Title

From Westchester to Warsaw: What you need to know about international child abduction cases

Summary

Any family can be an "international" family in today's world. Military families, diplomats, immigrants, or simply high-asset families who travel often and own property overseas. Family lawyers can increasingly expect to work with multi-jurisdictional, cross-border families, and when doing so, will inevitably run into the issue of child abduction. Panelists will address the laws that family lawyers need in their tool kit, how to find resources and information to prevent and respond to child abductions, and when they should seek outside guidance to help on their cases.

Melissa Kucinski Bio

Melissa Kucinski is a family lawyer and mediator based in Washington, DC who works predominantly with international families. She routinely works with counsel throughout the United States and overseas, providing case support, strategy, and expert services on cases of international child abduction, abduction prevention, the UCCJEA, and enforcement and recognition of foreign judgments. Melissa is a fellow of the IAFL, has served on international delegations to the last two Hague Conference Special Commission meetings on the 1980 and 1996 Conventions, is a member of the US Secretary of State's Advisory Committee on Private International Law, is a member of the Uniform Law Commission's Joint Editorial Board on Uniform Family Laws, has trained international family mediators in the United States and Japan, and has lectured globally on international family mediation and child abduction prevention. You can find Melissa by visiting her website at www.mkfamily.law.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("1980 Convention")

Text of 1980 Convention

Explanatory Report ("Perez Vera Report")

Other Resources from the HCCH

INCADAT – the HCCH's case law database – www.incadat.com

Goals of the 1980 Convention:

1) Ensure prompt return of a child wrongfully removed or retained in any Contracting State to the Child's Habitual Residence (prompt is construed to mean within 6 weeks of initiating a return petition)
2) Secure Protection for a Parent's Rights of Access to the Child

What the 1980 Convention is not:

1) Does not determine custody (in fact, any court in the jurisdiction to where the child was removed/retained shall not decide the merits of a custody suit, pending resolution of a 1980 Convention return petition – see Article 16)
2) Does not determine jurisdiction to issue a custody order
3) Does not conduct a best interest analysis in determining if a child should or should not be returned
4) Does not address the substance of other "Hague Conventions," such as the Hague Convention on Child Protection, the Hague Convention on Service of Process, the Hague Convention on International Adoption, the Hague Convention on Child Support, or the Hague Convention on Evidence
5) Does not address international travel or passport issues
6) Does not establish a court in the "Hague" (a city in the Netherlands) to resolve cases under the 1980 Convention (or any Hague Convention)

U.S. Implementing Legislation – International Child Abduction Remedies Act (ICARA, 22 USC 9001-9011)

Key Features:
1) concurrent jurisdiction between US state and federal courts
2) provides for burdens of proof (Sec. 9003)
3) provides for relaxed authentication rules (Sec. 9005)
4) fee shifting provisions for legal fees (Sec. 9007 (b))

U.S. Central Authority – U.S. Department of State, Bureau of Consular Affairs (www.travel.state.gov)

> The U.S. Central Authority does not initiate Hague Abduction return petitions in the United States on behalf of a Left Behind Parent. It is incumbent upon the parent to seek out competent legal counsel and initiate an action in the appropriate court on his or her own behalf.
>
> The U.S. Central Authority has no obligation to provide free legal counsel (having taken a reservation to Article 26 of the 1980 Convention) to Left Behind Parents, although it maintains a list of volunteer attorneys in many U.S. jurisdictions and attempts to facilitate contact between the Left Behind Parent and legal counsel.

Petitioner's Case

Key Elements of a Prima Facie 1980 Convention Return Petition:

1) Applies to a Child, under the age of 16
2) The case must be brought in a court of competent jurisdiction in the location of the child
3) The Petitioner must have a "right of custody" under the law of the child's habitual residence
    a. A right of custody can exist under an order, agreement, or by operation of law
    b. *Abbott v. Abbott*, 560 US 1 (2010), has ruled that a parent's right to prevent international travel (e.g., a *ne exeat* right) is a right of custody
4) The Petitioner must have been actually exercising his or her right of custody at the time the removal or retention became wrongful
5) The Child was removed from that child's "habitual residence"
    a. *Monasky v. Taglieri*, 140 S.Ct. 719 (2020) concluded that a child's habitual residence is based on a totality-of-the-circumstances analysis; a trial judge's findings will not be touched but for on a finding of clear-error
    b. Not equivalent to "home state," which is more clearly defined by the UCCJEA
    c. Not equivalent to "domicile"

*It is important to determine the date on which the retention or removal of the child from its habitual residence became "wrongful" under the meaning of the 1980 Convention.

** Be sure to give your Rule 44.1 notice of your intent to rely on foreign law.

*** Ensure that not only are both countries parties to the 1980 Convention, but the Convention is in place between the two countries (*i.e.*, if the foreign country acceded to the Convention, that the U.S. has accepted its accession prior to the wrongful removal/retention, so that a treaty relationship exists). You can find a status table on the link provided at the top of this outline.

Respondent's Case

Exceptions to returning a Child under the 1980 Convention:

1) Consent – Article 13(a) – did the Left Behind Parent have the intent to let the child travel for an indefinite or permanent time period?
2) Acquiescence – Article 13(a) – a subsequent formal position taken by the Left Behind Parent that shows acquiescence to the child's removal or retention (*i.e.*, formal statement like testimony; written renunciation of rights; consistent attitude over a significant period of time)
3) Mature Child's Objection – Article 13 (objection may be discounted if the child was coached or unduly influenced)
4) One Year Passed (since the wrongful retention or removal) and the Child is Settled – Article 12; there is no "tolling" of this one-year timeframe (*Lozano v. Alvarez, 133 S.Ct. 2851 (2013)*)
5) Human Rights Exception – Article 20 – meant to be restrictively applied on the "rare" occasion when returning a child would utterly shock the conscience of the court or offend all notions of due process
6) Grave Risk of Harm – Article 13(b) – risk to the child if returned (the language of Article 13(b) also includes that the child would also otherwise be placed in an intolerable situation if returned); see the Hague Conference's Guide to Good Practice on Article 13(b)

Other Issues

Article 18 – "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

Undertakings – A court, in deciding whether a child must be returned to its habitual residence, may make that return contingent upon certain "undertakings" by the Left Behind Parent. Conditions should be limited in scope. There is concern over whether the habitual residence/foreign court will enforce these undertakings. (See also, Saada v. Golan)

Access Claims

No provisions for the judicial enforcement of access rights in the 1980 Convention. Some federal Courts (despite ICARA's concurrent jurisdiction provisions) have ruled that neither the Convention nor ICARA provides for federal courts to exercise

jurisdiction over access claims. Practitioners should refer to the UCCJEA to see the relationship between custody/access claims and that interplay with the 1980 Convention to protect a parent's rights of access.

Judges Newsletter Contribution 2018
By Melissa Kucinski[1]

Lessons from the United States to Make Mediation More Available to Global Families

Family Mediation in the United States

In 2001, the U.S. Uniform Law Commission (ULC) finalized its Uniform Mediation Act (UMA), defining mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[2] This definition summarizes the consensus among U.S. mediators, and while different models have emerged over the years, the predominant mediation practice in the United States continues to revolve around a neutral person[3] who acts as facilitator between disputing parties through a truly voluntary process.[4] The UMA also solidly confirms that mediation communications are privileged and not to be used in any formal proceeding,[5] with only few exception,[6] and that mediators are prohibited from making any report, assessment, evaluation, or recommendation regarding the mediation.[7]

Proximate in time to the ULC codifying certain fundamental mediation principles in the United States, the Association for Family and Conciliation Courts (AFCC) and the American Bar Association (ABA) were jointly developing standards for family mediators. These model rules for family mediators focus on the need for educated mediators <u>and</u> an educated public.[8] Not only should mediators be qualified by education and training to undertake their role, but the mediator has an obligation to ensure that the parties to the mediation are equally educated, so that they can voluntarily choose mediation, end the mediation whenever it no longer addresses their needs, and understand what happens throughout the mediation so they can make appropriate and informed decisions.

At the end of 2018, eleven U.S. territories have adopted the UMA.[9] Other U.S. states may already have existing laws regulating the practice of mediation, making the UMA duplicative for those states. While the AFCC and ABA's model standards are only instructional, most U.S. family mediators abide by its basic principles. Mediation itself is practiced as a fluid skill, and each mediator has his or her own style and way of engaging with the parties. Without any mediator credentialing in the United States, each mediator has a different background and is free to show his or her unique inherent personality traits. In the United States, therefore, mediation may be practiced differently depending on the selection of the mediator, giving options for families to seek out a mediator whose style and personality fits their needs. U.S. family mediators also have different training and education. The ABA and AFCC model standards urge mediators to ensure they are competent to handle each case the mediator undertakes, but there is no definition of what makes a family mediator "competent." Any individual can practice mediation in the United States,

and consumers are left to select a mediator based on their own research and needs. In the U.S., the only restriction for holding oneself out as a mediator involve those mediators who accept cases from a roster, typically associated with court-referred cases or referrals through nonprofit or mediation organizations. This lack of defining a mediator's background has perpetuated the view that mediation is a skill, not a profession. Accordingly, most "mediators" in the United States are in dispute resolution professions, such as lawyers or counselors, each bringing their unique professional style to the mediation process.

Challenges with Ensuring Widespread Access to Cross-Border Family Mediation in the United States

When it comes to defining consistent standards for cross-border mediation and a creating a trained pool of cross-border mediators in the United States, there are some significant obstacles. First, with no consistent nationwide definition of the ideal background for family mediators, it is difficult to define the optimal background for a *cross-border* family mediator. In fact, some within the United States are concerned about rigid mediator credentialing, fearing that by creating training requirements and a performance assessment, then some highly qualified and competent mediators could be excluded from practice. Nonetheless, cross-border family cases have distinct and complex issues that most mediators rarely find the opportunity to address in their routine practice, so advanced training or experience should be encouraged, and mediators who are not competent to handle a case should decline to accept the case. Designing a training curriculum comes with difficulties as well. Since there is a lack of nationwide mediator credentialing in the United States, each family mediator will come to the topic of cross-border family mediation from a different starting point, therefore making it difficult to design a one-size-fits-all advanced training. Cross-border family mediator training may need to be designed on a case-by-case basis, depending on the audience being trained.

In addition to mediator training, there should be separate education for the gatekeepers (those who first interact with a family and ultimately refer the family to mediation) about what comprises a cross-border family case. Both the gatekeepers (such as government offices, courts, judges, lawyers, or counselors) and the mediator need to be able to determine whether a specific family has unique cross-border issues, so that the family can be referred to the proper mediator. Unfortunately, many people overlook issues that require advanced skills for a variety of reason, at times because the family is all one nationality, religion, or culture. Many mediators expect that if a family does not have a clear overt international child abduction issue, then the case can be handled like "any other" family case. This is misleading and dangerous. This excludes cases where there may need to be discussion about abduction prevention, international travel, child relocation, multi-jurisdictional custody, and the costs associated with this cross-border lifestyle. Without being able to determine, at the outset, what complex issues are present in a family's life, the case may be referred to a mediator who lacks sufficient training or experience. This creates the need for a comprehensive

screening and intake protocol. Case screening and intake needs to be consistent, comprehensive, and culturally sensitive, factoring in many variables not necessarily addressed in a typical domestic case intake process. U.S. jurisdictions that already have domestic intake procedures for their cases need to re-assess these processes, because it is otherwise easy to have complex cross-border cases shuffled into basic family mediation programs in courts and organizations that may be mis-handling the cases and wrongly assigning them to mediators who lack the required background to meet their professional and ethical duties to the family.

With more comprehensive case screening, mediators can also assess whether the family may benefit from conducting the mediation, entirely or partially, at a distance. Distance mediation can include use of video conferencing, telephonic mediation, or other electronic communication, to counter-act the difficulties families in the United States may encounter in these cross-border cases. With a large country, expensive travel, difficulty in obtaining travel visas to attend mediation in person, and the potential for criminal arrest warrants related to a child abduction, mediators need to focus on being flexible and creative in structuring processes that will make mediation more widely available, and less exclusive. Distance mediation can also work towards addressing the power imbalances that may exist between disputants who are otherwise afraid of in-person contact. With this flexibility, however, come additional ethical considerations. It may be easy to define a mediator's obligations if the family is meeting in one jurisdiction. It is not as easy to assess what obligations exist when a mediator and the parents are each in different cities, causing confusion as to what law may apply to the mediation process.

Above all, perhaps the most important addition to any successful mediation in the United States is highly trained attorneys. There is a lack of legal training in international family law cases in the United States, including understanding the legal and practical outcomes for these families. With a highly educated lawyer guiding a parent through the mediation process, the mediator can typically get through certain roadblocks much more easily. Because a mediator is not able to advise a parent when that parent may be pursuing an approach that is counter to the law, a lawyer can play a key role in the mediation process, providing the necessary reality checks for the parties, and helping brainstorm creative solutions in complex legal structures, including helping any agreements achieve enforceability in multiple jurisdictions. Some U.S. mediation programs run through courts have begun implementing rosters of attorneys who will represent parties in a limited scope for the mediation alone, which may be much more cost effective and manageable for some attorneys.

Envisioning European Models in the United States

Europe has several successful cross-border family mediation programs.[10] There are some key similarities in the European programs. Mediation sessions tend to be condensed into a short timeframe (two to three full days), and held in person in the city where the child is now located. The case tends to be mediated by two

mediators in a co-mediation model. There may be some cost to the mediation, but the cost is kept fairly minimal to facilitate the mediations occurring in person. For some programs, the parents may even be granted reimbursement for the cost of their travel to conduct the mediation in person.

Unfortunately, these mediation structures tend to be un-workable in the United States. The United States has no unified court, and a Hague child abduction return petition can be filed in any court in the entire United States. With a country that requires a six-hour flight to get from one side to the other, even parents who have domestic cross-border cases, have insurmountable costs, with time out of work, away from their home, and on airfare, hotel, and other transportation costs. The caseload in the United States also includes a high number of indigent families who cannot afford to pay for mediation services, and the case itself is typically costly enough that there are insufficient funds to offer compensation or reimbursement for one mediator, making a co-mediation model difficult to employ. Most judges and lawyers will see relatively few, if any, international family law cases in his or her career. The same holds true for mediators. Most U.S. family mediators do not see the utility in attending expensive trainings, often out of town, for a skillset that they are not likely to use in other parts of their career. Therefore, there needs to be economical web-based trainings available to family mediators, and better understanding that international families have many more complex issues than just child abductions under the Hague Abduction Convention. This also calls for flexibility in designing the mediation process, including the use of online dispute resolution or distance mediation.

There are existing structures within the United States. Nearly every single family court in each state in the United States has a mediation program. The programs differ, at times dramatically, from paid private mediator referral services to free in-house mediation sessions. There may be limitations on the number of sessions or hours that parents can use through a court program. But, the court programs tend to require their family mediators to have certain basic background requirements, including certain basic training. It may be prudent to explore whether a national organization within the United States, like the National Center for State Courts,[11] would consider working with the U.S. family courts to ensure that at least one family mediator per court program or county has advanced cross-border training, and that the courts are properly screening cases to ensure the cross-border family mediator is referred those cases. In addition, court annexed programs may consider using technology to facilitate mediation sessions, particularly when low budget court programs previously refused mediation to families where one parent is overseas, unless that parent travels at his or her own cost.

The United States is also a mixing bowl of cultures, heritages, religions, and backgrounds. You can find nearly every single cultural group in the world within the United States. It is difficult to ensure you have an experienced cross-border family mediator who is sufficiently skilled in all cultures and all languages. It may

be beneficial to ensure mediators, instead, are adequately trained to screen cases, educate themselves about their specific cases, and decline cases for which they are not competent, which often takes some preliminary pre-mediation work on the part of the mediator, and the need to have cases referred early in the family's dispute, so the mediator can structure the process with multiple sessions over a period of time, and not condensed into short stretches, making it possible to consult other experts or mediators throughout the mediation process, as necessary.

Current Resources for International Families Who Seek Out Mediation in the United States

Despite the somewhat significant challenges in the United States, there are advancements towards making high quality mediation services available for international families.

The U.S. Department of State, which serves as the U.S. Central Authority under The Hague Abduction and Adoption Conventions, is able to facilitate access to no-cost mediation with one of three U.S. law schools if an international family expresses an interest, and has an open case with the Central Authority. The law schools typically accept access cases, although one law school has agreed to accept some cases where a left-behind parent is seeking the return of their child. The cases are mediated through the law school's clinical education programs, where law students, who are learning mediation skills, serve as the mediator, alongside a law professor. While this program has some limitations, including the skillset of the student mediator, the limited screening, and the restrictions in caseload, it does offer no-cost services to families where a Hague Abduction case is opened with the U.S. Central Authority.

Likewise, the Office of the Attorney General in California is also working on designing a pilot mediation program for The Hague Abduction cases it handles between California and Mexico. The pilot program is still at its infancy, with the Office of the Attorney General assessing the background criteria for its pilot program mediators, along with determining how to make training, background requirements, and process consistent between California and Mexico so that cases can be co-mediated with one California mediator and one Mexican mediator.

As stated above, nearly every family court in the United States has an established family mediation program. The mediators in these programs already meet basic background requirements and are experienced family mediators. If a more robust screening and intake protocol were designed for these court-annexed programs, along with a widely accessible low-cost training program, these courts could more readily funnel appropriate cases to mediators within their own programs who have an appropriate background to handle the issues common among international families.

Most mediation in the United States, however, remains in the hands of private family mediators. These private family mediators set their own fee structures, with many agreeing to use a sliding scale (*i.e.*, accepting different fees based on the family's ability to pay) or accepting *pro bono* referrals. The ABA, the largest organization of lawyers in the United States, explored the issue of international family mediation through a task force in the years of 2010 to 2015. The task force created internal background standards for international family mediators, and, based on those standards, designed a 40-hour advanced family mediation training, held in November 2013 and again in November 2015, attended by approximately thirty private family mediators across the United States between the two offerings. These mediators were trained in skills ranging from the law, cultural competencies, criminal and immigration issues, online dispute resolution, ethics, and drafting cross-border agreements, among other things. Some mediators who attended the training have begun creating a consortium of their individual private practices, so they could harness their own experiences, and create a U.S. network of skilled cross-border family mediators in different regions across the country.[12]

Finally, International Social Service, with its U.S. branch in Baltimore, Maryland, hosted a conference in June 2018 at the George Washington University School of Law, bringing together a variety of professionals, ranging from lawyers to social workers to the government, to discuss structures that might work within the United States, and plant the seed of building these structures within regions and communities in the country.

Conclusion: Ensuring the United States is Part of the Global Discussion

Above all, the U.S. variety of mediation offerings teaches us that mediation is a flexible process. No two mediations look the same. In fact, each family may require different mediators with different skills and backgrounds, and differently structured processes. With the United States' challenges in designing a nationwide cross-border family mediation structure, we can learn a lot about new and creative avenues for providing mediation as an option to international families. Whether we incorporate distance mediation, technology, or existing structures, such as court-annexed mediation programs, into the broader discussion about what future international family mediation processes look like, a lot can be learned by examining the United States' challenges, and how it has creatively addressed these challenges, making mediation widely available to families within its vast geography. With additional research into comprehensive screening and intake protocols, more cases can be directed to fewer mediators, and processes can be better structured to meet the needs of cross-border families. It may be that any country only needs a small number of highly trained cross-border family mediators, but with the technology and innovation seen in different places within the United States, that may be more than sufficient to serve the number of families. With earlier identification of these international families by courts, lawyers, and the government, mediators will have the flexibility to design a mediation process that incorporates

distance mediation, over multiple time zones, and uses different methods of communication that might be more appropriate for the family. The many challenges within the United States may ultimately prove to be fertile ground for more creative processes to help more families than ever before.

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[2] UMA, Section 2(1), http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act, last accessed 11/22/18

[3] Id. at Section 9

[4] Id. at Section 10

[5] Id. at Section 5

[6] Id. at Section 6

[7] Id. at Section 7

[8] https://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.pdf, last accessed 11/22/18

[9] Ibid. at FN 2

[10] Among the most successful programs are mediation structures through Reunite in the UK (www.reunite.org), MiKK in Germany (www.mikk-ev.de), and IKO in the Netherlands (http://www.kinderontvoering.org).

[11] https://www.ncsc.org (last accessed 11/22/18)

[12] www.globalfamilymediation.com (last accessed 11/22/18)

Prevention is the Best Medicine

By Melissa A. Kucinski[1]

Parental child abduction is a serious and complicated legal issue. If the abduction involves removing a child from the United States, the legal complexity and cost is compounded. Even when laws are in place to secure the prompt return of a child who is abducted overseas, or retained at the end of a limited duration trip, those laws do not always function as expected. Despite the United States having straightforward mechanisms, in its UCCJEA, to register and enforce foreign custody orders, other countries do not have the same if a U.S. custody order were taken overseas. Even if a child is ultimately returned to the United States post-abduction, the child will experience long-lasting harmful effects. It is always better to try to prevent a child abduction before it occurs, and a prepared lawyer can help their client make an assessment as to whether there is a risk of such an abduction, and what to do in order to thwart that act.

Lawyers need to put in place a concrete intake process for new clients. Many lawyers mistake some clients as having purely domestic problems because the family members are all U.S. nationals, such as military families, foreign service families, or families that work for foreign corporations in the United States. Any family that has a connection to another country could have an international family law problem. Even if the connection is purely travel on vacation out of the country, there will be potential future issues with passports, travel permissions, or legal custody decisions that might need to be made while in a foreign jurisdiction. When a lawyer is screening a family for child abduction or retention, that lawyer should focus on two potential avenues of risk. The first involves red flags that relate to a parent's behaviors and statements. The second involves red flags that relate directly to a country, and its laws or lack thereof.[2]

The two key red flags that any lawyer should investigate first, are: (1) whether a parent has previously abducted or attempted to abduct their child, or, (2) whether a parent has threatened to abduct their child (by words or behaviors). The lawyer should also look at whether the parents might have engaged in activities indicating they are planning an abduction (or retention); including, quitting a job, selling a residence, terminating a lease, closing financial accounts, liquidating assets, hiding or destroying important documents, conducting unusual financial transactions, applying for visas or other travel documents for themselves or another family member, and requesting documents like the child's birth certificate, school records or medical file. If the potential abducting parent has also engaged in domestic violence, stalking, child abuse, neglect, or has disregarded existing

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[2] See the Uniform Law Commission's Child Abduction Prevention Act here: https://www.uniformlaws.org/committees/community-home?communitykey=c8a53ebd-d5aa-4805-95b2-5d6f2a648b2a&tab=groupdetails, last accessed 7/12/19

custody orders, they may also be more of a risk to abducting their child. The lawyer should inquire about the ties that each parent and the child have to the United States and to other countries, including financial, family, emotional or cultural ties. The lawyer should ask questions about each parent and the child's immigration status, and their legal ability to remain in the United States. Inquiring further, the lawyer should determine whether the potential abducting parent has been denied citizenship, has forged government documents or provided misleading information to any government entity at any time in the past. Do they use multiple names, and if so, why? There is no one single factor that indicates abduction is a certainty, but a savvy lawyer will be able to make appropriate inquiries and assess whether the facts in a particular case indicate a parent may be a risk of abducting their child, or retaining the child outside of the United States if permitted to travel overseas with that child.

Once a lawyer has a true sense of the family's allegiance and connections, the lawyer should conduct certain research that will give them information on how difficult it would be to return a child to the United States, *if* the other parent abducts that child. This assessment should begin by determining whether the Hague Child Abduction Convention is in place between the United States and the other country. The United States ratified this treaty, which provides for the prompt return of abducted or retained children, in 1988. The treaty, however, is not law between the United States and *all* countries that have also become party to this treaty. Even if the treaty is in place between another country and the United States, it may not function as intended. Some countries have significant impediments to returning children despite the law, whether it is because that country does not have the resources for their courts or government agencies to function, or because its domestic laws do not support the goals of the treaty or the enforcement of the return orders made under the treaty. The U.S. Department of State is obligated, under the Sean and David Goldman International Child Abduction Prevention and Return Act,[3] to publish a yearly report on countries' cooperation in returning abducted or retained children.[4] You should note that child abduction is a federal and state criminal act in the United States. The International Parental Kidnapping Crime Act[5] criminalizes removing a child from the United States in a way that impedes a parent's access to their child, and even criminalizes attempted abductions. However, even if a left-behind parent can convince U.S. prosecutors to press charges and issue a warrant, there may be no extradition with the country where the taking parent now sits. In addition, a lawyer should look to laws in the other country that relates to the child's health (for example, would the child be forced to undergo female circumcision), and wellbeing (for example, would the laws prevent the left-behind parent from contacting the child). Are the other country's laws based on gender or religious presumptions, such as prohibiting a child from exiting a country based on the child or parent's gender, nationality, marital status or religion? The lawyer should do a review of the U.S. Department of State's current list of state sponsors of terrorism, whether the U.S. has a diplomatic presence in the other

[3] Pub. L. No. 113-150
[4] https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html, last accessed 7/12/19
[5] IPKCA 18 U.S.C. § 1204

country, and if the other country is engaged in an active military action or war (and the child would be exposed, or conscripted into service).[6]

If, after an assessment, the lawyer feels that there is sufficient information to warrant concern that a child who exits the United States may not be returned, that lawyer should take pro-active measures to obtain a court order that would work towards preventing any abduction. A court order is the only real mechanism, in the United States, to gain traction in the fight against parental child abduction. A court order can be sent to the U.S. Department of State for enrollment in certain government databases. Depending on the language in the court order, the government can take certain steps to help aid a parent in the order's enforcement. For example, if the order is clear on what parent may and may not apply for a new or duplicate U.S. passport for the child, the U.S. Department of State can make note so it properly assesses any future passport applications. If there is a clear prohibition on the child's travel outside of the United States, then the Department of Homeland Security can enroll the child in its Prevent Departure program[7], which should flag the child at a border crossing. Regardless, the court order must be clear, concise, and easily understood with the assumption it may be read by a foreign judge or a lay person, such as law enforcement or border control. It should avoid vague language such as "reasonable access" or "Greater New York City metropolitan area," and should not leave discretion to the parents, such as "the child is prohibited from leaving the United States, until further court order *or by agreement of the parents.*" The court order should make a clear statement as to the court's authority to issue the order, citing to the UCCJEA provision in that state, reference to due process standards being met, and define the child's habitual residence, so that any foreign jurisdiction has clear guidelines on which to proceed. The order should consider giving authority to U.S. law enforcement to take appropriate action to stop a child's abduction, or enforce the terms of the order. On a continuum of least restrictive to most restrictive, the court could order an exchange of information between parents about the child's future travel plans, location, and travel dates; a restriction on who holds the child's passports and a prohibition on obtaining new passports[8]; restrictions on the child's travel outside of the United States; cash or security bonds put into escrow to fund future litigation at the time of a child abduction; requirement that the parents obtain a mirror order in the foreign jurisdiction before any travel is permitted; limited or supervised access between the parent and child; or no access between the parent and child. Nothing is a replacement for consulting competent foreign legal counsel prior to presenting a proposed order to a judge, or entering into a voluntary parenting agreement. Foreign counsel can aid you in what language may need to be incorporated for easier future enforcement or litigation in that country.

Given the comparatively low numbers of Hague Abduction cases that are filed in the United States each year, it is more likely that a family law practitioner will encounter an

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[6] https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction.html, last accessed 7/12/19

[7] https://www.cbp.gov/travel/international-child-abduction-prevention-and-return-act, last accessed 7/12/19

[8] https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/prevention/passport-issuance-alert-program.html, last accessed 7/12/19

abduction prevention case than a post-abduction case where the treaty applies. Any lawyer who works with one of these at-risk families should familiarize themselves with the U.S. Department of State[9] resources, the National Center for Missing and Exploited Children[10], and The Hague Conference on Private International Law's child abduction resources[11] and its child abduction caselaw database.[12] Consider consulting a lawyer who routinely works with international families as a consultant or co-counsel, or using a lawyer as an expert witness to testify about the laws, risk factors and prevention measures to present a clear and organized case to your judge. Finally, do not overlook that it may be *your* client that exhibits certain risk factors inherent with a child abductor. If you, after your due diligence, determine your client may be a risk of abducting their child, be sure to advise him or her appropriately and ethically, including about the criminal nature of parental child abduction.

[9] https://childabduction.state.gov/, last accessed 7/12/19
[10] www.ncmec.org, last accessed 7/12/19
[11] https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction, last accessed 7/12/19
[12] www.incadat.com, lat accessed 7/12/19

What You Assume Could Hurt You:
Basic Principles to Help you Avoid Common
International Family Law Pitfalls

By Melissa A. Kucinski[1]

Principle 1: The "Hague Convention".

There is more than one "Hague Convention," including more than one treaty that applies in "family law" cases. A family lawyer may be equally likely to refer to the following "Hague Conventions," all of which relate to different aspects of family law: the Hague Child Abduction Convention[2], the Hague Child Support Convention[3], the Hague Child Protection Convention[4], and the Hague Adoption Convention[5]. Be precise when you speak, particularly when representing this information to a judge, who may also not realize there are multiple "Hague Conventions," some of which are not yet law in the United States (like the Hague Child Protection Convention).

In addition to the "Hague Conventions" that relate to family law, there are additional "Hague Conventions" that family lawyers may need to use as part of their cases. These include: the Hague Apostille Convention[6], the Hague Service Convention[7], and the Hague Evidence Convention[8].

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[2] The 1980 Hague Abduction Convention – https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction (ratified by the United States in 1988)

[3] The 2007 Hague Child Support Convention - https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support (ratified by the United States in 2016)

[4] The 1996 Hague Child Protection Convention - https://www.hcch.net/en/instruments/conventions/full-text/?cid=70 (signed by the United States in 2010, but not ratified as of the date of these materials)

[5] The 1993 Hague Adoption Convention - https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption (ratified by the United States in 2007)

[6] The 1961 Hague Apostille Convention - https://www.hcch.net/en/instruments/specialised-sections/apostille (acceded to by the United States in 1981)

[7] The 1965 Hague Service Convention - https://www.hcch.net/en/instruments/conventions/specialised-sections/service (ratified by the United States in 1969)

[8] The 1970 Hague Evidence Convention - https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence (ratified by the United States in 1972)

Principle 2: Understanding Treaty Law.

The Hague Conventions are treaties. Treaties, for the most part, do not decide the underlying issues in your family law case. Treaties will not resolve which parent should have custody of a child or the amount of child support one parent should pay to the other. Analyzing the treaty is the first step in your legal analysis. The treaty may help you determine who decides the underlying issues in your family law case, or what country's laws should apply. Treaty law involves a lot more than understanding the content of the treaty, itself, which for some of the family law treaties will require you refer to domestic law, not the treaty's text. Understanding when a treaty is actually the law in the United States, when it applies and does not apply, and its limitations, are all important to analyzing a particular treaty for your case.

Principle 3: Knowing the law can get you only so far.

You need to know practical resources, and where to access information to be an effective advocate. The U.S. Government will have offices that function as the point of contact or "Central Authority" for certain treaties. The Department of State acts in this capacity for some treaties, but the Office of Health and Human Services or the Department of Justice does for other treaties. Some of the work on a case will involve working within the structure of these offices in the United States, or their complimentary offices in foreign countries. You may need to access certain resources within these offices, including forms, reports, and services. The Hague Conference on Private International Law also has significant resources, including profiles by countries after that country joins a treaty, status tables of treaty parties, guides to good practice, and explanatory reports that serve as commentary from the drafters of the treaty. It also maintains a database of international case law on child abduction cases (www.incadat.com). There remain other international NGOs that can provide services on the ground, or guidance and connections to other resources, like the National Center for Missing and Exploited Children (www.ncmec.org) or International Social Service (www.iss-usa.org). It can be daunting to know where to look for resources, and there is no single database that helps you track down precisely what you need and where. With turnover of the employees in certain offices, any old telephone numbers or email addresses may be obsolete, so it benefits you to connect with someone who works routinely in this field and with all the relevant offices and contacts.

Principle 4: An "international family" may not always be obvious.

Most practitioners mistake "international families" that need special considerations for purely domestic cases because they do not understand basic international family law principles. International families are not just families that have parents of different nationalities. Lawyers will need special experience in "international family law" to work with a variety of families that many family

lawyers will mistake as being a "normal" or "typical" domestic case. This includes military families, diplomats, or families with resources that travel or have a home overseas. If you cannot issue spot properly, you may miss certain legal issues that need to be addressed. It is also important to remember that nationality has little role to play in an international family law case from a U.S. perspective. For example, two U.S. nationals living overseas, despite being American, may not be able to use the U.S. courts to resolve their family law dispute. This may differ for other countries, which may provide for jurisdictional bases to bring suit based on nationality.

Principle 5: There are other laws related to child abduction that are NOT the "Hague Convention".

Besides mistaking what the Hague Abduction Convention does, and does not do, many practitioners forget to look elsewhere for legal guidance. Child abduction may be a criminal act, under state or federal law. There is a federal statute called the "Goldman Act" that codifies certain measures the government can take to pressure other countries to comply with their obligations to return children. There are statutes that can put measures in place before child abduction occurs. Lawyers may need to look at passport laws in the United States and in other countries, nationality laws, parentage laws, immigration laws, immunity law and extradition treaties. Even the UCCJEA, the custody jurisdiction statute in the United States, can prove a useful tool, if used correctly, to enforce foreign custody orders to secure the return of children, short of needing to use the Hague Abduction Convention.

Principle 6: The Problem with Foreign Order Recognition.

Never assume what we do in the United States will create a court order that will be valid and recognized in a foreign jurisdiction. This is one of the times when you must consult legal counsel in the other country, and the best advice is to consult them early and often. If you consult foreign counsel early, they can help guide you as to what language and elements should be incorporated into your court order or agreement that will improve your chance of having that order (or agreement) recognized in the other country. There may be processes in other countries where your U.S. court order can be mirrored. There may be none. Do not be surprised if the process, if one exists, includes the foreign court re-visiting the terms of your agreement or order and conducting its own analysis of what is in the child's best interest.

The UCCJEA in International Cases

By Melissa A. Kucinski[1]

1. What is the UCCJEA?

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in Article 5-A of the New York Consolidated Laws – DOM, was enacted in 2002 in the State to replace its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA was originally drafted by the Uniform Law Commission[2] to address the concern of conflicting custody orders among states, and the growing issue of litigants forum shopping for a sympathetic court to resolve their custody dispute. In 1997, the Uniform Law Commission revised the UCCJA considering conflicting provisions between it and the federally enacted Parental Kidnapping Prevention Act (PKPA), along with years of inconsistent case law.

2. Why would it apply to international cases?

Clearly, as families became more mobile, the need for clear guidelines on which jurisdiction has authority to issue an initial custody order, modify an existing order, and enforce existing orders, became ever more apparent. NY DOM LAW § 75-D specifies that the UCCJEA applies in a near-equal way to foreign countries, as it would to sister-states. Furthermore, so long as foreign custody orders were made "under factual circumstances in substantial conformity with the jurisdictional standards of this article" [of the UCCJEA], the foreign custody order must be recognized and enforced under the provisions of the UCCJEA. The only real caveat where a court need not treat a foreign country as a sister-state is if the "child custody law of a foreign country violates fundamental principles of human rights." (NY DOM LAW § 75-D).

3. Establishing Initial Child-Custody Determinations

One of the most salient features of the UCCJEA is that it provides a prioritized means of determining what jurisdiction has authority to issue an initial-custody order. While the UCCJA provided for four independent and concurrent bases for jurisdiction, the UCCJEA prioritizes a child's home state[3] as the means of determining which state or country may issue this initial child-custody order.

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[2] See www.uniformlaws.org

[3] NY DOM LAW § 75-A defines home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the

a. Foreign Child-Custody Determinations & the Issue of Substantial Conformity

While the language of the UCCJEA may be somewhat clunky, the act is clearly written to ensure that a parent does not remove his or her child from the United States, land in a foreign country, utilize the foreign country's laws to immediately file suit for custody, and then be able to usurp the authority of a U.S. court to issue a custody order. In that regard, the UCCJEA applies to foreign countries that have issued their custody orders under facts that are in "substantial conformity" with the jurisdictional requirements of the UCCJEA. Where some countries may have domestic laws that permit custody suits based on a child or parent's nationality, or mere physical presence for a brief timeframe, the UCCJEA creates a scheme whereby the child must have more connections (a six-month home state, or, if no home state, then some substantial connections beyond mere physical presence[4]). This provision permits a U.S. court to accept jurisdiction even if a foreign court may have already taken up the case under its domestic law.

b. Domestic Child-Custody Determinations and the Issue of Temporary Absence from the Home State

In perpetually mobile families, it may be difficult to determine a child's home state. While a several month summer vacation to Europe may clearly be an absence from a child's home state in New York, is a 12-month residence in a foreign country with a parent who is serving a 12-month tour in the U.S. military a temporary absence? These types of situations are less clear-cut. Would it be clearer if the entire family moved to Germany for a 3-year stint for the father's military service? Would it also matter if the family sold its house in the United States before moving? These situations are very fact intensive, and practitioners should counsel clients accordingly.[5]

c. Six Month Extended Home State Provision

The UCCJEA provides that home state jurisdiction continues for six months after a child has been removed from the jurisdiction, so long as a parent (or person acting as a parent) continues to live in the state (or country). This becomes particularly helpful if a parent absconds with a child to outside of the United States but puts the onus on the parent that remains in the United States to act somewhat expeditiously in ensuring they meet the statutory timeframe, lest that parent possibly lose home state jurisdiction to a new country.

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child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period."

[4] See NY DOM LAW § 76

[5] For example, see Maryland Court Case of *Garba v. Ndiaye*, 277 Md. App. 162 (2016) where a parent who moved routinely with the child for one year job postings for a job with the United Nations was only temporarily absent from the home state of Maryland with each posting.

d. The Foreign Country Declining Jurisdiction

Recognizing that different countries have different jurisdictional bases for issuing an initial child-custody determination, we must also recognize that some countries may have no legal basis for issuing a custody order, even if, under the UCCJEA, the United States would deem that foreign country to be the child's home state. NY DOM LAW § 76(1)(b)(c) allows for New York to otherwise take up the issue of custody jurisdiction if the foreign country that would otherwise have jurisdiction as the child's home state declines to exercise its jurisdiction on the basis that New York is a more appropriate forum.

4. Modifying an Existing Child-Custody Determination

a. The Problem with Continuing Exclusive Jurisdiction

As children age, and their circumstances change, it may become necessary to modify an existing custody order. The UCCJEA provides a mechanism to ensure that mobile families do not take up further custody litigation in other jurisdictions, resulting in competing, and, at times, conflicting custody orders. NY DOM LAW 76-A provides for New York's continuing and exclusive authority to modify its initial custody order as long as a child, a parent of the child, or any person acting as a parent of the child continue to have a significant connection the State. This provision is helpful in cases of families moving state-to-state, where each state has some version of the UCCJEA. It is less helpful with a family whose mobility spans international borders. For many countries, if a child moves, despite a parent remaining in the jurisdiction issuing the initial custody order, the authority to modify that custody order typically moves with the child. In the United States, after a child has been absent from the state that issued the initial custody order for some time, and that state deems itself to no longer be a convenient forum to litigate a custody modification, that state can decline jurisdiction, but this is different than custody jurisdiction following the minor child's residence. It is not uncommon for a U.S. state to deem it to have the authority to modify its existing custody order simultaneous with a foreign country also determining it has the authority, under its domestic laws, to modify the same custody order, resulting in competing custody orders, yet again.

5. Registering and Enforcing a Foreign Child-Custody Determination

One of the most helpful mechanisms in the UCCJEA for foreign parents is our streamlined registration and enforcement procedure. With small exception, a U.S. court will register a final custody order from another jurisdiction that was issued in a manner in substantial conformity with the UCCJEA, so long as due process standards were met. Once registered and a quick 20-day turnaround, that foreign custody order can be enforced expeditiously, and with few grounds to contest it.

a. Our Expedited Procedure

Under NY DOM LAW § 77-D, counsel can send the following items to its local courthouse to register the foreign order: a document requesting that the foreign order be registered, two copies of the order (one copy being certified), a statement that this is a final (not modified) order, the name and address of the person seeking its registration, and the name and address of any person awarded custody under the order being registered. The court clerk should generate a notice and send it to the other person in the case, giving that person 20 days to contest the registration under the very narrow grounds already noted.

i. Getting an Apostille

The UCCJEA requires a "certified copy" of the foreign court order be filed with the clerk's office to register it. For many foreign courts this "certified copy" will take the form of an authentication called an Apostille. While many lawyers reference the "Hague Convention," referring to the 1980 Hague Child Abduction Convention, there are actually a great number of Hague Conventions. One is a Convention that provides for authentication of documents through an Apostille process.[6]

ii. How do we know the order is final? The issue with some countries requiring a judicial determination that it is final

The foreign order that you are registering needs to be a final order. In other words, you cannot register a prior order that has been modified or superseded. Furthermore, the order is not final if you are waiting on a resolution through the appellate process. In the United States, when you receive a court order, the order, on its face, does not always state, "this is a final order." Each jurisdiction will have its own rules on how to appeal, and the length of time that must pass before a litigant waives his or her right to appeal. In some countries, courts may require a formal request for a subsequent court ruling that clarifies its order is final. Counsel should be certain that any order is final, and all procedures are followed in the other country before bringing that order to the U.S. court to be registered.

b. Enforcing the foreign order

A foreign court order that is properly registered can be enforced in our courts in an expedited fashion[7]. Also recognize that the power to enforce a foreign order does not necessarily give one the power to modify it in our courts. This is a contradictory concept to some foreign courts, where a request to enforce a foreign order is often met with a re-examination of the child's best interests, and possible modifications to the order before it is enforced.

c. Human Rights Issues

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[6] See https://www.hcch.net/en/states/authorities/details3/?aid=353 for information on the US Competent Authority under the Hague Apostille Convention

[7] See NY DOM LAW § 77-G

The language in the UCCJEA permits our state to refuse recognition of a foreign custody order because that country's custody laws violate human rights. The 1980 Hague Child Abduction Convention also includes language that invokes a human rights exception to returning an abducted child. The U.S. Department of State issued a Federal Register notice in 1986 that elaborated on the "human rights" language of that treaty.[8] The U.S. Department of State used the language that the laws of the other country should "utterly shock the conscience of [our] court" or "offend all notions of due process." This is a high threshold. The comments in the UCCJEA further focus a court on scrutinizing the other country's child custody laws, *not* other aspects of the foreign legal system, and stresses that this provision is invoked in only the "most egregious cases."[9]

d. Due Process Issues – The Hague Service Convention

In that due process is an undeniable requirement in recognizing and enforcing a foreign custody order, practitioners should become familiar with yet another Hague Convention – the Hague Service Convention. The US Supreme Court held that courts must apply the Hague Service Convention where service must occur abroad (and the other country is a treaty partner with the United States under this treaty).[10]

e. It has nothing to do with the 1980 Convention

In referencing a variety of "Hague Conventions," note that the UCCJEA has nothing to do with the 1980 Hague Child Abduction Convention. Lawyers may frequently misconstrue the 1980 Hague Child Abduction Convention as deciding which country has custody jurisdiction. <u>It does not</u>. Some may believe that a country's failure to be a State Party to the 1980 Hague Child Abduction Convention means that the United States will not recognize that foreign country's custody orders. That is, for the most part, wrong. The 1980 Hague Child Abduction Convention only serves to return (or not) a child to his or her habitual residence[11]. It is a one-trick-pony and does not determine jurisdiction, nor resolve custody.

f. But it will eventually have something to do with the 1996 Convention

There is, however, a "Hague Convention" that will address custody jurisdiction – this is the 1996 Hague Child Protection Convention. Unfortunately, while the United States signed this treaty in 2010, it is not yet law in the United States. The United States has not finalized the ratification process for this treaty, and as of this article, it is unclear as to when, if ever, it will be ratified.

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[8] Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10,494, 10,510 (1986)

[9] See Comment to Section 105 of the UCCJEA (1997) at www.uniformlaws.org

[10] *Volkswagenwerk v. Schlunk*, 486 US 694 (1988)

[11] See https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction to learn more about the 1980 Hague Child Abduction Connvention

g. The problem with foreign jurisdictions that won't issue orders (if the parents reach an agreement)

Finally, as mediation and other forms of alternative dispute resolution take hold, causing more parents to enter into voluntary agreements (as opposed to judicially mandated custody arrangements), practitioners should be wary. The UCCJEA allows for registration and enforcement of "child-custody determinations." This term of art, as defined in the UCCJEA equates to a custody order. In some countries, custody orders are a thing of the past when two willing parents reach an amicable settlement agreement. This will negate the ability to use the UCCJEA's expedited registration process when there is no court order forthcoming from that foreign country.

h. Using the Easy Enforcement Procedure to Return Abducted Children

While many practitioners see the 1980 Hague Abduction Convention as the primary mechanism for returning a child abducted from that child's usual place of abode, you should not overlook using the easy enforcement mechanisms available under the UCCJEA to secure the same relief. If the 1980 Hague Abduction Convention does not fully apply[12] or when the UCCJEA process is a more efficient option,[13] you should consider using the UCCJEA either exclusively to secure the child's return, or in tandem with a 1980 Convention proceeding if it is available to you.

[12] The 1980 Convention may not fully apply if the United States is not a treaty partner with the other country, or if the left behind parent obtained a custody order from the home country post-abduction.

[13] Proceedings under the 1980 Convention may be prolonged, be costly, require significant experts, and there are more exceptions (or defenses) available to a Taking Parent than in a UCCJEA enforcement proceeding.