cases. In total 30,849<sup>109</sup> judges can hear cases. As the USA is geographically vast, and comprises 50 States and the District of Columbia, all of which operate their own legal systems, it would be neither practical nor possible to limit jurisdiction to one court such as in the UK jurisdictions. However, it is understood that the State of California is considering restricting jurisdiction in Convention cases,<sup>110</sup> and perhaps this could act as a catalyst for jurisdiction to be limited on a State by State basis. Certainly, the current number of judges is far too large in terms of allowing expertise to be established. Of the cases commenced in 1999 in the US there were just 64 which went to court and consequently it is unlikely that with such a large number of judges any one judge would hear more than one case in a lifetime.

While the Conclusions and Recommendations of the Fourth Special Commission stated the “considerable advantage to be gained by a concentration of jurisdiction” in “a limited number of courts”, it is recognised that no one model could operate in all States. In the questionnaire sent out by the Permanent Bureau prior to the Fourth Special Commission there was general approval for the idea that jurisdiction should be limited. However, it was also recognised that while the “English system of concentration of jurisdiction is a model of efficiency, well suited to a small geographic area”,<sup>111</sup> such a model cannot necessarily be translated into larger Federal States. The Australian view is that the “Australian model of concentrating jurisdiction in one Federal Court, is well suited to a

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<sup>106</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>107</sup> Ibid.

<sup>108</sup> See International Child Abduction Remedies Act of 1988 § 11603 (a).

<sup>109</sup> See National Report for the USA, op. cit., n. 85.

<sup>110</sup> See USA Response to Hague Questionnaire, op. cit., n. 86.

<sup>111</sup> See Australian response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter ‘Australian Response to Hague Questionnaire’).

Federated State with a large geographic area”.<sup>112</sup> Canada “recognis[ed] the positive experience of several countries that have concentrated jurisdiction over Hague cases to a limited number of courts and judges and that this is a principle worth promoting as an effective means for improving compliance with the Convention”,<sup>113</sup> they also acknowledged that “the legal systems of many countries including those of Canada make this objective either difficult to achieve in practice, or, indeed, might be constitutionally prohibited”.<sup>114</sup>

While it is recognised that it is not always easy to concentrate jurisdiction, it can be achieved to some extent in all Contracting States either by legislative reform or by practice. Where the Convention is operating at a Provincial level jurisdiction should be concentrated within each Province. Where the Convention is operating at a Federal level across a large State, jurisdiction should be limited to a small number of courts in order to allow expertise to develop. It has been suggested that “[g]enerally speaking, the Convention has tended to work better where jurisdiction has been concentrated in a relatively small number of judges who are able to develop a degree of expertise with Convention cases”.<sup>115</sup>

### 4.3 JUDICIAL TRAINING

Convention cases are intended to be a forum and not a merits hearing and in this respect they differ from domestic proceedings, being applications on their full merits. In general the Convention anticipates that judges will order the return of the child to the State of habitual residence, the defences being rarely applied. Judges operating the Convention need to be aware of this framework. Judges also need access to Convention jurisprudence, and in this regard, the creation and development of the International Child Abduction Database (INCADAT) is important.<sup>116</sup> Additionally, the Permanent Bureau has published “The Judges’ Newsletter”,<sup>117</sup> which is a useful resource for judges and gives valuable information.

While limiting jurisdiction can create expertise amongst the judges empowered to operate the Convention, judicial training is also essential. Indeed, at the Fourth Special Commission of the Convention, it was stated that “where a concentration of jurisdiction is not possible, it is particularly important that judges concerned in proceedings be offered appropriate training or briefing”.<sup>118</sup>

At the Special Commission there was a strong emphasis on the importance of the judiciary with regards to the operation of the Convention and many Contracting States included judges in their delegations. In the Conclusions and Recommendations it was stated that, “Contracting States should actively encourage

<sup>112</sup> See *ibid.*

<sup>113</sup> See Canadian response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter ‘Canadian Response to Hague Questionnaire’).

<sup>114</sup> See *ibid.*

<sup>115</sup> Duncan, W. *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau* 2000 N.Y.U. J INT’L L. & POL. 103.

<sup>116</sup> See <http://www.incadat.com>

<sup>117</sup> “The Judges’ Newsletter”, Volume III Autumn 2001, published by Butterworths LexisNexis. (Hereafter ‘*The Judges’ Newsletter*’).

<sup>118</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 3.2.

international judicial co-operation”,<sup>119</sup> one form of this being the “attendance of judges at judicial conferences”.<sup>120</sup> In this regard, there has been an increasing number of judicial meetings in recent years both on a national and international level to discuss the operation of the Convention. Many States have also implemented internal training programmes for judges, either on a regular or an ad hoc basis. Notably there has been an Anglo-German conference held in 1997, three judicial seminars at De Ruwenberg, held in 1998, 2000 and 2001, a Common Law Judicial conference held in 2000, and an Anglophone-Francophone conference held in 2001. At each of these meetings, some time was given towards discussion of the Convention. In the questionnaire sent to Contracting States prior to the Fourth Special Commission there was wide support from the seven Contracting States<sup>121</sup> here analysed for the recommendation that more judicial seminars at a national and an international level should be held.

At both the second De Ruwenberg meeting and the Common Law Conference it was stated that conferences such as these “are important events in emphasising mutual understanding, respect and trust between the Judges from different countries”. It was further stated that these are factors “essential to the effective operation of international instruments concerned with the protection of children, and in particular the Hague Child Abduction Convention”.<sup>122</sup>

At the Fourth Special Commission Contracting States were “encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at an international level communications between judges or between a judge and another authority”.<sup>123</sup> The concept of a network of liaison judges was launched at the 1998 De Ruwenberg judicial conference and in principle it has received support.<sup>124</sup> Lord Justice Thorpe<sup>125</sup> has commented on his perception of the role of a liaison judge:

“The liaison judge will hold responsibility for the collection of information and news relevant to the Abduction Convention. He will be responsible for contribution to the Permanent Bureau’s judicial newsletter. He will be responsible for the reverse-flow, ensuring that other judges within his jurisdiction who take Hague cases receive their copy of the judicial newsletter and any other information that might contribute to the development of the expertise of the individual judge.”<sup>126</sup>

In the questionnaire sent out by the Permanent Bureau prior to the Fourth Special Commission, 19 States supported the draft recommendation concerning liaison judges and 13 States did not support this recommendation.<sup>127</sup> According to the Permanent Bureau the reasons why States did not support the recommen-

<sup>119</sup> *Ibid.*, para. 5.6.

<sup>120</sup> *Ibid.*

<sup>121</sup> France and Mexico did not respond to this question.

<sup>122</sup> Judges Seminar on International Protection of the Child – De Ruwenberg, 3-6 June 2000, p. 1.

<sup>123</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 5.5.

<sup>124</sup> Judges at the 2000 De Ruwenberg Conference representing, France, Germany, Italy and the Netherlands all expressed support in principle for the idea of a network of liaison judges. Similarly the delegates at the Common Law Judicial Conference held in Washington, DC, in 2000 passed the same resolution.

<sup>125</sup> Judge of the Court of Appeal, England.

<sup>126</sup> *The Judges’ Newsletter*, *op. cit.*, n. 117, p. 20.

<sup>127</sup> See Preliminary Document No. 5, *op. cit.*, n. 83, p. 28.

dation included “concern that the appointment of a liaison judge may be difficult from a structural point of view in certain jurisdictions”.<sup>128</sup> Certainly with regard to Federal nations it may be difficult to conceive of one liaison judge and possibly a number of liaison judges would be required. As Lord Justice Thorpe has commented; “[j]ust as a telephone directory offers city codes within the country code so could an international judicial directory list the judge for the State or Province within the entry for the jurisdiction as a whole”.<sup>129</sup> In this regard it should be noted that Canada has nominated at least two liaison judges representing different Provinces.<sup>130</sup>

As of September 2001 at least eight liaison judges had been appointed.<sup>131</sup> Five of these judges are from the seven States analysed in this report.<sup>132</sup> There are also several Contracting States which have appointed liaison judges to act less generally but with regard to cases between certain countries, for example Mexico and the USA.<sup>133</sup> The establishment of a network of liaison judges may be useful to ensure that information about the Convention, including jurisprudence is disseminated to all judges involved in operating the Convention. Where a Contracting State has designated a liaison judge, other judges within that State will be able to ask him for information and advice when handling cases.

In addition to judicial attendance at conferences and the establishment of liaison judges, discussion has also focussed on the possibility of direct judicial communication in individual Convention cases. At the Fourth Special Commission, it was recommended that; “[t]he Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications”.<sup>134</sup> The concept of direct judicial communication does not sit easily in some Contracting States and is perhaps a notion more suited to common law jurisdictions. Consequently, further exploration of this concept is perhaps necessary. However, States appear keen to consider this further exploration as 25 supported the recommendation with only 5 which did not.<sup>135</sup>

As the Permanent Bureau have pointed out: “The idea of direct communications between judges in different countries in international child protection cases is still a novel one for most jurisdictions, though the number of cases in which such communications occur is increasing”.<sup>136</sup> Direct judicial communications have been used to secure the safe return of the child and the

<sup>128</sup> Ibid.

<sup>129</sup> See “International Liaison Judges for Family Proceedings” submitted by the Right Honourable Lord Justice Thorpe in *The Judges’ Newsletter*, op. cit., n. 117, p. 19.

<sup>130</sup> The Honourable Jacques Chamberland (Quebec, Canada), and The Honourable Justice Robyn Diamond (Manitoba, Canada).

<sup>131</sup> *The Judges’ Newsletter*, op. cit., n. 117, p. 17.

<sup>132</sup> Namely, The Right Honourable Lord Justice Mathew Thorpe (England), the Honourable Justice Joseph Kay (Australia), The Honourable James Garbolino (USA), The Honourable Jacques Chamberland (Quebec, Canada) and The Honourable Justice Robyn Diamond (Manitoba, Canada).

<sup>133</sup> See Mexican response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter ‘Mexican Response to Hague Questionnaire’).

<sup>134</sup> Conclusions and Recommendations, op. cit., n. iv, para. 5.7.

<sup>135</sup> See Preliminary Document No. 5, op. cit., n. 83, p. 28.

<sup>136</sup> Ibid., p. 27.

abducting parent,<sup>137</sup> and have been helpful in discussing problems of delay and conflicting jurisdiction.<sup>138</sup> A number of safeguards have been suggested including –

- “a) communications to be limited to procedural issues and the exchange of information,
- b) parties to be notified in advance of the nature of proposed communication,
- c) record to be kept of communications,
- d) confirmation of any agreement reached in writing,
- e) parties or their representatives to be present in certain cases, for example via conference call facilities”.<sup>139</sup>

Such safeguards seem sensible and may help to allay some of the scepticism in certain Contracting States regarding the notion of direct judicial communication. Certainly it is an area that needs to be explored further but, as it is a concept alien to many jurisdictions, progress may take some time. In the majority of cases such communication should not be necessary, however, if direct judicial communication can help to enable the child to return safely to the State of habitual residence, or can speed up cases which are experiencing delay, then it is to be welcomed. Nevertheless, it should be remembered that such communications may themselves slow down proceedings and should, therefore, only be attempted in a limited number of cases where it can be confidently supposed that it would be beneficial to the disposal.

#### 4.4 RECOMMENDATIONS OF GOOD PRACTICE

- Contracting States should limit jurisdiction to a small number of judges to whatever extent possible in their jurisdiction.
- There should also be a limited number of judges involved in hearing appeals.
- Convention cases should be heard by high level courts where possible.
- Judges involved in hearing Convention cases should receive training.
- International Judicial conferences are to be encouraged as a means of improving knowledge and facilitating the development of suitable networks.
- Judges involved in hearing Convention cases should be made aware of the existence of INCADAT and the Judges’ Newsletter.
- Liaison judges should be appointed to disseminate information and act as a point of reference for other judges in their jurisdiction.
- Direct communication between judges should be encouraged whenever it can help expedite resolution of cases.

<sup>137</sup> *Re M and J (Abduction) (International Judicial Collaboration)* [1999] 3 FCR 721.

<sup>138</sup> See “Memoirs of a Liaison Judge” submitted by The Honourable Justice Joseph Kay in *The Judges’ Newsletter*, op. cit., n. 117, pp. 20-26.

<sup>139</sup> See Preliminary Document No. 5, op. cit., n. 83, p. 28.

## 5. INITIAL PROCESSING OF APPLICATIONS

### 5.1 INTRODUCTION

This chapter considers the initial processing of applications under the Convention including their transmission to the relevant authority, procedures and agencies able to assist in locating children and efforts made to seek a voluntary return or amicable resolution of the issues. Of primary importance in this context, are the Central Authorities. According to the Conclusions and Recommendations of the Fourth Special Commission, “[t]he Central Authorities designated by the Contracting States play a key role in making the Convention function”.<sup>140</sup> Article 7 “sets out an overall duty of co-operation” and lists “some of the principal functions which the Central authorities have to discharge”. Central Authorities have a duty to co-operate with each other, and to “promote co-operation amongst the competent authorities in their respective State”, which means they have a duty to utilise relevant authorities which may help them to fulfil their obligations. In addition to utilising relevant authorities, Central Authorities are permitted by Article 7 to use “any intermediary” to undertake the functions listed in that Article. As a consequence, the procedures outlined in this chapter are not limited to those operated exclusively by the Central Authorities. Instead, the chapter considers certain aspects of procedure which may be carried out by Central Authorities or initiated by Central Authorities but carried out by other authorities on their behalf.

### 5.2 APPLICATIONS

#### 5.2.1 TRANSMISSION OF APPLICATIONS

The Convention does not prescribe a set procedure for applications, and consequently, “any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State”.<sup>141</sup> Additionally, by Article 29, “any person, institution or body” can apply “directly to the judicial or administrative authorities of a Contracting State”, thus bypassing the Central Authorities. Consequently, there is a broad discretion concerning how to apply under the Convention and indeed who to apply to. Notwithstanding that Article 8 expressly mentions the Central Authority of the child’s habitual residence, “this must not be understood as signifying that applications directed to other Central Authorities are to be regarded as exceptional”.<sup>142</sup> As a general rule, however, it is envisaged that applications will be made to the Central Authority in the child’s State of habitual residence.

An application must then be transmitted to the relevant Central Authority in the State where the child is believed to be, before any proceedings can commence.

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<sup>140</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.1.

<sup>141</sup> Article 8 of the Hague Convention, *op. cit.*, n. 25.

<sup>142</sup> See Explanatory Report, *op. cit.*, n. i, para. 99.

Perhaps surprisingly, there is no obligation in the Convention upon Central Authorities to transmit applications. Indeed the Pérez-Vera Report argues that Article 9 which deals with transmission of applications has “not been very artfully drafted”.<sup>143</sup> The Article obligates Central Authorities who have received an application from another Central Authority, to transmit that application to a third Central Authority if it is discovered that that child is not in the initial requested State. However, there is no obligation upon the Central Authority initially seized of the case to transmit the application to the Central Authority in the requested State. Nevertheless, the necessity to transmit applications can be implied into the general duty upon Central Authorities to co-operate with each other. More specifically, Article 7 (i) obligates Central Authorities to “keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application”, and this would surely include transmitting applications.

### 5.2.2 APPLICATION FORMS

During the drafting of the Convention a model form for applications was produced.<sup>144</sup> Use of this form was however discretionary and consequently, “it was necessary to include in the text of the Convention the elements which any application submitted to a Central Authority *must* contain in order to be admissible”.<sup>145</sup> Such information is found in the second paragraph of Article 8. Additionally, by Article 8 “[t]he application *may* be accompanied or supplemented by”<sup>146</sup> various documentation. According to the Pérez-Vera Report, the reason for making such information discretionary, “is that obtaining the documents in question is sometimes difficult and, what is more, could take up precious time better spent in speedily discovering the whereabouts of the child or an amicable resolution of the affair, such requirements may seem merely accessory”.<sup>147</sup>

Many States, including the seven analysed in this report, provide standard application forms so that all the necessary information can be obtained from the applicant. It is essential that where States devise such forms, these include all the information required in the second paragraph of Article 8, while not requesting too much information which may be burdensome to the applicant and delay the application. It is equally important that these forms are made readily available. Some of the seven States analysed have application forms available on the Internet, namely, Australia, Canada, UK–England and Wales only–and the USA. This is a useful practice as it enables applicants to have easy access to the forms. It was also a recommendation of the Fourth Special Commission which “encouraged” Central Authorities to “establish and regularly update a web site”,<sup>148</sup> and recommended that a web site should contain information on “application procedures, documentary requirements, any

<sup>143</sup> See *ibid.*, para. 102.

<sup>144</sup> *Actes and Documents of the 14<sup>eme</sup> Session*, The Hague, 1980, and [http://www.hcch.net/e/conventions/recomm\\_28.pdf](http://www.hcch.net/e/conventions/recomm_28.pdf)

<sup>145</sup> See Explanatory Report, *op. cit.*, n. i, para. 100. (Emphasis added).

<sup>146</sup> Emphasis added.

<sup>147</sup> See Explanatory Report, *op. cit.*, n. i, para. 100.

<sup>148</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.7.

standard forms employed and any language requirements”.<sup>149</sup> It would also be helpful to have a link on The Hague web site to the applications forms of various Contracting States.

Where Central Authorities are unable to establish web sites, the Conclusions and Recommendations of the Fourth Special Commission stated that they should produce a brochure or flyer containing similar information.<sup>150</sup> In this regard it is to be noted that Germany, whilst not having a web site, has a brochure containing information on application procedures.

### 5.2.3 INFORMATION REQUIRED

While it is important that Central Authorities do not demand too much additional information which could slow down an application, where certain information is required by the courts in the requested State, applicants need to be made aware of this. Such information is not always necessary at the initial stage of application, and applications should not be delayed due to a lack of documentary evidence, if this can be obtained later. In Mexico, the Central Authority will begin processing an application which it has received by fax, while it waits for the original to arrive, usually by courier. The Mexican courts require various certified documentation before they will commence proceedings, however, the Central Authority is able to process the application initially without this information, so as to prevent delays. Similarly, in France, the Central Authority has recently started to forward the application directly to the Prosecutor without waiting for all the necessary documents, but simply informing the Prosecutor that these documents will follow shortly. The French Central Authority does however, require an application to be accompanied by an explanation of the relevant law and how it is applied in the requesting State for example with regard to rights of custody. States which have many applications with France, such as England and Wales and the USA have copied the relevant areas of law and had them translated so that they can include them in any application made to France.

In Germany, the application is carefully checked to see that the basic requirements particularly those under Articles 12 and 3, have been fulfilled. It is also sometimes necessary to seek further clarification of the facts or to obtain further documents. In the past this checking process took a few days<sup>151</sup> but in an attempt to speed up the process, following changes introduced in October 2000, the inquiries made by the Central Authority at this stage have become limited to the most essential issues. In particular no further investigation is made even in the face of objections made by the abductor.<sup>152</sup>

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<sup>149</sup> See *ibid.*, para. 1.8.

<sup>150</sup> See *ibid.*

<sup>151</sup> See Lowe, N and Perry A. “The Operation of the Hague and European Conventions on International Child Abduction between England and Germany, Part II” [1998] IFL 52 at 53.

<sup>152</sup> Prior to October 2000 where the abductor was resident in Germany and objected to a return the Central Authority undertook further enquiries of the Requested State, but now these enquiries are left to the court. See e.g. the German team’s presentation in the International Centre for Missing & Exploited Children’s Report and Recommendations to the Fourth Special Commission on The Hague Convention on the Civil Aspects of International Child Abduction, p. 7. (Hereafter ‘The ICMEC Report’).

#### 5.2.4 TRANSLATION ISSUES

To facilitate speed, some States, such as the USA and Mexico, which have a large number of applications between each other, have produced bilingual application forms. The Convention in Article 24 states that “any application, communication or documentation ... shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English”. The second paragraph of Article 24 states that Contracting States may make a reservation objecting “to the use of either French or English but not both”. The USA has made a reservation stating that translations must be into English,<sup>153</sup> and France has made a reservation stating that translations must be into French.<sup>154</sup> The other States analysed in this report have not made a reservation concerning language, with the exception of the Province of Quebec in Canada where applications not already in French or English must be translated into French.<sup>155</sup> Neither France nor the USA, which have made reservations as to language, provide legal aid to cover the costs of translations. Where Contracting States have a standardised form, or even a bilingual application form, it makes translation easier. Additionally, where States have not objected to the use of French or English, they should accept applications in both languages.

Often courts require documents to be translated into the relevant language of the State, or region within the State. Some Contracting States provide translations free of charge which undoubtedly speeds up the procedure and saves expense for the applicant. Notably, in England and Wales, all necessary documents are sent by the Central Authority to Central Translators who are able to provide certified translations free of charge to the applicant. These translations are also undertaken expeditiously. In Mexico, while translation is not provided free of charge, the Central Authority is able to recommend certain language schools which are able to provide certified translations at lower prices.

#### 5.2.5 MEANS OF COMMUNICATION

The Conclusions and Recommendations of the Fourth Special Commission stated that, “Central Authorities should acknowledge receipt of an application immediately and endeavour to provide follow-up information rapidly”.<sup>156</sup> Central Authorities are also required to “reply promptly to communications from other Central Authorities”.<sup>157</sup> In this regard, it is essential that Central Authorities use “modern rapid means of communication”.<sup>158</sup> The availability of such means of communication is a resources issue discussed in chapter 3. However, the use of such means of communication is a procedural point of good practice. Certain Central Authorities are equipped with fax machines and email facilities, but do not use them in transmitting applications and documentation. Given the

<sup>153</sup> <http://www.hcch.net/e/status/stat28e.html#us>

<sup>154</sup> <http://www.hcch.net/e/status/stat28e.html#fr>

<sup>155</sup> <http://www.hcch.net/e/status/stat28e.html#ca>

<sup>156</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 1.3.

<sup>157</sup> See *ibid.*, para. 1.3.

<sup>158</sup> See *ibid.*, para. 1.4.

importance the Convention places on the need for speed it is essential that where available, such means of communication are utilised. In Mexico, the postal system is often unreliable, and we have heard that the fax machine is not kept in the office of the Central Authority, which causes delay. Telephone communication does however, appear to operate effectively, although other communication is needed to transfer application forms and documentation. Telephone communication is also not always appropriate where States are operating in different time zones.

#### 5.2.6 REJECTION OF APPLICATIONS

According to Article 27, “[w]here it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons”. It is therefore open to the Central Authority initially seized of the application, and the Central Authority which receives an application from another Central Authority to reject that application. In 1999 102 applications were rejected by requested Central Authorities, that is Central Authorities who had received an application transmitted from another Central Authority.<sup>159</sup> Sixty of these applications were rejected by one of the seven States analysed in this report. Globally, the largest proportion of applications, 32%, were rejected because the child was located in another State. A further 26% of rejected applications were due to the fact that the child was not located at all. Other reasons for rejection included that the applicant did not have rights of custody and that the Convention was not in force between the requesting and the requested State. While it is important to reject cases which do not fulfil the requirements of the Convention, where applications are rejected due to an inability to locate the child, it is essential that all possible means of finding the child have been utilised.

#### 5.3 LOCATING THE CHILD

By Article 7 (a) Central Authorities are required to “take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained”. In many cases, the applicant will know where the child is and therefore location will be a simple task. Indeed, Article 8 requires that applications contain “all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be”. This was further underscored by the Conclusions and Recommendations of the Fourth Special Commission which stated that applications should contain “detailed information on location of the child.”<sup>160</sup> Consequently, where the applicant or the requesting Central Authority is aware of information relating to the location of the child, this information must be transmitted to the requested Central Authority without delay.

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<sup>159</sup> It is not known how many were rejected by the requesting States.

<sup>160</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.6.

While in many cases the exact location of the child will be known, there will be occasions where it is not, and in such cases, the Central Authorities, either “directly or through any intermediary”,<sup>161</sup> must attempt to locate the child. In 1999 27 Convention applications were rejected because the child was not located, 14 of which were rejected by 1 of the 7 States analysed.<sup>162</sup> Additionally, there were some applications which were still pending many months and even years after they were instigated due to the fact that the child had not been located. Central Authorities view location of children in different ways. In the UK for example, it is felt that procedures for locating children are efficient and therefore if after following all relevant procedures a child is not found, it is assumed that the child is not in the UK and therefore an application is rejected fairly quickly. Conversely, in the USA and Mexico, cases are left open often for a long time while authorities attempt to locate children. In the USA this is made more difficult as a result of a large number of illegal immigrants living in the State. Certainly, NCMEC as the body which handles all incoming applications to the USA is a specialist missing children organisation and appears reluctant to reject applications on the basis of non-location. In Mexico, at least eight cases commenced during 1999 were still pending the location of the child in May 2001.<sup>163</sup> Where a child is not located in a Contracting State, this is not necessarily an indicator of poor location facilities, indeed it may be that the child never entered the State or has since moved to another State. Equally, the abductor may be particularly devious in moving the child from one State to another to avoid being located. Indeed, 33 applications made in 1999 were rejected because the child was located in another State.

Central Authorities could helpfully make use of authorities and organisations in their State which have experience of locating missing persons. In many States the police are called upon to help locate children, although it has been suggested<sup>164</sup> that in States where parental abduction is not a crime, the police may not act with urgency given that they have many other duties competing for their time.<sup>165</sup> Indeed the French Central Authority has commented that on occasions the French authorities will advise the left-behind parent to bring a criminal claim as this gives greater investigative powers to the police to locate a child, than they have in civil cases.<sup>166</sup> Similarly, in Canada, criminal charges can be helpful with regard to locating children. Often criminal charges will be dropped once a child has been located, and the civil Convention remedy will be pursued. If criminal charges have been issued in the USA, the local police can contact INTERPOL who can assist in locating the child. In such cases NCMEC acts as a liaison with INTERPOL.

<sup>161</sup> See Article 7 of the Hague Convention, *op. cit.*, n. 25.

<sup>162</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>163</sup> See *ibid.*

<sup>164</sup> See USA Response to Hague Questionnaire, *op. cit.*, n. 86.

<sup>165</sup> At the Second International Forum on Parental Child Abduction held in Alexandria, Virginia, USA, in November 2000, a presentation entitled “Should International Child Abduction be treated as a Felony?” Anne-Marie Hutchinson proposed that Contracting States should set up a scheme to use powers of police and INTERPOL for all Hague cases, whether or not an offence has been committed.

<sup>166</sup> Meeting with Mme Biondi, Head of French Central Authority, November 2001. (Hereafter “Biondi Meeting”).

Many Contracting States utilise bodies specialised in dealing with locating missing children. In the USA, for example, there are 50 State Clearinghouses plus a clearinghouse in the District of Columbia which operate as missing children's registries. In Canada, the Royal Canadian Mounted Police operate a Missing Children's Registry, which is useful for helping to locate children. In Mexico City there are two organisations dedicated to locating missing persons, LOCATEL and CAPEA and these are sometimes used in Convention cases.

In the USA, the fact that NCMEC acts as the Central Authority in incoming applications has proved beneficial, as it is also a specialist missing children's organisation with considerable experience in locating missing children in the United States of America. NCMEC uses sophisticated technology which can age photographs of children missing several years earlier in order to aid their recovery now. While this may have less relevance to Convention cases, the remedy being mainly for cases where location occurs relatively quickly, this technology and expertise shows the extent of NCMEC's dedication to searching for missing children. NCMEC and the International Centre for Missing & Exploited Children have been active in developing web sites<sup>167</sup> containing photographs of missing children, in an attempt to aid their location. There have been a number of stories of successful recovery of children based on their appearing on these web sites.<sup>168</sup>

At the Fourth Special Commission, it was stated that each Central Authority should provide a web site or brochure, which could detail "means by which a missing child may be located".<sup>169</sup> In the questionnaire approved by the Fourth Special Commission, for newly acceding States, States are asked to "indicate the agencies involved and the processes available for the location of missing children".<sup>170</sup> In this regard, the Central Authority web sites in Australia, Canada, England and Wales and the USA, contain information on how to search for a missing child as well as links to non-governmental organisations who may be able to assist in the search and provide support to the applicant parent.<sup>171</sup> It is a point of good practice that Central Authorities have adequate links with authorities and organisations able to assist in locating missing children within their State.

In addition, it is also important that Central Authorities are aware of domestic laws which may assist them in locating a child. In Australia, the Commonwealth Central Authority can apply to the court for a location order<sup>172</sup> requiring a person to give information to the court about the whereabouts of the child which he may have or which he may obtain. When a child is located a recovery order<sup>173</sup> will enable authorities to recover and return the child to the person seeking recovery. In the UK, the court can order any person to reveal the location of the

<sup>167</sup> For links to these missing children's sites, see [www.missingkids.com](http://www.missingkids.com) and <http://www.icmec.org>

<sup>168</sup> See NCMEC web site. [www.missingkids.com](http://www.missingkids.com)

<sup>169</sup> Conclusions and Recommendations, op. cit., n. iv, para. 1.8.

<sup>170</sup> Ibid., para. 2.3 II.

<sup>171</sup> See Australia – <http://www.law.gov.au/childabduction/infoforparents.html>; Canada – <http://www.missingchildren.ca>; <http://www.mcsc.ca>; USA – <http://www.missingkids.com>; UK – England and Wales <http://www.offsol.demon.co.uk/>

<sup>172</sup> See Family Law Act 1975 s 67J, 67K, 67L, 67M, 67N, 67P.

<sup>173</sup> See Family Law Act 1975 s 67Q, 67R, 67S, 67T, 67U, 67V, 67W, 67X, 67Y.

child.<sup>174</sup> Failure to comply with such an order is punishable as contempt which includes possible imprisonment. The police are also entitled to search property and recover children.<sup>175</sup> In Germany there is domestic law requiring everyone to register changes of residence within three weeks. While this may help in the location of missing children, as Hutchinson, et al., have pointed out, “non-registration is a minor offence and fuller investigation may be required.”<sup>176</sup>

Locating children abducted to Mexico often takes a considerable time.<sup>177</sup> However, this problem has been recognised and in June 2001 an agreement was made between the Mexican Central Authority and the Federal police to help to locate missing children. The Federal police have access to information on the electoral role and information held by social security, hospitals and school records. There was optimism when this agreement was formulated that the Federal police should be able to locate children within a week. It is too early to say what effect the agreement has had.

The Conclusions and Recommendations of the Fourth Special Commission stated that, “Central Authorities, in seeking to locate children, should be able to obtain information from other governmental agencies and authorities and to communicate such information to interested authorities.”<sup>178</sup> It further stated that “[w]here possible their enquiries should be exempted from legislation or regulations concerning the confidentiality of such information”.<sup>179</sup> In many States, Central Authorities are able to access government records in order to trace abducted children. In Australia, the Federal and State police, the Department of Immigration, the Secretary of Foreign Affairs and Trade and the relevant Embassies or High Commissions may be required to assist in enquiries concerning the location of a missing child. A warrant can also be issued to the Federal and / or State police for the possession of the child. Where such a warrant has been issued, the court may overrule any secrecy regulations on government documentation which may hold information on the whereabouts of the child. Any person believed to have knowledge of the child’s whereabouts can be subpoenaed and questioned by the court.<sup>180</sup>

In the UK, government agencies including the Department of Social Services, the National Health Service and the Office of Population Census and Surveys can be ordered to assist in tracing a missing child. In Mexico, the Treasury and the Public Credit Ministry may check the Federal Taxpayers Register in order to trace an abductor, and State authorities can check records such as driving licenses in order to locate missing children.

In the USA, the International Child Abduction Remedies Act of 1988 which implements the Convention, gives the USA Central Authority power of access to certain USA records which may have information regarding the location of the child or the abductor.<sup>181</sup> In Germany, legislation known as the *BKAGesetz* empowers the Central Authority to obtain information to aid the location of

<sup>174</sup> See Family Law Act 1986 s 33.

<sup>175</sup> See Family Law Act 1986 s 34, and for application to Scotland see s 40 (2).

<sup>176</sup> Hutchinson, A; Roberts, R and Setright, H. *International Parental Child Abduction* Family Law 1998, p. 100.

<sup>177</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>178</sup> Conclusions and Recommendations, op. cit., n. iv, para. 1.9.

<sup>179</sup> *Ibid.*

<sup>180</sup> Information received from New South Wales Central Authority, July 2000.

<sup>181</sup> See ICARA § 11608 (a).

a missing child from the Federal Criminal Police Office (INTERPOL Germany) or from local police stations. Conversely, under the Civil Code in France, there is no authority to consult social security records to help locate missing children. A criminal investigation is needed in order to access such files. There is a circular which permits the Central Authority to require authorities to check if an abducted child has been registered in a school, but this circular is rarely used and experience has shown that responses from authorities are often delayed.<sup>182</sup> As locating children is a prerequisite to their return under the Convention, all available means and methods of location should be undertaken as expeditiously as possible.

#### 5.4 SEEKING VOLUNTARY RESOLUTION

Once the application has been transmitted and the child has been located, Central Authorities are also under a duty to “take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues”.<sup>183</sup> This duty is further highlighted in Article 10 which states that, “[t]he Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child”. Globally, of cases commenced in 1999, 18% ended in a voluntary return, as against 32% which ended in a judicial return.<sup>184</sup> In addition, it is to be noted that this figure does not take into account other forms of voluntary resolution such as access being agreed.<sup>185</sup>

The Convention prioritises the importance of voluntary resolutions and as the Pérez-Vera report states, the inclusion of Article 10 giving preferential treatment to Article 7 (c), “highlights the interest of the Convention in seeing parties have recourse to this way of proceeding”.<sup>186</sup> The importance of seeking voluntary resolution was further emphasised in the Conclusions and Recommendations of the Fourth Special Commission where it was stated that, “Central Authorities should encourage voluntary return where possible”.<sup>187</sup> A Working Document produced by International Social Services also emphasised the importance of voluntary resolution, stating that extra-judicial solutions are usually preferable to court proceedings.

The method and means of seeking a voluntary resolution are not prescribed by the Convention merely that a voluntary resolution is sought. Articles 10 and 7, initially place the duty upon Central Authorities. However, the obligation is merely that the Central Authority ensures that voluntary resolution is sought, and it does not fall on the Central Authority itself to undertake such negotiations, the use of “any intermediary” being expressly permitted. Indeed in the Conclusions and Recommendations of the Fourth Special Commission, it was stated that:

<sup>182</sup> Biondi Meeting, *op. cit.*, n. 166.

<sup>183</sup> See Article 7 (c) of the Hague Convention, *op. cit.*, n. 25.

<sup>184</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>185</sup> See *ibid.*

<sup>186</sup> Explanatory Report, *op. cit.*, n. i, para. 103.

<sup>187</sup> Conclusions and Recommendations, *op. cit.*, n. iv, para. 1.10.

“Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7 (c) of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised”.<sup>188</sup>

The lack of prescription concerning the means and methods of seeking voluntary resolution has led to considerable diversity in interpreting these provisions. In Australia, Germany, Scotland, the USA and some Canadian jurisdictions, the Central Authority, is involved, to some degree, in negotiating a voluntary resolution. In Australia the implementing Regulations specifically require the Central Authority to seek an amicable resolution and a voluntary return.<sup>189</sup> In the Canadian Provinces of British Columbia and Manitoba the Central Authorities will make a request for a voluntary return if it is considered appropriate. In some other Canadian jurisdictions, Central Authorities initiate contact with bodies such as the police who may be involved in bringing about voluntary resolutions.<sup>190</sup>

Several Central Authorities initiate suggestion of voluntary resolution by sending a letter to the abductor requesting that they return the child within a certain period of time. In some jurisdictions, so as not to create delay, court proceedings are initiated simultaneously with the attempts to seek a voluntary resolution, in case negotiations fail. Since reforms introduced in October 2000 this has been the procedure adopted in Germany. Previously, the practice was to write to the abductor first and only institute court proceedings after a two-week period had elapsed.<sup>191</sup> The Central Authority will now *both* institute court proceedings and in appropriate cases write to the abductor seeking a voluntary return. The letter explains that court proceedings under the 1980 Convention have been initiated and to avoid costs, the recipient should either return together with the child to the child’s place of habitual residence or surrender the child to the parent filing the return application. If the abductor agrees to a voluntary settlement then the court proceedings are halted and no costs are incurred. There are no official statistics kept on the success rate of such letters of request but, according to the German Response to the Hague Questionnaire, it was thought to be low,<sup>192</sup> though it was also felt that the new practice of also instituting court proceedings could mean that the letter now has a greater impact.<sup>193</sup> However, it is too early to say how this change of practice is actually working.

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<sup>188</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 1.10.

<sup>189</sup> Regulation 13 (4) (a) and (b) Family Law (Child Abduction Convention) Regulations 1986. But see post at p. 42.

<sup>190</sup> See Canadian Response to Hague Questionnaire, op. cit., n. 113, p. 3.

<sup>191</sup> See e.g. Lowe and Perry, op. cit., n. 95, p. 53.

<sup>192</sup> Ibid. Considered that under the former system the letter prompted a voluntary return in about 10% of cases. It might be noted that in 1999 16% of return applications made to Germany, ended in a voluntary return though by no means all of these will have been prompted by the letter.

<sup>193</sup> If the Scottish experience, where a similar system to that newly established in Germany is operated, is anything to go by, then this hypotheses seems well founded.

Several Canadian Central Authorities also send letters to the abductor suggesting a voluntary return. Similarly, in the USA, NCMEC will write to the abductor informing them that an application has been made and asking them to return the child on a voluntary basis. The recipient is given about 10 days to respond to this letter and if there is no response after this time proceedings will commence. If the abductor is agreeable to a voluntary return, arrangements are made between the parents and the Central Authorities or the attorneys representing the parties. In Scotland, the Central Authority sends a letter to the lawyer assigned to the case encouraging the lawyer to first seek a voluntary resolution. Consequently, while it is the Central Authority which initiates seeking voluntary resolution by sending the letter, the responsibility of undertaking negotiations rests on the lawyer in the case. The procedure in Mexico, is similar to that in Scotland. The Central Authority prepares the formal petition to the court. This will provide a summary of the Hague application, and the obligations under the Convention including the obligation under Article 7 (c) to negotiate a voluntary return. Negotiations are then in the court's hands.

In the remaining States, namely, France and the UK-England and Wales and Northern Ireland, attempts to seek voluntary resolutions are not initiated by the Central Authorities. In France, the Prosecutor will make an application to the court, but before it is heard, he will try and seek a voluntary return.<sup>194</sup> As the Prosecutor is in charge of resolving the case, the Central Authority will not attempt to seek a voluntary resolution.<sup>195</sup> If the case is particularly sensitive, the Prosecutor will personally attempt to persuade the parties to agree upon a voluntary return, if necessary, an experienced mediator will be involved. In most instances the police are asked by the Prosecutor to visit the abductor, and discuss the application. If the abductor does not agree to a voluntary return, the application will go to the court to be decided by a judge. Frequently, a police social worker will become involved in the negotiations.

The Central Authority in England and Wales, has set itself an 80% target for forwarding applications to a lawyer within 24 hours, and one judge<sup>196</sup> has commented that the Central Authority "invariably achieves a 100% rate". The lawyer will issue proceedings in court immediately and as proceedings are prioritised the case will reach court incredibly quickly. It could therefore be argued that insufficient time is given to the seeking of voluntary resolutions. Certainly there are fewer voluntary returns from England and Wales than from other Contracting States and more judicial returns. Research has shown that only 5% of applications to England and Wales commenced in 1999 resulted in a voluntary return, compared with a global average of 18%, and 51% of applications resulted in a judicial return compared with a global average of 32%.<sup>197</sup> Lowe and Perry<sup>198</sup> found that in 1996 8% of incoming applications to England and Wales resulted in a voluntary return, compared with 22% in outgoing applications.<sup>199</sup> While

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<sup>194</sup> French response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter 'French Response to Hague Questionnaire').

<sup>195</sup> Biondi Meeting, op. cit., n. 166.

<sup>196</sup> Wall J in *Re S (Child Abduction: Delay)* [1998] 1 FLR 651, p. 660.

<sup>197</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>198</sup> Lowe, N and Perry, A. *International Child Abduction – The English Experience* (1999) 48 ICLQ 127.

<sup>199</sup> The system in Northern Ireland is similar with applications being sent to court rapidly, and little time given to the seeking of voluntary resolutions.

prioritising Convention cases in the court system is a good practice, it is also important not to neglect the Convention obligation to seek a voluntary return.<sup>200</sup>

Indeed, the Pérez-Vera Report contextualises the duty to seek voluntary return highlighting that “a considerable number of cases can be settled without any need to have recourse to the courts”.<sup>201</sup> The benefits of this were underlined in a Working Document presented at the Fourth Special Commission<sup>202</sup> which favoured voluntary return stating that, “[t]he disruption to the child is minimal; the polarisation of parties attitudes which so often results from court action is avoided and so the chance of a satisfactory long term solution is greater”. Others have suggested that:

“Notwithstanding the prime facie wrongful actions of the abductor, the parties will still have to remain in communication as regards the practicalities of arranging contact with the child. For this reason it would surely be beneficial, and of course cheaper, if potentially acrimonious judicial proceedings could be avoided”.<sup>203</sup>

Notwithstanding, the general duty under the Convention to seek a voluntary resolution, it is widely recognised that such negotiation may not be appropriate in all cases. There are a number of provisos, which though not found in the Convention itself were highlighted in the Conclusions and Recommendations of the Fourth Special Commission. For example, Contracting States were encouraged to “ensure the availability of effective methods to prevent either party from removing the child prior to the decision on return”.<sup>204</sup> Seeking voluntary resolution is not always appropriate especially where it may cause the abductor to flee with the child. In Germany, the letter requesting voluntary resolution is not sent where the left-behind parent expressly asks that it should not be sent, or if there are serious reasons to fear that the abductor might disappear or flee or might otherwise cause the child harm upon learning of the application for return.<sup>205</sup> Similarly, in the USA and Canada, no letter will be sent to the abductor if it is believed that he or she may abscond with the child.

In State Central Authorities within Australia, a preliminary decision is made as to whether it is appropriate to negotiate a voluntary return. Even where it is considered appropriate, the Central Authority may still obtain urgent ex parte restraining orders. These orders protect the Central Authority if the negotiations break down and the abducting parent tries to flee with the child. The orders may include interim orders for the surrender of passports, preventing the removal of children from Australia, placing children’s names on the airport “watch list”,

<sup>200</sup> See Armstrong, S. “Is the Jurisdiction of England and Wales Correctly Applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction?” (2002) 51 ICLQ 427.

<sup>201</sup> See Explanatory Report, op. cit., n. i, para. 92.

<sup>202</sup> Working Document No. 9 Revised. Proposal by the delegation of the United Kingdom on Voluntary Settlement presented at the Fourth Special Commission in The Hague, March 2001, and highlighting the Scottish system.

<sup>203</sup> Beaumont, P and McEleavy, P. *The Hague Convention on International Child Abduction*, Oxford University Press 1999, p. 246.

<sup>204</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 1.12.

<sup>205</sup> See Germany’s response to the questionnaire concerning the practical operation of the Convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter ‘German Response to Hague Questionnaire’), and Weitzel, op. cit., n. 101.

orders for interim residence of the child and orders for the issuing of warrants to apprehend children. A child may be removed from an abducting parent but only as a last resort. If a voluntary return is negotiated after obtaining these orders, the matter is resolved by consent orders for return. In Queensland, the State Central Authority is more inclined to pursue a voluntary return before filing the application or obtaining holding orders.<sup>206</sup> In the light of *MHP v Director General Department of Community Services*,<sup>207</sup> the obligation to seek a voluntary resolution as found in the implementing Regulations will be changed to a discretion, the word “must” being replaced by the word “may”.<sup>208</sup>

The Conclusions and Recommendations of the Fourth Special Commission also stated that “[m]easures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings”.<sup>209</sup> In Scotland where 8 of the 10 applications received in 1999 resulted in a voluntary resolution, the Central Authority has commented that there is no evidence that seeking voluntary resolution leads to delay. Certainly a statistical analysis of cases in 1999 would support this view. Voluntary resolutions in the jurisdiction were completed in a mean average of 27 days from application to conclusion, the one judicial return not being significantly delayed taking 44 days.<sup>210</sup>

## 5.5 RECOMMENDATIONS OF GOOD PRACTICE

- It is vital that applications are processed with maximum speed.
- Contracting States should have a standard application form which seeks the information required by Article 8 and any other information necessary in the particular Contracting State.
- Where possible, and necessary, Central Authorities should provide bilingual application forms in order to expedite proceedings.
- Copies of custody legislation of the requesting State should be provided. Where appropriate this legislation should be translated into the language of the requested State.
- Central Authorities should reply promptly to all communication and should rapidly acknowledge receipt of an application.
- Central Authorities should be aware of organisations who are able to help locate missing children in their State and should include such information on their web sites or in their brochures.
- Central Authorities and courts attempting to locate missing children should be given access to appropriate government and other records.
- Contracting States should work with police to help locate missing children.
- Web sites containing photos of missing children should be utilised to aid location.

<sup>206</sup> Australian Response to Hague Questionnaire, op. cit., n. 111.

<sup>207</sup> See *MHP v Director General Department of Community Services* [2000] Fam CA 673 available at <http://www.familycourt.gov.au>

<sup>208</sup> Email correspondence from Jenny Degeling in the Attorney General's Department, Australia, 9 May 2001.

<sup>209</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 1.11.

<sup>210</sup> See Preliminary Document No. 3, op. cit., n. ix.

- Contracting States should be prepared to use powers vested in domestic legislation or the inherent jurisdiction of the courts in order to locate and recover missing children.
- The Central Authority or an intermediary acting on their behalf (such as a lawyer or mediator) should attempt to seek a voluntary resolution in all appropriate cases.
- Procedures to ensure the safety of the child must be put in force where it is felt that seeking voluntary return may jeopardise the safety of the child or cause the abductor to flee with the child.
- Attempts at seeking voluntary resolution should not unduly delay proceedings.

## 6. JUDICIAL PROCESSING OF APPLICATIONS

### 6.1 INTRODUCTION

This chapter considers the judicial process in Convention applications, including legal representation, legal aid and the court procedure itself, both at first instance and appellate levels. Article 7 (f) obliges Central Authorities to “take all appropriate measures to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child”. Generally, Contracting States refer cases to the judicial authorities in their State. However, in certain States administrative authorities may be utilised.<sup>211</sup> There is an obligation upon Central Authorities in Article 7 (c) and Article 10 to seek a voluntary resolution, but where this fails, or is inappropriate, judicial proceedings will be necessary. Of all cases commenced in 1999 that had concluded, other than by rejection or withdrawal, by 30 June 2001, 70% were the result of judicial proceedings, the remaining 30% being resolved voluntarily.<sup>212</sup> In other words, a considerable proportion of applications are resolved in the courts of the Contracting States and it is, therefore, important to analyse the court procedures in Convention cases when considering good practice.

### 6.2 LEGAL REPRESENTATION

Article 7 (g) requires Central Authorities to “take all appropriate measures where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers”. The Conclusions and Recommendations of the Fourth Special Commission stated that:

“In States where an applicant for a return order is in effect unable to bring his / her application promptly before the courts in the requested State, this constitutes a serious hindrance to the rapid and efficient operation of the Convention. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved”.<sup>213</sup>

<sup>211</sup> For example, access applications made to Denmark are dealt with by administrative bodies.

<sup>212</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>213</sup> Conclusions and Recommendations, op. cit., n. iv, para. 3.6.

The Common Law Judicial Conference in September 2000, recommended that, “left-behind parents should be provided promptly with experienced legal representation”, recognising that “[l]ack of legal representation is a significant obstacle to invoking the Convention’s remedies”.<sup>214</sup>

Contracting States have taken different approaches concerning how to institute proceedings and how to represent applicants. The Pérez-Vera Report states that, “the Central Authority must itself initiate proceedings (if that can be done under its internal law) or facilitate the institution of proceedings”.<sup>215</sup> In some States, the Central Authority represents the applicant, while in other States, the Central Authority passes the case to a private lawyer. In Australia, the Central Authority is itself the applicant, which is an unusual, and possibly a unique practice.

The State Central Authorities in Australia initiate cases on behalf of the Commonwealth Central Authority. As the Central Authority represents the Commonwealth and the Commonwealth is required to act as a model litigant, the Central Authority must place all relevant information before the court and explain the case to the court having regard to Australia’s international obligations. As left-behind parents are not the applicants they are not permitted to directly brief the Central Authority lawyers and all communications must go through the Central Authority. It has been suggested that as the Central Authority in Australia is the applicant there is a potential conflict of interests, particularly with regard to whether an appeal should be brought.<sup>216</sup> However, the system appears to operate effectively. According to the Australian Central Authority, “if the relationship between a left-behind parent seeking the return of the children overseas and Central Authority remains one of member of the public / public servant carrying out their statutory duty, there should not be any conflict of interests”.<sup>217</sup>

Research undertaken by the American Bar Association in 1995 found that from Central Authorities in their sample, 10 reported that the Central Authority office represents applicants and 17 reported that they refer the applicant to private lawyers.<sup>218</sup> Of the Central Authorities considered in this paper, those of Germany, Mexico and two of the Canadian Provinces, namely, Manitoba and New Brunswick, represent the applicant. In Germany, the Central Authority does this by commissioning a lawyer from a list of 400 who files the application and presents the case in court. However, it is the Central Authority who represent the applicant, and the lawyer in turn merely sub-represents the Central Authority. The services of lawyers are used because the Central Authority does not have sufficient personnel to operate this function.

In the Canadian Province of Manitoba the Central Authority represents applicants in its capacity as Crown Counsel for the Minister of Justice. Unlike private counsel, Crown Counsel has a greater obligation to the court and will identify issues, if applicable, that may impact on the court’s decision to order a child’s return. In New Brunswick, the Central Authority is the head office of the Public Prosecutions branch of the Department of Justice. Staff lawyers from the office represent the applicant in incoming applications.

<sup>214</sup> Common Law Judicial Conference on International Parental Child Abduction, Washington, DC, 17-21 September 2000 available at <http://www.hcch.net/elconventions/seminar.html>

<sup>215</sup> See Explanatory Report, op. cit., n. i, para. 96.

<sup>216</sup> See Australian Response to Hague Questionnaire, op. cit., n. 111.

<sup>217</sup> See *ibid.*

<sup>218</sup> Chiancone, J and Girdner, L. *Issues in Resolving Cases of International Child Abduction*. Final Report of the Office of Juvenile Justice and Delinquency Prevention. Washington, DC: American Bar Association Center on Children and the Law, 2000.

The remaining Central Authorities refer applicants to State or privately appointed lawyers. Where this is the practice, it is essential that the Central Authority has a monitoring system to track the speed and outcome of cases. In this way it will remain involved in the case, despite having passed it into the judicial system. In France, the Central Authority refers applicants to the Public Prosecutor “*Procureur Général*” based in the Court of Appeal “*Cour d’Appel*” in the area where the child is located. The *Procureur Général* will then forward the application to the “*Procureur de La République*” who is based at the first instance court “*Tribunal de Grande Instance*” in that district. The *Procureur de La République* will then assign a representative “*Procureur Adjoint*” or “*Substitut*”, who will represent the applicant and present the case in court. The *Procureurs* are not specialised in Convention matters and the Central Authority always provides information pertaining to the Convention when it forwards an application. It is for this reason that applicants in France are often advised to retain an additional private lawyer. However, it is generally recognised that few private lawyers in France have a detailed knowledge of the Convention either.

In most cases in the USA State of California, the District Attorney acts through local prosecutors negating the need for private representation. The District Attorney assesses applications and acts as a “friend of the court”. If they consider that the applicant needs private representation, they will contact the local bar association and pro bono groups to locate a private lawyer for the applicant. This system limits the number of lawyers able to bring Convention cases and thus allows for greater experience amongst practitioners. In Washington State there is also a system of public representation in Convention cases.<sup>219</sup>

Alternatively, in all the jurisdictions where representation is provided by the Central Authority, or by a State appointed lawyer, applicants are entitled to retain a private lawyer. However, in Australia, France, Manitoba and California representation is free to applicants if they use the Central Authority or public representation provided.<sup>220</sup> Where the use of Central Authority lawyers or public lawyers allows the Contracting State to provide the representation free of charge, this is to be recommended as a means of getting around legal aid eligibility criteria in Convention cases. Conversely, in all three UK jurisdictions and in the remaining Canadian and US jurisdictions, applicants are represented by private lawyers. In England and Wales, the Central Authority passes applications to a lawyer selected from a panel of 20 firms, the majority of whom are located in the London area, within easy access of the Central Authority and the High Court. The large number of cases received combined with the small number of lawyers able to represent applicants, results in lawyers being highly experienced in their field. In Scotland, a lawyer is hired in the area where the child is believed to be and a further lawyer is hired in Edinburgh as all cases are heard in the Court of Session situated in Edinburgh. This adds an extra administrative layer and consequently it has been suggested that the practice of appointing a lawyer in the area where the child is located may be inappropriate.

<sup>219</sup> Beaumont and McEleavy, op. cit., n. 203.

<sup>220</sup> See post at 6.3.

As Convention cases can be heard at almost any civil court in the USA, there are a considerable number of lawyers able to take cases, many of whom have no Convention experience. Convention proceedings can be brought in State or Federal courts<sup>221</sup> and to a certain extent the choice of court could depend on whether the lawyer has audience rights before the Federal court. Consequently, it is important that applicants are aware of this if they are intending to bring a case in Federal court. NCMEC offers advice to applicants about retaining a lawyer and they are able to provide information regarding lawyers offering reduced fee or pro bono assistance.

While it does not make much difference in terms of good practice whether lawyers represent the Central Authority or whether applicants retain State appointed or private representation, it is important that lawyers have a knowledge of the Convention. In this respect having a limited number of specialised, experienced lawyers able to act in Convention cases is to be recommended. This is certainly the case in Australia, where the Central Authority is itself the applicant. Even where States have limited the number of lawyers able to hear Convention applications, there may still be a large number who are able to hear cases. In Germany there are 400 lawyers on the Central Authority list, and consequently, it is still possible that a lawyer on the list will have little or no experience of Convention applications. In Germany, the authorities have tried to strike a balance between limiting jurisdiction and allowing applicants to have access to a local court. Conversely, in England and Wales, there are just 20 firms able to represent applicants which is perhaps most appropriate for States which are smaller geographically and which have limited jurisdiction to a small number of courts. Similarly, the use of the limited number of District Attorneys in California is to be recommended.

It is important that legal representatives receive training. In the USA there are training programmes organised by NCMEC in an attempt to educate lawyers in Convention matters and lawyers who are entered onto NCMEC's list of pro bono lawyers all receive training. In France the Central Authority provides some training for *Procureurs* and the Head of the Central Authority has proposed that one specialised *Procureur* should be appointed in each *Cour d'Appel* who should undergo compulsory training in the Convention.

Delay in finding legal representation can “constitute a serious hindrance to the rapid and efficient operation of the Convention”.<sup>222</sup> Consequently, Central Authorities must be aware of lawyers willing and able to act in Convention proceedings and must be able to promptly refer applicants to these lawyers. In this regard, it is useful for Central Authorities to hold lists of appropriate lawyers. In the Conclusions and Recommendations of the Fourth Special Commission, it was stated that Central Authorities should provide on their web sites or in their brochures, information relating to “the provision of legal service”.<sup>223</sup> This is essential in order that applicants are aware of methods and means of obtaining legal counsel in the relevant State.

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<sup>221</sup> See ICARA 1988 § 11603 (a).

<sup>222</sup> Conclusions and Recommendations, op. cit., n. iv, para. 3.6.

<sup>223</sup> Ibid., para. 1.8.

### 6.3 LEGAL AID

Article 26 States that “[e]ach Central Authority shall bear its own costs in applying this Convention”. Further, Contracting States are not permitted to “require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers”. However, the third paragraph of Article 26 allows Contracting States to make a reservation declaring that they “shall not be bound to assume any costs referred to ... 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”.

It is accordingly possible for Contracting States to limit their liability in Convention cases to only those applicants who would be eligible for legal aid in the requested State. In the commentary on Article 7 (g), which obliges Central Authorities “where the circumstances so require, to provide or facilitate the provision of legal aid”, the Pérez-Vera Report helpfully explains that the phrase “‘where the circumstances require’ ... refers to the applicant’s lack of economic resources, as determined by the criteria laid down by the law of the State in which such assistance is sought, and that it does not therefore refer to abstract considerations as to the convenience or otherwise of granting legal aid”.<sup>224</sup> Therefore, if an applicant would qualify for legal aid if he were a national of the requested State, he is entitled to legal aid. However, this duty to provide legal aid is restricted to applicants who are nationals of other Contracting States or are habitually resident within a Contracting State.<sup>225</sup> There is no Convention obligation to provide legal aid to other applicants.

With the exception of Australia,<sup>226</sup> Mexico and the Canadian Province of Manitoba, the States analysed in this report have made a reservation to Article 26. However, Mexico does not provide free legal representation to all applicants. Conversely, all three UK jurisdictions have not implemented the reservation and provide legal aid to all applicants in return applications regardless of means and merits.<sup>227</sup> Applicants in France who are represented by the *Procureur* do not need to pay for this representation and similarly applicants in California receive free representation through the office of the District Attorney. Respondents in these jurisdictions are not entitled to free legal representation unless they meet legal aid eligibility requirements in the relevant State.

The other jurisdictions analysed in this report are only under a duty to provide legal aid where their legal aid system would require this and consequently, the USA reservation to Article 26 met with heavy criticism<sup>228</sup> as there is no comprehensive system of legal aid in the State. In response to this criticism, the Department of Justice in association with the USA Central Authority, agreed in 1985 to fund the creation of a network of lawyers able to provide pro

<sup>224</sup> See Explanatory Report, op. cit., n. i, para. 96.

<sup>225</sup> See Article 25 “Nationals of the Contracting States and persons habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State”.

<sup>226</sup> Additionally, Australia provides free legal representation to all applicants in access applications.

<sup>227</sup> Additionally, Scotland provides free legal representation to all applicants in access applications.

<sup>228</sup> For a summary of the criticisms see National Report for the USA, op. cit., n. 85.

bono or reduced fee assistance in Convention cases, the International Child Abduction Attorney Network (ICAAAN).<sup>229</sup> NCMEC uses an objective scale to determine if a party is eligible for pro bono or reduced fee legal representation and where appropriate they will provide a lawyer from ICAAN. The scale used by NCMEC has been criticised as being difficult to fathom, but is apparently based on the scale used by the American Bar Association. The creation of ICAAN in a jurisdiction which has no comprehensive system of legal aid is a significant achievement. Where the applicant is not entitled to a pro bono or reduced fee lawyer, legal representation can be very expensive in the USA. The International Child Abduction Remedies Act of 1988, which implements the Convention, makes the abductor responsible for the petitioner's costs unless this would be unjust.<sup>230</sup>

As in the USA, there is no comprehensive system of legal aid in Mexico. However, where an applicant has no income,<sup>231</sup> the *Desarrollo Integral de la Familia (DIF)*, which assists the Central Authority on a regional basis, may provide a lawyer free of charge to the applicant and the respondent. It is recognised that the *DIF* lawyers are competent in Convention proceedings.

In Germany legal aid in Convention cases is determined on a merits basis and it is the court which determines eligibility. Application forms for legal aid are available in both English and German from the German Central Authority and from certain other Central Authorities, including that of the USA. In France, where applications are made through the *Procureur* there is no cost to the applicant. Conversely, if the applicant wishes to appoint a private lawyer, this will only be provided free of charge if under domestic law the applicant is eligible for legal aid. If it is necessary for the child to have a separate lawyer, the President of the Bar of the region where the child is located will appoint a legal aid lawyer for the child.<sup>232</sup>

In Canada, the issues of legal aid are decided at a Provincial and Territorial level and consequently eligibility requirements differ from one region to the next. In British Columbia and Ontario, means-tested legal aid is available if the applicant would be eligible for such legal aid in his or her own jurisdiction. Delays have been noted with regard to seeking legal aid in Ontario because applicants must provide a letter from the legal aid authority in their home jurisdiction stating that they qualify in that jurisdiction, and providing undertakings.<sup>233</sup>

Applications for legal aid in Quebec should be made to the Quebec Central Authority which will then forward them to the regional legal aid corporation which has territorial jurisdiction to determine whether the applicant is eligible. Where an application for legal aid is unsuccessful, the Central Authority will provide the applicant with a telephone number of the referral service of the Bar Association which will provide the names of lawyers who are able to represent the applicant. If an applicant in Alberta is eligible for legal aid, the Central Authority will forward the application to the Legal Aid Board who will appoint a legal aid lawyer. In Nova Scotia, legal aid is available to those who meet the criteria in Nova Scotia.<sup>234</sup>

<sup>229</sup> For more information see <http://www.abanet.org/media/may96/ican.html>

<sup>230</sup> ICARA § 11607 (3).

<sup>231</sup> The basis for establishing this test is not clear.

<sup>232</sup> Hutchinson, et al., op. cit., n. 176.

<sup>233</sup> Canadian Response to Hague Questionnaire, op. cit., n. 113, p. 3.

<sup>234</sup> Degeling, J and Levett N. *International Child Abduction – A Guide for Parents and Practitioners*, November 2001.

In States where legal aid is not automatically available, it is essential that applicants are given appropriate information about how to obtain it. Article 7 (g) of the Convention states that Central Authorities “shall take all appropriate measures ... to provide or facilitate the provision of legal aid”. The Conclusions and Recommendations of the Fourth Special Commission further stated that Central Authorities should provide on their web site or in their brochure, “details, where applicable, of how to apply for legal aid”.<sup>235</sup> Application for legal aid can cause delays and in this regard it is essential, given the expeditious nature of the Convention, that applicants are promptly made aware of the necessary procedure for applying for legal aid.

Some States, conscious of the need to expedite procedures relating to the application for legal aid have attempted to speed up the process. In the past Germany has been criticised for failing to commence court proceedings in cases where the application for legal aid was pending. This could delay a case for weeks or even months. However, changes introduced in October 2000 changed this rule and now the Central Authority institutes court proceedings simultaneously with the application for legal aid. Nevertheless, it is still essential that a completed legal aid form is submitted, or an advance of costs is paid, before the Central Authority will take an action before the courts. For those opting not to seek legal aid the practice has long been for the Central Authority to request payment of €1,100 (formerly, DM 2,000) as an advance<sup>236</sup> against the lawyer’s fees.<sup>237</sup> In case of an appeal a further advance of usually not more than €500 (formerly, DM 1,000) is levied. In the event of an overpayment, the surplus money will be returned. It has been pointed out<sup>238</sup> that it would greatly assist the speed of the process if the requesting Central Authority could either transfer the advance or submit the documents for applying for legal aid at the same time as sending the documents instituting proceedings. Similarly, in France, in matters of urgency, the President of the court can grant legal aid automatically on a temporary basis without waiting for the legal aid commission decision.<sup>239</sup>

In both Australia and England and Wales additional costs as well as legal representation are covered by the State. In Australia, costs associated with the application, including, psychologists’ reports, translations and separate representation for the child are also covered by the Federal system of legal aid. Similarly, in England and Wales costs associated with the application such as translation are covered.

<sup>235</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 1.8.

<sup>236</sup> On the face of it this requirement to pay an advance is hard to square with Article 22 which expressly forbids a Contracting State requiring an applicant to pay a bond or deposit to initiate proceedings. See Wolfe ‘A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United State and Germany’ (2000) 33 NYU J Int’l L & Pol. 285, p. 321. The Germans, however, take the view that Article 22 only forbids *court* costs being claimed.

<sup>237</sup> As Hutchinson, et al., op. cit., n. 176, p. 101, point out, legal costs in Germany are in fact cheaper than in some other countries. The standard advance charge assumes that the lawyer will normally expect €300 (formerly DM 600) for counselling and €300 (formerly DM 600) for advocacy. Privately appointed lawyers are, however, likely to charge more. See Wolfe, op. cit., n. 236, pp. 322-323. Fees are also higher for appellate proceedings. See Weitzel, op. cit., n. 101.

<sup>238</sup> See Weitzel, op. cit., n. 101.

<sup>239</sup> See French Response to Hague Questionnaire, op. cit., n. 194.

Canada and Australia are both generous with regard to legal aid for applicants in Canada and Australia seeking the return of their child from a foreign jurisdiction. In Australia, this may cover overseas legal fees, travel costs for a child ordered to return and travel and related costs for a left-behind parent seeking return. Legal costs incurred in Australia with respect to an overseas application are not covered. In Canada, legal aid, where available, does not cover the costs of repatriation of the child. However, the Royal Canadian Mounted Police – Missing Children’s Registry offers a programme called the Travel Reunification Program,<sup>240</sup> which has been operating since 1991. This is designed to help parents or guardians who cannot afford to pay to have their children returned to Canada. Transport and accommodation may be provided by Air Canada, Canadian Airlines International, Via Rail and Choice Hotels Canada Inc. The application for assistance must come from the Provincial or Territorial Central Authority, investigating police department or the Consular Operations and Emergency Services Division. The requesting authority must assess the financial status of the family to determine whether transportation should be provided. A parent or guardian will not be sent overseas unless all the legal steps have been taken for the return of the child to Canada and the local authorities are co-operating in the return.<sup>241</sup>

## 6.4 COURT PROCEEDINGS

### 6.4.1 CONVENTION REQUIREMENTS

The Convention does not prescribe a procedure which the courts must adopt in Convention applications. However, there are several Articles which expand upon the duty to initiate judicial proceedings. The Convention both directs courts to order the return of the child unless certain specified exceptions to return are made out (Articles 12 and 13), and to be conscious of the need for speed (Articles 2 and 11).

Article 12 states that where a period of less than one year has elapsed from the date of the wrongful removal or retention, the “authority concerned shall order the return of the child forthwith”. The court in the State to which the child has been removed or retained is to act merely as a forum and courts in Convention cases are not to deal with the merits of the case. As such, speedy resolution is required in order that the court in the child’s State of habitual residence can consider the case on its merits.

Article 2 directs Contracting States to “use the most expeditious procedures available” to “secure within their territories the implementation of the objects<sup>242</sup> of the Convention”. There is no duty upon Contracting States to bring new procedures into their domestic law, merely that in “any question concerning the subject-matter of the Convention” they “use the most expeditious procedures

<sup>240</sup> For more information see <http://www.ourmissingchildren.ca/en/about/travel.html>

<sup>241</sup> International Child Abductions – A Manual for Parents [http://www.voyage.gc.ca/Consular-el/Publications/child\\_abductions-e.htm#1](http://www.voyage.gc.ca/Consular-el/Publications/child_abductions-e.htm#1) (Hereafter ‘A Manual for Parents’).

<sup>242</sup> The objectives of the Convention being stated in Article 1 “The objects of the present Convention are – a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights or custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

available in their internal law”.<sup>243</sup> Article 11 (1) further highlights the importance of speed by stating that “[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children”. Additionally, by Article 11 (2), the applicant or the Central Authority of the requested State, has the “right to request a statement of the reasons for the delay” if a decision has not been reached within six weeks.

The Conclusions and Recommendations of the Fourth Special Commission called upon Contracting States to “process return applications expeditiously”.<sup>244</sup> Furthermore, they called upon “trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications”,<sup>245</sup> and requested “firm management by judges, both at trial and appellate levels, of the progress of return proceedings”.<sup>246</sup> Additionally, it was stated that “[r]ules and practices concerning the taking and admission of evidence, including the evidence of experts, should be applied in return proceedings with regard to the necessity for speed and the importance of limiting the enquiry to the matters in dispute which are directly relevant to the issue of return”.<sup>247</sup> These recommendations highlight the importance placed on expeditious undertaking of cases.

#### 6.4.2 COURT PROCEEDINGS AT FIRST INSTANCE

In order to achieve this expeditious undertaking, many Convention States have set in place procedures which prioritise cases to prevent delays. Notably in England and Wales, cases are passed to a solicitor within 24 hours and then the case is prioritised in court. No adjournment may be for more than 21 days.<sup>248</sup> Judges are actively involved in controlling the length and scope of the hearing and judges have set themselves a target of dealing with all cases within six weeks:

“The goal for which we should strive in this jurisdiction, both at first instance and on appeal, should be 6 weeks from invitation to conclusion. It cannot be too strongly emphasised that this is intended to be a hot pursuit remedy and if the courts permit it to linger into anything else they aid the creation of unnecessary litigation issues”.<sup>249</sup>

All cases commenced in 1999 which went to court in England and Wales were handled relatively quickly. Cases which resulted in a judicial return were decided in a mean average time of 71 days, which compares favourably with the global average of 107 days. Cases which resulted in a refusal to return in this jurisdiction were decided in a mean average time of 78 days, which again compares favourably with the global average of 147 days.<sup>250</sup> The timings stated here are more impressive given the large number of cases handled in the jurisdiction.

<sup>243</sup> See Explanatory Report, op. cit., n. i, para. 63.

<sup>244</sup> See Conclusions and Recommendations, op. cit., n. iv, para. 3.3.

<sup>245</sup> See *ibid.*, para. 3.4.

<sup>246</sup> See *ibid.*, para. 3.5.

<sup>247</sup> See *ibid.*, para. 3.7.

<sup>248</sup> Family Proceedings Rules 1991, SI 1991/1247, r 6.10.

<sup>249</sup> Thorpe LJ in *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478 at 488.

<sup>250</sup> Figures taken from Preliminary Document No. 3, op. cit., n. ix.

In Australia, the Convention obligation to act expeditiously is reflected in the implementing Regulations.<sup>251</sup> Where possible cases are prioritised to the extent allowed by court lists and due process requirements. Hearing orders can therefore be made on the day that the application is received and a return hearing can be fully determined within two or three weeks of the first court appearance.

Conversely, in many of the other States analysed, there are no specific rules helping to prioritise Convention cases. However, certain expeditious internal procedures can be used and are often recommended by the relevant Central Authorities. In France, a domestic procedure known as a *référé* is often used in Convention cases. The availability of this procedure in Convention proceedings has been confirmed by the *Cour de Cassation*, the highest court in the land.<sup>252</sup> Special sessions for hearing *référé* applications are usually held once a week, more often in large cities. In cases of extreme urgency, *référé* applications can be heard immediately by filing a *référé d'heure à heure*. Despite the availability of this procedure, judges in France are apparently reluctant to admit these emergency procedures due to the backlog of cases. Consequently, it is the responsibility of the lawyer or the public prosecutor (*Procureur*), to explain to the judge the importance of hearing the case expeditiously. In Germany, once the application is before the court, it is the responsibility of the court to ensure the case progresses.<sup>253</sup> Usually the court (*Amtsgericht*) acts promptly within a few days or a couple of weeks.<sup>254</sup>

Another means of reducing delay regards the admission of evidence in Convention cases. Several States allow cases to progress on the basis of documentary evidence alone and do not allow, or severely limit, the ability to bring oral evidence. In Australia, Canada, Mexico, all jurisdictions in the UK and the USA, documentary evidence is the normal method of procedure in Convention cases. Oral evidence is usually permitted where exceptions to return are being argued, and in some instances oral evidence is required. Conversely, in France and Germany an oral hearing is normal procedure. In Scotland, prior to 1995, domestic proceedings were resistant to the widespread use of affidavits. However, review of civil procedure welcomed the use of documentary evidence<sup>255</sup> and this is now the standard procedure in Convention cases.<sup>256</sup> Oral evidence only being admitted “on special cause shown”.<sup>257</sup>

As oral evidence is not required in many of the States analysed it is often not necessary for the left-behind parent to attend the hearing. Obviously this can save significant time and expense. However, in the three civil law jurisdictions, namely, France, Germany and Mexico, it has been suggested that attendance at the hearing is preferable. We have heard some anecdotal evidence suggesting that failure to attend hearings in certain jurisdictions may be interpreted as a lack of commitment.

<sup>251</sup> See Family Law (Child Abduction Convention) Regulations 1986, Reg. 15 (2) and (4).

<sup>252</sup> Cass., 1<sup>ère</sup>, 7 June 1995, Bull. Civ. I, n deg. 234.

<sup>253</sup> It is understood that the courts now (that is since reforms introduced in October 2000) exercise closer supervision on the management of the case.

<sup>254</sup> Hutchinson, et al., op. cit., n. 176.

<sup>255</sup> See Lord Cullen, *Review of the Business of the Outer House of the Court of Session*, December 1995. Cited in Beaumont and McEleavy, op. cit., n. 203.

<sup>256</sup> The revision came into force on 5 August 1996.

<sup>257</sup> Rule 70.6 (5) of the Rules of the Court of Session.

#### 6.4.3 COURT PROCEEDINGS AT APPELLATE LEVELS

Of court cases commenced in 1999, which had reached a final conclusion by 30 June 2001, 14% were the result of appeal court decisions.<sup>258</sup> There were also several cases, the exact number being uncertain, which were pending appeal at that date. In France, the proportion of cases which went to appeal was 31% which is more than twice the global average of 14%. It is also a significantly higher proportion than in any other State analysed in this report. In Canada and Germany the proportion of appeal cases at 17% and 15% respectively, was also above the global average. In Canada and Germany any party may appeal a decision. Indeed in Germany we have heard anecdotal evidence that the Central Authority will generally err on the side of the applicant and will appeal if the applicant so desires. There are no explicit limitations on the grounds for an appeal and new facts and evidence are admissible. The right of appeal is subject to strict time-limits. A written complaint must be received by the *Oberlandesgericht* (Court of Appeal), within two weeks of service of the first instance court order.<sup>259</sup> Each Canadian jurisdiction handles appeals differently, some offering expedited procedures for Convention cases.

In the USA, as in Germany and Canada, any party may appeal an order granting or denying return. However, the proportion of appeal decisions in this jurisdiction in 1999 was just 3%.<sup>260</sup> It is likely that this low proportion does not truly represent the number of appeals but rather shows something of the delays in appeal proceedings in this jurisdiction. It is perhaps likely that the small proportion of appeals concluded relates to delays in proceedings meaning that many cases are still pending appeal. Indeed 25 cases, (12%), were still pending a conclusion at 30 June 2001.<sup>261</sup> According to Judge Garbolino, “[w]hen parties appeal Convention cases, ‘promptness’ regrettably becomes a relative term”.<sup>262</sup> However, some courts have obtained a waiver of the time-limits given in which to file appellate briefs and others have used expedited procedures to determine appeal.<sup>263</sup>

Conversely, in Australia and England and Wales, it is harder to appeal decisions of the first instance court. In Australia, the appellate court will only interfere with the lower court decision if the appellant can demonstrate that, having regard to all the evidence now before the court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In England and Wales there is no automatic right of appeal, permission being needed from the trial judge or from the Court of Appeal. Furthermore, an appeal will only be granted where a judge has misdirected himself in law or failed to give sufficient weight to a particular aspect of the case or where there is new evidence subsequent to the hearing. While these measures restrict appeals, both States have concentrated jurisdiction at both first instance and appellate levels which means that courts are experienced and therefore appeals are relatively infrequent. Indeed in England and Wales in 1999 just 2% of court cases were appealed. Furthermore, there is no backlog in the appeal process.<sup>264</sup>

<sup>258</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>259</sup> See s 8 (2) of the 1990 Implementing Act.

<sup>260</sup> See Preliminary Document No. 3, op. cit., n. ix.

<sup>261</sup> See *ibid.* Some of which may well be pending in the process of appeal.

<sup>262</sup> See Honourable Judge James D. Garbolino *International Child Custody Cases: Handling Hague Convention Cases in US Courts* Third Edition. The National Judicial College 2000.

<sup>263</sup> See National Report for the USA, op. cit., n. 85.

<sup>264</sup> See Preliminary Document No. 3, op. cit., n. ix. Only 2% of applications received by England and Wales were still pending at 30 June 2001.

In Mexico there are also few appeals, in fact only three since Mexico acceded to the Convention. However, only 6 of the 41 applications received in 1999 actually went to court, the rest still being pending at 31 May 2001.<sup>265</sup> While the Central Authority can represent applicants in Convention proceedings, they are not able to file an appeal and therefore an applicant seeking to appeal a Convention decision would have to retain a private lawyer in order to file an appeal.

While it is important, to allow a right of appeal in appropriate cases, it is also important that appeals are not merely used as a means of delaying enforcement. In this respect the procedure in Australia and England and Wales of only allowing appeals in limited circumstances may avoid needless delays.<sup>266</sup> Globally, decisions at appellate level which resulted in a judicial return took a mean average of 208 days from initial application to conclusion. The decisions which resulted in a judicial refusal to return took a mean average of 176 days.<sup>267</sup> It should be emphasised that these timings only relate to cases in which the appeal process was concluded by 30 June 2001. It is generally at the appeal stage that delays occur. The Conclusions and Recommendations of the Fourth Special Commission called upon “trial and *appellate* courts to set and adhere to timetables that ensure the speedy determination of return applications”.<sup>268</sup> Additionally, the Special Commission called for “firm management by judges both at trial and *appellate* levels, of the progress of return proceedings”.<sup>269</sup>

#### 6.4.4 EXCEPTIONS TO RETURN

Many States have specific procedures in Convention cases when exceptions to return under Articles 12, 13 or 20 are raised. It is generally accepted that the burden of proving such an exception lies on the abductor. Generally the burden required is the civil standard of a balance of probabilities or a preponderance of evidence. In the USA, where Article 13b or Article 20 are raised the standard of proof is higher, than for the other exceptions. The recognised standard in such cases being, “clear and convincing evidence”.<sup>270</sup> While most States do not require or even allow oral evidence, there is often a requirement to present oral evidence in applications where exceptions to return are raised. Of the 952 cases commenced in 1999 for which we have data, 107 (11%), resulted in a judicial refusal to order return.<sup>271</sup> This amounts to 26% of all cases which went to court. The most common reason for refusal was Article 13b which was used 26 times, followed by the objections of the child which were used as reasons for refusing return 21 times. Interestingly, Article 20 was never used.<sup>272</sup>

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<sup>265</sup> See *ibid.*

<sup>266</sup> It must be recognised that placing limits on appeals would be much more difficult in Civil jurisdictions where it tends to be regarded as a general right.

<sup>267</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>268</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 3.4. (Emphasis added).

<sup>269</sup> See *ibid.*, para. 3.5. (Emphasis added).

<sup>270</sup> See USA Response to Hague Questionnaire, *op. cit.*, n. 86.

<sup>271</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>272</sup> See *ibid.*

Exceptions to return are generally narrowly construed. As stated in the Conclusions and Recommendations of the Fourth Special Commission, this is “in keeping with the objectives of the Convention, as confirmed in the Explanatory Report by Elisa Pérez-Vera (at paragraph 34)”.<sup>273</sup> While narrow interpretation of these exceptions is to be welcomed and is in line with the expectations of the drafters, it is important to recognise that there are appropriate circumstances where exceptions should be applied.

Article 13 (2) allows the judicial authorities to refuse return if “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”. This clause was added in the light of the fact that the Convention applies to all children under the age of 16.<sup>274</sup> As the Pérez-Vera Report points out, “it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will”.<sup>275</sup> However, there was no consensus regarding a minimum age as this seemed arbitrary. Consequently, Contracting States have interpreted the concept of children being of sufficient age and understanding in different ways. In the analysis of all applications commenced in 1999,<sup>276</sup> there were two cases where applications were refused on the basis of objections by children under the age of seven years old. In one of these, the left-behind parent’s consent was also relied upon as a reason for refusing return. In the other, the objections of a sibling aged between 8 and 10 years were also considered.

Where the objections of the child are raised, these often have to be brought to the attention of the court prior to the hearing. The Conclusions and Recommendations of the Fourth Special Commission stated that:

“There are considerable differences of approach to the question of interviewing the child concerned. Some States have strong reservations about the appropriateness of interviewing young children in connection with return applications. Where it is appropriate and necessary to do so, it is desirable that the person interviewing the child should be properly trained or experienced and should shield the child from the burden of decision-making”.<sup>277</sup>

In several States a report may be required. In England and Wales, the Children and Family Court Advisory and Support Service (CAFCASS) is required to organise the report. This is considered more beneficial than using psychologists as the Children and Family Reporters are available in the same building as the court and can thus make reports expeditiously. They can also be contacted at short notice. While reports on children’s welfare may be crucial it is again important that courts do not allow the collection of such reports to significantly delay proceedings.

In relation to court proceedings especially with regard to how courts handle cases where exceptions to return are raised, the creation and development of the International Child Abduction Database (INCADAT)<sup>278</sup> is important. This

<sup>273</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 4.3.

<sup>274</sup> See Article 4 of the Hague Convention, *op. cit.*, n. 25.

<sup>275</sup> See Explanatory Report, *op. cit.*, n. i, para. 30.

<sup>276</sup> See Preliminary Document No. 3, *op. cit.*, n. ix.

<sup>277</sup> See Conclusions and Recommendations, *op. cit.*, n. iv, para. 3.8.

<sup>278</sup> <http://www.incadat.com>

database contains cases from several jurisdictions, which can aid courts in their interpretation of the Convention. In this respect the Hilton House web site<sup>279</sup> is also valuable. The Fourth Special Commission encouraged Contracting States to “collaborate with the Permanent Bureau to explore possible sources of funding (including partnership funding) or material assistance to assist in the completion of INCADAT and to secure its position for the future”.<sup>280</sup>

## 6.5 RECOMMENDATIONS OF GOOD PRACTICE

- Contracting States should use the most expeditious court procedures available.
- Central Authorities should have a monitoring system to track the speed and outcome of each case.
- A concentrated number of suitably trained legal practitioners should be involved in handling Convention cases in order that expertise can develop, and Central Authorities should maintain a list of such lawyers.
- Where possible, legal advice and representation should be free to applicants and in any event, no fee should be charged.
- Where there is no comprehensive system of legal aid in a State, attempts should be made to establish a network of lawyers willing to offer free or reduced fee representation and advice to applicants and respondents.
- Where possible costs associated with the application such as translation should be provided free of charge to the applicant.
- Central Authorities should publish on their web site or in their brochure information relating to the availability of legal aid and how to obtain it.
- Legal aid applications must be dealt with expeditiously or emergency procedures must be used to ensure that the application for legal aid does not unduly delay the Convention application.
- Where possible Central Authorities or other relevant authorities should attempt to organise free travel and accommodation for returning children, and where appropriate, for those seeking the return of children. (See Australian and Canadian models).
- Remembering that a Convention hearing is a forum and not a hearing on the merits of the case, oral evidence and necessary documentation should be limited to that which is essential.
- Courts at trial and appellate levels should set and adhere to timetables that ensure the speedy determination of return applications.
- Appeals should not be used to delay enforcement of decisions and in this regard it is recommended that Contracting States limit the availability of appeal in Convention cases.
- Judges at both trial and appellate levels should firmly manage the progress of proceedings.
- Courts should ensure that where exceptions to return are raised, these are interpreted narrowly.
- Where it is necessary to obtain a report on the child, this should be undertaken expeditiously so as not to delay proceedings.
- Contracting States should have an effective mechanism for the immediate enforcement of court orders.

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<sup>279</sup> <http://www.hiltonhouse.com>

<sup>280</sup> See Conclusions and Recommendations, op. cit., n. i, para. 8.1.



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