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Think Fast: Post Judgment Considerations in Hague Child Abduction Cases

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THINK FAST: POST JUDGMENT CONSIDERATIONS IN HAGUE CHILD ABDUCTION CASES

By: Timothy L. Arcaro¹

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I. INTRODUCTION

A fundamental aspect of our legal system is that there exists, should a party wish to take advantage of it, a procedural framework by which a court's decision-making process may be reviewed for accuracy by higher tribunals. Litigation under *The Hague Convention on the Civil Aspects of International Child Abduction*² is no different – a party that does not prevail in a lower court proceeding may also seek post judgment relief. The difference is the expeditious nature of Hague Abduction proceedings which proceed more swiftly through the justice system than almost any other contested child custody-related matter from initiation of the litigation to entry of a final order.

In a practical sense, post judgment proceedings in Hague Abduction cases may offer insignificant remedies where time is of the essence in resolving international child abduction cases. A party must carefully consider, prepare for, and plan post judgement strategies both before and

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² Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 98 [hereinafter Abduction Convention or Convention].

during the lower court proceedings because the effectiveness of potential remedies will rest on factors such as timeliness, substantive law, and economic considerations. Legal remedies may not provide the practical relief a litigant seeks in the time within which the litigant needs it, given the speed at which many Hague Convention cases proceed. Although procedural rules provide the blueprint for post judgment review, they are frequently subordinated to the Convention mandate of resolving international abduction cases as expeditiously as possible to limit the harm suffered by child victims.

This article will focus on post judgment considerations in the context of federal district court proceedings, which frequently parallel the procedural aspects of U.S. state court proceedings.³ Part I of this article will examine the Abduction Convention structure and function to contextualize the interplay of return cases and post-judgment considerations. Part II will examine the flexible notions of Due Process and post-trial relief in Hague proceedings at the federal district court level. Part III will examine post-judgment access remedies and practical considerations in establishing custodial rights. In Part IV, I will share my conclusions on post-judgment relief in the Hague Abduction cases.

II. CONVENTION STRUCTURE

A. Overview of the Hague Abduction Convention and the International Child

The Hague Convention on Civil Aspects of International Child Abduction (the “Hague Convention”) is a private international treaty⁴ that provides civil remedies to facilitate expedient resolution of international child abduction cases among member states.⁵ The primary objectives of the Convention are to promptly return abducted children to their country of

³ See generally Mark R. Kravitz & Erika L. Amarante, *Key Differences Between Civil Appeals in the Second Circuit and Connecticut's Appellate Courts*, 76 CONN. B.J. 149, 150-53 (2002) (illustrating comparative differences between federal court appellate procedures).

⁴ “The traditional purpose of the Hague Conference on private international law which is, according to Article 1 of its statute, to ‘work for the progressive unification of the rules of private international law.’ The reference to “private” law has generally been felt to exclude criminal law which is normally classified as public law.” Preliminary Document No. 1 of November 1992 for the attention of the Special Commission of January 1993 drawn up by Adair Dyer, First Secretary at the Permanent Bureau, Introduction 1, Commentary.

⁵ See Abduction Convention, *supra* note 2. See generally Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1228-29 (2014) (addressing purpose of Abduction Convention).

habitual residence⁶ and to support and respect access rights⁷. The Convention has become a vital tool in combating international parental abduction even though it provides no criminal sanctions.⁸ The Convention was implemented in the United States through the International Child Abduction Remedies Act (“ICARA”) and became effective on July 1, 1988.⁹ The remedies set forth in ICARA are provide in addition to remedies that may exist within other laws.¹⁰

The Convention requires each contracting state to designate a Central Authority to discharge the administrative duties imposed by the Convention.¹¹ These duties include assisting left-behind parents with access to Convention remedies, communicating with other Central Authorities, communicating with national judges on specific cases, and attempting to amicably resolve cases where possible.¹² Effective communication between Central Authorities enhances the important task of providing relevant case developments in a timely manner.¹³ Central Authorities play a critical role in the overall operation of the Convention given their multiple

⁶ See Abduction Convention, *supra* note 2, at art. 1(a). These cases will be referred to as “Return Cases,” in which a petitioner is seeking a voluntary return of an abducted child in a member state or is seeking a compulsory return through compulsion of law.

⁷ See Abduction Convention, *supra* note 2, at art. 1(b). These cases will be referred to as “Visitation Cases,” in which a petitioner is seeking to orchestrate or enforce rights of access to a child but not force the child’s return. See also Abduction Convention, *supra* note 2, art. 21.

⁸ See generally *Montoya Alvarez*, 134 S. Ct. at 1224 (2014) (applying Abduction Convention in custody arrangement).

⁹ See Permanent Bureau, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*:

United States Country Profile, HCCH 1, 10 (Nov. 2012), https://assets.hcch.net/upload/abduct2012cp_us.pdf; see also International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 22 U.S.C.S. §§ 9001-11 (2018)) (noting ICARA is procedural in nature and provides no additional substantive remedies beyond those expressly within Convention).

¹⁰ See 22 U.S.C.S. § 9003(h) (LEXIS through Pub. L. No. 115-193) (discussing full faith and credit judgment pursuant to Convention).

¹¹ See Abduction Convention, *supra* note 2, at art. 6 (requiring each contracting state to establish at least one (1) Central Authority, but “Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extend to their powers”).

¹² See generally *Guide to Good Practice, Part I – Central Authority Practice*, HAGUE CONF. ON PRIV. INT’LL. (2003), https://assets.hcch.net/upload/abdguid_e.pdf [hereinafter *Guide to Good Practice, Part I*].

¹³ See *Conclusions and Recommendation of the Inter-American Expert Meeting on International Child Abduction Co-Organised by the Inter-American Children’s Institute and the Hague Conference on Private International Law*, HCCH 1 (Nov. 10, 2006), https://assets.hcch.net/upload/concl_iin_e.pdf (identifying time periods in communication related to cases under Convention).

responsibilities.¹⁴ Importantly, Central Authorities may be able to effectuate an abducted child's voluntary return without litigation or alternatively assist a parent with the implementation of judicial procedures.¹⁵

Central Authorities can assist left-behind parents with each of the two types of cases that technically fall within the Convention's purview: "return cases" and "access cases." Return cases involve a left-behind parent seeking to enforce custodial rights by returning an abducted child to the child's habitual residence.¹⁶ Access cases involve a left-behind parent's effort to organize or enforce visitation rights between the left-behind parent and a child taken to a member state.¹⁷ Access remedies are not available in U.S. Federal courts, but may be presented in state court proceedings where the child's best interests can be fully explored.¹⁸

Importantly, ICARA confers concurrent jurisdiction in Federal court and U.S. state courts giving the petitioner the choice of forum in return cases.¹⁹ Federal courts have generally deferred to state court jurisdiction on access rights set forth in Article 21 given the Domestic Relations Exception

¹⁴ See Abduction Convention, *supra* note 2, at art. 7. A Central Authority may fulfill its obligations under Article 7h, to take or cause to be taken an action to protect the welfare of children by:

alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger; advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child; providing the requested State with a report on the welfare of the child; encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights

See Permanent Bureau of the Hague Conference, *Report of the Fifth Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility Measures for the Protection of Children 30 October-9 November 2006*, HCCH, <https://assets.hcch.net/upload/abduc97e.pdf>; see also FED. JUD. CTR., INT'L LITIG. GUIDE 10-11 (2012), <https://www.fjc.gov/sites/default/files/2012/HagueGuide.pdf> [hereinafter FED. JUD. CTR.].

¹⁵ See generally Rita Wasserstein Warner, *International Child Custody and Abduction Under the Convention*, 23 INT'L L. PRACTICUM 50 (Spring 2010) (explaining administrative assistance under Convention as potential remedy for voluntary return of children). This remedy would not require the initiation of legal process but instead the Central Authority would work as the conduit between the parents in an effort to resolve the case without judicial proceedings. See *id.*

¹⁶ See Abduction Convention, *supra* note 2, at art. 1(a).

¹⁷ See Abduction Convention, *supra* note 2, at art. 1(b), art. 21.

¹⁸ See Abduction Convention, *supra* note 2, at art. 21; *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (stating child's best interests well served when custody decisions are made in habitual residence states); *Cantor v. Cohen*, 442 F.3d 196, 199-200 (4th Cir. 2006) (recognizing purpose of Convention).

¹⁹ See 22 U.S.C.S. § 9003(a) (LEXIS through Pub. L. No. 115-193). For purposes of this article, I have chosen to focus my analysis on federal court proceedings in return cases.

and ongoing state court jurisdiction over child custody matters.²⁰ A prima facie case for return under the Convention requires the petitioner to establish that the petitioner had rights of custody that were being exercised²¹ when breached by the child's wrongful removal or retention²² from the child's habitual residence.²³ There is a temporal element to each of the factors that must exist to support a return.²⁴ These elements must be established by a preponderance of evidence in the U.S.²⁵ which compels the child's return "forthwith" unless one of the narrow defenses is applicable.²⁶ The Convention only applies to children under the age of 16.²⁷ There are limited defenses to petitions for return, which are set forth in Article 12²⁸, Article

²⁰ See *In re Burrus*, 136 U.S. 586, 593–94 (1890) (holding right to control and possess belongs to state laws and not laws of United States).

²¹ See Abduction Convention, *supra* note 2, at art. 3(a); FED. JUD. CTR., *supra* note 14, at 20.

²² See Abduction Convention, *supra* note 2, at art. 3; FED. JUD. CTR., *supra* note 14, at 20.

²³ See Abduction Convention, *supra* note 2, at art. 4; FED. JUD. CTR., *supra* note 14, at 20.

²⁴ See *Redmond v. Redmond*, 724 F.3d 729, 738 (7th Cir. 2013) ("A Hague Convention case asks the following questions in this order: (1) When did the removal or retention of the child occur? (2) In what State was the child habitually resident immediately prior to the removal or retention? (3) Was the removal or retention in breach of the custody rights of the petitioning parent under the law of the State of the child's habitual residence? and (4) Was the petitioning parent exercising those rights at the time of the unlawful removal or retention?"); see also *Karkkainen v. Kovalchuk*, 445 F.3d 280, 287 (3d Cir. 2006) (same); *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir.2001) (same).

²⁵ See 22 U.S.C. § 9003(e)(1)(A) (LEXIS through Pub. L. No. 115-193).

²⁶ See 22 U.S.C.S. § 9001(a)(4) (LEXIS through Pub. L. No. 115-193) ("Children who are wrongfully removed or retained . . . are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.").

²⁷ See Abduction Convention, *supra* note 2, at art. 4.

²⁸ See Abduction Convention, *supra* note 2, at art. 12. Article 12 states,

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, 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 judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

13²⁹, and Article 20³⁰ of the Convention.³¹ The most utilized defense in return cases is Article 13(b) which is also referred to as the “grave risk of harm defense” and must be established by clear and convincing evidence.³² Courts have made clear that Convention defenses are the exception and not the rule when it comes to granting return petitions.³³ Convention defenses were intentionally drafted to have narrow application in return cases.³⁴ When a defense is established, the court’s duty to return the child to the state of

²⁹ See Abduction Convention, *supra* note 2, at art. 13. Article 13 of the Convention states the following:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Id.

³⁰ See Abduction Convention, *supra* note 2, at art. 12 (dealing with judicial or administrative authority). The child’s return under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. *See id.*

³¹ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (“All four of these exceptions are ‘narrow’”); ELISA PÉREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION ¶ 34 (1982), <https://assets.hcch.net/upload/expl28.pdf> (“[The exceptions] are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.”); *see also id.* at ¶ 116 (“it cannot be inferred . . . that the exceptions are to receive a wide interpretation.”) [hereinafter PÉREZ-VERA REPORT].

³² See 22 U.S.C.S. § 9003(e)(2)(A) (LEXIS through Pub. L. No. 115-193) (“In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing— by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies”); *see also* Kevin O’Gorman & Efrén C. Olivares, *The Hague Convention on the Civil Aspects of International Child Abduction: An Update After Abbott*, 33 HOUS. J. INT’L L. 39, 46 (2010) (establishing burdens of proof in Hague cases under ICARA); 22 U.S.C. § 9003(e)(1)(A) (LEXIS through Pub. L. No. 115-193) (stating burden for return petition is preponderance of evidence regardless of filing in other court).

³³ See *Krefter v. Wills*, 623 F. Supp. 2d 125, 135 (D. Mass. 2009) (“[T]he bar for proving the ‘grave risk’ exception is set exceptionally high.”); Hague International Child Abduction Convention, 51 Fed. Reg. 10, 491-501 (Mar. 26, 1986) (“[T]he person opposing the child’s return must show that the risk to the child is grave, not merely serious.”).

³⁴ See 42 U.S.C.S. § 9001(a)(4) (LEXIS through Pub. L. No. 115-193) (“Children who are wrongfully removed or retained . . . are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.”).

habitual residence shifts from one that is mandatory to one that is discretionary.³⁵

The Convention calls for expedited resolution of child abduction cases within a suggested six-week timeframe from the initiation of legal process.³⁶ Abduction cases filed under the Convention are generally given priority on court dockets by administrative order in compliance with the dictates of ICARA and the Convention goals.³⁷ The expedient nature of Convention judicial proceedings is designed to help ameliorate the harms of international child abduction by quickly returning abducted children to their habitual residence.³⁸ The Convention only addresses the remedy of return; it does not mandate or require a change of custody as a condition precedent to the child's return, nor does it require a change of custody upon the child's actual return.³⁹ As a result, return orders under the Convention generally direct a child's return to the child's country of habitual residence and not necessarily to a specific parent.⁴⁰ The Convention flatly prohibits member states from making return decisions based on the merits of substantive custodial disputes.⁴¹ The United States has provided similar provisions in ICARA.⁴² The Convention authorizes tribunals to resolve only the limited issues related to return petitions, including the merits of wrongful removal or retention claims while excluding a best interest custodial analysis for the

³⁵ See *Gsponer v. Johnstone*, 12 Fam LR 755, 765 (Family Court of Australia 1988) (holding return of child to Switzerland under Convention); PÉREZ-VERA REPORT, *supra* note 31, ¶ 113 (emphasizing judges retain discretion to return children even when enumerated exception may apply).

³⁶ See Abduction Convention, *supra* note 2, at art. 11.

³⁷ See *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001) (ruling courts to place cases on "fast track" to expedite proceedings and execute purposes of Convention).

³⁸ See PÉREZ-VERA REPORT, *supra* note 31, ¶ 23 (emphasizing importance of considering interests of the child).

³⁹ See 22 U.S.C.S. § 9001(b)(4) (LEXIS through Pub. L. No. 115-173) (restricting courts from making decisions on merits of child custody issues); see also *Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999) (explaining purpose of the Hague Convention); *Barzilay v. Barzilay*, 536 F.3d 844, 847 (8th Cir. 2008) (describing Hague Convention's role); PÉREZ-VERA REPORT, *supra* note 31, ¶ 16 (explaining importance of returning children to preserve status quo in custody disputes).

⁴⁰ See *Barzilay v. Barzilay*, 600 F.3d 912, 917 (8th Cir. 2010) (emphasizing Convention returns child back to their habitual residence).

⁴¹ See Abduction Convention, *supra* note 2, at art. 16 (explaining process after receiving notice of wrongful removal or retention of child). "[T]he judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention. . . ." *Id.* See Abduction Convention, *supra* note 2, at art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.").

⁴² See 22 U.S.C.S. § 9001(b)(4) (LEXIS through Pub. L. No. 115-173) ("[T]he Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

subject child.⁴³ The Convention operates on the premise that each member state exercises sovereign authority to enter custodial orders to protect the children that come before tribunals.⁴⁴ Courts should respect the right of each member state to resolve underlying child custody disputes that arise within their own territorial boundaries pursuant to their own respective cultural and legal norms.⁴⁵ Recognition and respect for the autonomous right of each member state to resolve such disputes helps deter forum shopping while reinforcing the mutual and collective benefits of Convention membership.⁴⁶

III. DUE PROCESS AND POST-JUDGMENT CONSIDERATIONS

A. Due Process

The Hague Abduction Convention does not provide a procedural framework for resolution of Convention cases. Instead, member states are to utilize the most expeditious procedures to bring about prompt return of internationally-abducted children.⁴⁷ When a return petition is filed under the Convention in U.S. federal district court, there are few, if any, procedural barriers that prevent the petition from being immediately set for a final hearing or summarily granted.⁴⁸ In the U.S., courts are left with substantial

⁴³ See Abduction Convention, *supra* note 2, at art. 1 (limiting Hague Convention from considering the merits of custody); see also *In re Morris*, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing “[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody.”); *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991) (noting courts review merits of abduction, not custody).

⁴⁴ See *Blondin v. Dubois*, 189 F.3d 240, 248–49 (2d Cir. 1999) (noting states’ deference to child’s home forum). “In the exercise of comity that is at the heart of the Convention. . . , we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.” *Id.*

⁴⁵ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) (analyzing principles “inherent in the Convention and the Act). “[T]he Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.” *Id.*; see also PÉREZ-VERA REPORT, *supra* note 31, ¶ 16 (explaining importance of returning children to preserve status quo in custody disputes.)

⁴⁶ See *Gitter v. Gitter*, 396 F.3d 124, 129–30 (2d Cir. 2005) (explaining purpose of Convention). The Convention is designed to deter “those close to [a child], such as parents, guardians, or family members” from unilaterally taking or keeping the child out of the country of habitual residence with an intent “to establish artificial jurisdictional links” to a more sympathetic forum for a custody dispute. *Id.*

⁴⁷ See generally Abduction Convention, *supra* note 2 (outlining expeditious procedures for returning children).

⁴⁸ See *Menechem v. Frydman-Menachem*, 240 F. Supp. 2d 437, 443 (D. Md. 2003) (emphasizing the Convention calls for an expeditious court process). Given the unique nature of the Abduction Convention, “neither the Convention nor ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires ‘that discovery be allowed or that an evidentiary hearing be conducted’ as a matter of right in cases arising under the

discretion in determining the procedures necessary to resolve abduction cases.⁴⁹ That discretion includes structuring the procedural aspects of abduction litigation in a way that balances the litigant's rights with the demand for expeditious resolution under ICARA.⁵⁰ It may also include dispensing with traditional notions of due process protections, including pre-trial discovery or even an evidentiary hearing.⁵¹ To be clear, this does not mean that all Hague Abduction proceedings are quickly resolved at the trial court level. Many of the reported appellate decisions from U.S. courts reflect extensive trial court proceedings in which the trial court took significant measures to ensure a full evidentiary hearing was conducted in order to explore the factual circumstances of the issues presented.⁵² While the due process hallmarks of "notice and opportunity to be heard" are still in play, every indication should be that these cases will be resolved faster rather than slower.⁵³ The practitioner's traditional arsenal of procedural protections in the form of civil procedure rules may be completely useless in this context.⁵⁴

The Convention sets forth a short time frame for resolution of judicial proceedings, but neither the Convention nor ICARA provides any direct guidance on post-judgment procedures nor any applicable time frames for resolution of post-judgment remedies. With no international mandate, each member state utilizes its own domestic law in determining how to best comply with Convention directives.⁵⁵ There may be a gap in time between

Convention." *West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013) (quoting *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001)).

⁴⁹ See *Dobrev*, 735 F.3d at 929 (explaining courts should use the "most expeditious procedures available" in return proceedings).

⁵⁰ See *Menechem*, 240 F. Supp. 2d at 443 (evidencing balance between litigant's rights and speedy resolution).

⁵¹ See *id.* (emphasizing court may omit pre-trial discovery and evidentiary hearings in order for quick resolution).

⁵² See e.g., *Krefter v. Wills*, 623 F. Supp. 2d 125, 127 (noting court held four days of evidentiary hearings over four-month period of time); see also *Friedrich v. Friedrich*, 78 F.3d 1060, 1070 (noting importance of using evidentiary hearings).

⁵³ See *Egervary v. Rooney*, 80 F. Supp. 2d 491 (E.D. Pa. 2000) (refusing to enforce *ex parte* order where respondent had not been served and had no actual notice).

⁵⁴ See *Menechem*, 240 F. Supp. 2d at 443 (rejecting Petitioner's argument that evidentiary hearings are required). Because of the Convention's interest in "prompt action," the Court decided:

that when, as here, there are no genuine issues of material fact in dispute and that the case is ripe for decision as a matter of law, summary judgment is the appropriate vehicle for deciding the case in a prompt and expeditious manner, consistent with the purposes of the Convention.

Id.

⁵⁵ See NIGEL LOWE & SARAH ARMSTRONG, NAT'L CTR. MISSING & EXPLOITED CHILD., *Good Practice in Handling Hague Abduction Convention Return Applications*, pg. 7 (2002), <https://www.icmec.org/wp-content/uploads/2015/10/Good-Practice-in-Handling-Hague->

expeditious judicial proceedings at the trial court level and lengthy appellate court proceedings which creates a number of strategic and substantive post-judgment considerations for the practitioner and the client.⁵⁶ This is especially true where a court orders a child's immediate and permanent return to the child's country of habitual residence, as the child may be physically removed from the court's jurisdiction within a very short period of time—literally hours or days from the entry of the return order. Once a child is physically returned to his country of habitual residence on a return order, post-judgment remedies are not legally moot, but they may not be practical with regard to enforcing the return of a child repatriated to a foreign country.⁵⁷

B. Return Orders and Undertakings

Once a U.S. court rules on a return petition, the child's return will either be ordered or it will be denied; there is very little room for a compromise position.⁵⁸ This may explain why the use of mediation to resolve Convention cases has not been widely adopted in most jurisdictions.⁵⁹ When a petition for return is not granted in a U.S. court, the child will be permitted to remain in the U.S, pending the next phase of the case which might include appellate proceedings or state court proceedings to address access rights.⁶⁰ Return orders frequently address the necessary details surrounding the child's repatriation, leaving only the matter of implementation of the court's order to take place.⁶¹

Abduction-Convention-Return-Applications.pdf (recognizing that member states use their own domestic law when addressing Convention instructions).

⁵⁶ See *Chafin v. Chafin*, 568 U.S. 165, 183-85 (2013) (Ginsburg, J., dissenting) (exemplifying scenario where court system was not expeditious). Justice Ginsburg noted that the inconsistency of the over two-year litigation involving the parties' minor child and the Convention, was a "protraction so marked is hardly consonant with the Convention's objectives." *Id.* at 183-85.

⁵⁷ See *Id.* at 166-67 (enforcing return order to habitual residence does not moot appeal pending in federal district court).

⁵⁸ See generally *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 280 (3d Cir. 2007) (affirming grant of Child Return Petition filed by plaintiff); *de Silva v. Pitts*, 481 F.3d 1279, 1288 (10th Cir. 2007) (denying petition for return of child).

⁵⁹ Jennifer Zawid, *Symposium Article: Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1, 11, 17 (2008) (describing mediation as an uncommon way of resolving international child abduction cases). While a national conference was held in 2008 to create an International Child Abduction Mediation program in the United States, "mediation has not been widely utilized in international child abduction cases." *Id.* at 11.

⁶⁰ See *infra* Part III (addressing state remedies available to orchestrate contact and access to state custodial laws).

⁶¹ See *Kufner v. Kufner*, 519 F.3d 33, 38 (1st Cir. 2008) (providing detailed final order for conditions of return).

The broad language of the Convention and ICARA, in conjunction with U.S. procedural and substantive law, has been interpreted by U.S. courts to provide a variety of prophylactic measures to protect children from further harm in abduction cases including emergency injunctive relief⁶², temporary timeshare orders⁶³, psychological evaluations, along with other measures to safeguard vulnerable children.⁶⁴ Some children face identifiable and particularized threats of harm associated with their return. Courts have clear authority to exhaust all reasonable measures to protect children during the litigation and to reduce risks associated with a child's return even where a grave risk of harm defense is asserted and established.⁶⁵ Courts have the ability to fashion protective conditions known as "undertakings" which are conditions put into place between the parties to ensure the safe return of a child.⁶⁶ Undertakings are not mandatory but must be taken into account to facilitate a child's safe return.⁶⁷ They may include a variety of conditions surrounding return orders including transportation details, visitation restrictions, and psychological services.⁶⁸ There is no authority within the

⁶² See 22 U.S.C.S. § 9004(a) (LEXIS through Pub. L. No. 115-193) (outlining authority of courts in international child abduction cases). ICARA provides similar language in furtherance of the objects of the Convention permitting courts to "protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." *Id.*

⁶³ See 22 U.S.C.S. § 9004(b) (LEXIS through Pub. L. No. 115-193) (authorizing physical removal of a child where substantive state law requirements have been met).

⁶⁴ See generally *Culculoglu v. Culculoglu*, No. 2:13-cv-00446-GMN-CWH, 2013 U.S. Dist. LEXIS 48842, at *2, *13 (D. Nev. 2013) (granting injunctive relief for petitioner's Motion for Temporary Restraining Order). The order sought to keep children in place until the resolution of the Wrongful Retention case on the merits. *Id.* at *2. See also *Etienne v. Zuniga*, No. C10-5061BHS, 2010 U.S. Dist. LEXIS 36857, at *4 (W.D. Wash. 2010) (granting ex-parte motion for U.S. Marshal Service to receive children's passports, visas, and travel documents); *Roszkowski v. Roszkowska*, 644 A.2d 1150, 1160 (N.J. Super. Ct. Ch. Div. 1993) (requiring defendant to bear costs associated with return of child and for psychological evaluations).

⁶⁵ See *Turner v. Frowein*, 752 A.2d 955, 972-74 (Conn. 2000) (reiterating need to protect children during litigation). The court went on to specifically identify the type of protections that would be necessary to return the children which included: the mother retaining custody of the child, an appropriate third party in the home country could care for the child, or the home country could enforce conditions of a return order. *Id.* at 972. Even where Article 13b was established, the child should be returned where the harm can be mitigated. *Id.* at 972-74

⁶⁶ See *Danaipour v. McLarey*, 386 F.3d 289, 303-04 (1st Cir. 2004) (explaining undertakings); see also *Danaipour v. McLarey*, 286 F.3d 1, 21 (1st Cir. 2002) (explaining how to apply undertakings), *aff'g* 386 F.3d 289 (1st Cir. 2004). The use of undertakings must be narrow in scope, and "must focus on the particular situation of the child" and on whether some set of requirements "will suffice to protect the child." *Id.*

⁶⁷ See generally Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 NYU J. INT'L L. & POL. 221 (2001) (explaining the use and function of undertakings).

⁶⁸ See generally Roxanne Hoegger, *What if she leaves? Domestic Violence Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELY WOMEN'S L.J. 181,

Convention or any other body of international law to compel any other member state to comply with undertakings.⁶⁹ If undertakings cannot protect a child, the court has the discretion to refuse a return order.⁷⁰ Undertakings are frequently used to facilitate returns associated with grave risk of harm to the child.⁷¹ Undertakings to do not include the authority of a court to dictate terms and conditions of post-return supervision.⁷² Failure to comply with a court ordered undertakings may result in contempt proceedings and may also result in the child not being returned.⁷³ Undertakings play an important role in the practical details of repatriating abducted children under the Convention.⁷⁴

U.S. federal and state court jurisdiction will end where a return order is implemented and a child is physically returned to their country of habitual residence.⁷⁵ Every return order carries the implied, if not expressed, finding

182-84 (2003), <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1193&context=bglj> (discussing shortcomings associated with Undertaking conditions); Peter Glass, *Blondin v. Dubois Hagois: A closer Step to Safeguarding the Welfare of Abducted Children?*, 26 BROOK J. INT'L L. 723, 724-28 (2000) (analyzing *Blondin v. Dubois* cases I and II).

⁶⁹ See *Frowein*, 752 A.2d 955, 970-72 (Conn. 2000) (discussing benefits of requiring compliance to the Hague Convention); see also Kyle Simpson, *What Constitutes a "Grave Risk of Harm?"*: Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims, 24 GEO. MASON L. REV. 841, 843-45 (2017) (explaining weakness of undertakings in context of domestic violence cases and 13(b) defenses under Convention).

⁷⁰ See *Feder v. Evan-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (detailing courts' discretion to refuse return order).

⁷¹ See *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000) (discussing how undertakings can mitigate a "grave risk of harm"); *Blondin v. Dubois*, 189 F.3d 240, 249-50 (2d Cir. 1999) (acknowledging "grave risk of harm" factor in return of children); *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 708-09 (D. Md. 2015) (describing undertakings and the ways in which they can "preserve [a] child's safety").

⁷² See *Kufner v. Kufner*, 480 F. Supp. 2d 491, 514 (D.R.I. 2007) (citing *McLarey*, 286 F.3d at 22 (1st Cir. 2002)) (explaining undertakings as safeguard). "The Court of Appeals for the First Circuit analyzed the use of undertakings from the perspective of international comity and concluded that undertakings which '[c]ondition[] a return order on a foreign court's entry of an order' likely offend notions of comity because they would "smack of coercion of the foreign court." *Id.* See also PÉREZ-VERA REPORT, *supra* note 31, ¶ 120 ("the return of a child cannot be made conditional upon [a] decision or other determination being provided [by the court of the country of habitual residence].").

⁷³ See *Kufner*, 480 F. Supp. 2d at 514-16 (violating undertakings can result in contempt of court).

⁷⁴ See William M. Hilton, *The Limitations on Article 13(b) of the Convention on Civil Aspects of International Child Abduction*, 11 A.M. J. FAM. L. 139, 142 (1997) ("An 'undertaking' is an agreement/stipulation between the parties on the specific issue of the logistics of returning a child to his or her 'habitual residence.'").

⁷⁵ See Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction; When Domestic Violence and Child abuse Impact the Goal of Comity*, 13 J. TRANSNAT'L L. 391, 427-28 (2000) (noting once Convention goal of return is effectuated, no

that the child's habitual residence is better situated to resolve the underlying child custody dispute regarding that child.⁷⁶ The return of the child to his state of habitual residence marks the end of the case as far as a U.S. court's jurisdiction to enter substantive relief over the child. The child's country of habitual residence will now have exclusive jurisdiction to resolve the underlying custodial dispute and organize the litigant's rights of custody and access pursuant to the domestic law of that forum state.⁷⁷ As such, it would be unlawful and inconsistent for a state court to exercise jurisdiction over a child that has been returned given the Uniform Child Custody and Jurisdiction Enforcement Act's (UCCJEA) jurisdictional mandates.⁷⁸

C. Post-Trial Motions

Hague Abduction cases may lawfully be resolved summarily without a full evidentiary hearing, a process that seems incompatible with U.S. notions of Due Process and fair play. However, the Federal Rules of Civil Procedure clearly provide an avenue for procedural relief if only from a statutory perspective.⁷⁹ As an academic matter, any party may request post-trial relief in federal court proceedings once the court enters a final order.⁸⁰

ongoing jurisdiction under Convention). Additionally, there is no other systemic measure to follow-up on the status of children once returned to their country of habitual residence. *Id.*

⁷⁶ See generally *Loos v. Manuel*, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994) (noting court's role is not to make traditional custody decisions). The court must determine in what jurisdiction such decisions should properly be made and order the physical return of the child to that location where jurisdiction would otherwise be proper under domestic law. *Id.*

⁷⁷ See PÉREZ-VERA REPORT, *supra* note 31, ¶ 19 (marking end of U.S. Courts' jurisdiction when back to habitual residence). "[T]he Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.*, of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." *Id.*

⁷⁸ See Abduction Convention, *supra* note 2, at art. 2 (explaining jurisdictional bases that exist under UCCJEA compared to predecessor Uniform Child Custody Jurisdiction Act (UCCJA)); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1997) (attempting to alleviate inconsistencies between states' varying interpretations of prior versions of the act).

⁷⁹ See FED. R. CIV. P. 59(a)(2) (explaining motion for rehearing filed under F.R.C.P. 59 is same as motion for new trial). According to the rule, "[a]fter a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." *Id.* See generally *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 700 (10th Cir. 1964) (recognizing service for motion of new trial effective upon mailing); *Slater v. Peyser*, 200 F.2d 360, 361 (D.C. Cir. 1952) (holding agreement with opposing counsel does not negate ten-day requirement); *Safeway Stores, Inc. v. Coe*, 136 F.2d 771, 775-76 (D.C. Cir. 1943) (holding appellant must file for rehearing within ten days).

⁸⁰ See FED. R. CIV. P. 59. (providing rules for post-trial motions). Pursuant to the Federal Rules of Civil Procedure, post-trial relief may include a motion filed under Rule 59 labeled "New Trial: Altering or Amending a Judgment" or possibly Rule 60 labeled "Relief From Judgment." See *id.*; FED. R. CIV. P. 60. On its surface each rule appears to provide a foundation for post-trial relief,

As a practical matter, post-trial relief will necessarily be narrowly construed in Hague cases given the impetus to expedite a final resolution and the court's substantial discretion in fashioning concomitant procedures.⁸¹ Although FRCP 59(b) provides up to 28 days to file a motion for a new trial, the child may already be repatriated to his habitual residence on a return order before the motion is even filed.⁸²

When a return order is entered by a U.S. court, the abducting parent must decide if they will live with the consequences of the court's return order, or alternatively pursue post-judgment relief. Utilizing post-judgment remedies solely as a tactic to delay a child's return is unethical and should be met with sanctions by the court.⁸³ Aside from strategic implications, there will also be economic considerations in return cases given ICARA's mandate of a compulsory award of attorney's fees and costs to the petitioner when an order of return is granted.⁸⁴ The respondent will face the daunting proposition of paying not only their attorney fees, but also the petitioner's fees for both trial and unsuccessful post-judgment litigation.⁸⁵ A party's ability to afford representation in post-judgment proceedings is a critical factor in determining whether the case ends at final judgment or moves forward.

but the case law does not support any significant procedural relief in Hague Abduction litigation. See FED. R. CIV. P. 59; FED. R. CIV. P. 60.

⁸¹ *Menechem v. Frydman-Menechem*, 240 F. Supp. 2d 437, 443 (D. Md. 2003) (explaining importance of expediency in stay proceedings). Given the unique nature of the Abduction Convention, "neither the Convention or ICARA, nor any other law of which we are aware including the Due Process Clause of the Fifth Amendment, requires 'that discovery be allowed or that an evidentiary hearing be conducted' as a matter of right in cases arising under the Convention." *West v. Dobrev*, 735 F.3d 921, 929 (10th Cir. 2013) (citing *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001)).

⁸² See FED. R. CIV. P. 59(b) (providing time guidelines for filing motion for new trial). Pursuant to Rule 59(b), "[a] motion for a new trial must be filed no later than 28 days after the entry of judgment." *Id.* Note that a motion filed under Rule 60 of the Federal Rules of Civil Procedure provides that a litigant may seek to be relieved from judgment within a "reasonable time," but "no more than a year after the entry of the judgment or order or the date of the proceeding." See FED. R. CIV. P. 60(c)(1). However, the movant will run into the same practical problem of the child's return taking precedence over the procedural posture of the case. *Id.*

⁸³ See *Cuellar v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) (noting Court will not encourage improper delaying tactics by abducting parents). The *Cuellar* court was of the opinion that if the party did not want to bear fees, he should not have engaged in manipulative tactics; thus the court declined to encourage these acts by abducting parents. *Id.*

⁸⁴ See 22 U.S.C.S. § 9007(b)(3) (LEXIS through Pub. L. No. 115-193) (citing 22 U.S.C.S. § 9003) (compelling Respondent to pay attorney fees for Petitioner when return petitions granted). Relief also includes the following: "legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." *Id.*

⁸⁵ See *Ovalle v. Perez*, 0:16-cv-62134-BB, unreported, on file with the author (compelling payment of all post-judgement fees including appellate expenses incurred by Respondent).

D. Application for Stay of Enforcement

A stay order suspends enforcement of an order or judgment while the appellate court assesses the legality of the order on appeal.⁸⁶ A stay pending appeal is not a matter of right, but rather discretionary relief potentially available in Hague Abduction cases where an injury resulting from a return order is actual and imminent as opposed to remote or speculative harm.⁸⁷ The party seeking a stay must establish the legal predicate for granting of such relief.⁸⁸ The district court may stay proceedings to enforce a judgment until after it has ruled on post-judgment motions.⁸⁹

Return orders under the Convention are designed to immediately return abducted children to their habitual residence. Parents that plan to appeal a return order must consider a stay to the enforcement of a return order to prevent the child's physical return to their country of habitual residence even though stays are generally disfavored and should be of short duration.⁹⁰ An order staying the child's return will be an exception rather than the rule given the resulting delay to a return order.⁹¹ The request must be filed with the trial court before accessing appellate review in order to give the trial court an opportunity to correct the complained-of errors.⁹² If the motion is granted by the trial court, then enforcement of the order is stayed pending the terms set forth in the court's order to stay enforcement. If no stay of enforcement of the return order is entered, the child will be returned immediately pursuant to the terms of the final judgment unless the movant

⁸⁶ See Dorothy Easley, *Appellate Stays in Civil Cases: Florida and Federal Courts Offer More Security Flexibility Than Believed, But Stay Violations Still have Teeth*, 86 FLA. B.J. 10, 48 (Dec. 2012),

<http://www3.flabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/2e129f3b5fd9aea085257ac300506870!OpenDocument&Highlight=0>,*(explaining general function of stays and strategic use of alternative security in stay proceedings).

⁸⁷ See generally *United States v. Apple Inc.*, 992 F. Supp. 2d 263, 278-89 (S.D.N.Y. 2014) (explaining standard in evaluating stay applicant including irreparable injury); *M.S.P.C. v. U.S. Customs & Boarder Protections*, 60 F. Supp. 3d 1156, 1161 (D. N. M. 2014) (stating stay not absolute right; therefore, party seeking stay must establish jurisdiction).

⁸⁸ See generally *Condon v. Haley*, 21 F. Supp. 3d 572, 577-78 (D.S.C. 2014) (reinforcing party seeking stay bears burden of establishing exacting standards).

⁸⁹ See FED. R. CIV. P. 62(b) (establishing appropriate terms for stays pending deposition of motion).

⁹⁰ See *Chafin v. Chafin*, 568 U.S. 165, 183 (2013) (“[S]tays, even of short duration, should not be granted ‘as a matter of course,’ for they inevitably entail loss of ‘precious months when [the child] could have been readjusting to life in her country of habitual residence.’”).

⁹¹ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) (staying an order).

⁹² See *Didon v. Castillo*, 838 F.3d 313, 319 (3d Cir. 2016) (filing motion for stay of District Court's judgment denying order before filing appeal).

seeks a stay from the federal district court of appeal.⁹³ Federal courts of appeal use the same legal criteria as the trial court in determining the issuance of a stay order.⁹⁴ Entry of a stay order may be critically important depending on the child's country of habitual residence. If the appellant prevails on appeal, it may be dramatically easier to have the child returned to the U.S. from a member state that is compliant with its treaty obligations as opposed to a member state that is non-compliant with its treaty obligations.⁹⁵

The cardinal rule of stay applications is that the party seeking the stay of the federal district court's order must ordinarily pursue that relief first by filing a motion for stay directly with the lower court.⁹⁶ If the district court denies the stay, the proper procedure is to then file a motion for stay directly with the circuit court of appeals.⁹⁷ In *Haimdas v. Haimdas*, the reviewing court specifically recognized the helpfulness of the trial court procedure to grant a brief stay for purpose of seeking appellate court review of a Hague return order.⁹⁸ Even if the District Court is not inclined to stay the child's

⁹³ See *Chafin*, 568 U.S. at 173 (explaining standard for Federal Courts of Appeal in issuing stay order).

⁹⁴ See *id.* (noting Federal Court standard same as Trial Court for issuing stay order).

⁹⁵ For example, England is identified by the U.S. State Department in its 2015 country report as compliant with its treaty obligations. Compliant means the country has judicial procedures to promptly facilitate requests for relief under the convention. Conversely, Guatemala is identified as non-compliant with its obligations, meaning it fails to comply with its treaty obligations. There should be little faith that a non-compliant country would return a child to the U.S. by compulsion of a U.S. court order where the country has failed to comply with its treaty obligations. This factor alone should carry more weight with a reviewing court when a stay is requested. See U.S. DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, ANNUAL REPORT ON INTERNATIONAL PARENTAL CHILD ABDUCTION 29-32 (2015), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2015%20Annual%20Report.pdf>.

⁹⁶ See FED. R. APP. P. 8(a)(1) (providing party seeking stay must first seek relief from District Court). This is the case unless seeking this relief is otherwise impractical. *Id.* See also *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (stating cardinal rule of stay applications); *Wyatt v. Syrian Arab Republic*, 800 F.3d 331, 341 (7th Cir. 2015) (challenging jurisdiction); *Securities and Exchange Commission v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (stating cardinal rule of stay application).

⁹⁷ See FED. R. APP. P. 8(a)(2) (listing requirements for motion to court of appeals). See generally *Shiley, Inc. v. Bentley Labs., Inc.* 782 F.2d 992, 993 (Fed. Cir. 1986) (holding appeal of district court's denial of stay not final decision). The *Shiley* court also held that an appeal of the district court's "denial of a stay of post-trial injunction pending an appeal on the merits is neither a 'final decision' . . . nor within this court's jurisdiction over *interlocutory* orders as delineated in 28 U.S.C. § 1292(c)." *Id.*; see also 28 U.S.C.S §1292(c) (LEXIS through Pub. L. No. 115-193) (outlining where the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction).

⁹⁸ See *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 212 (E.D.N.Y. 2010) (finding brief stay is in order). Respondent may make a request to the Second Circuit Court of Appeals for an emergency stay and expedited treatment of his appeal. *Id.* See also *Diorinou v. Mezitis*, 237 F.3d 133, 138 (2d

return, the brief stay for appellate review preserves the status quo while simultaneously affording the appellant the opportunity to seek a stay from the reviewing court.⁹⁹ In the oft-quoted passage from the Sixth Circuit: “Staying the return of a child in an action under the Convention should hardly be a matter of course. The aim of the Convention is to secure prompt return of the child to the correct jurisdiction, and any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court.”¹⁰⁰

The same legal factors and case law to support the issuance of a stay apply regardless of whether the stay is sought at the district court or appellate court level.¹⁰¹ If the appellate court issues a stay, that order will set forth the details for suspension of enforcement of the trial court order.¹⁰² Unless a stay is issued by the district court, taking an appeal of the district court’s final order alone will not suspend the enforcement of the district court’s order.¹⁰³ A party trying to prevent enforcement of the return order must obtain the discretionary relief provided through a stay pending appeal. A stay may also provide an opportunity to organize undertakings to support return.

Cir. 2001) (noting district court’s grant of Hague Convention petition “helpfully stayed its order” of return). This was for a period of two days to permit respondent to seek a stay pending appeal from the Court of Appeals. *Id.*

⁹⁹ See *Diorinou*, 237 F.3d at 138 (maintaining status quo with holding).

¹⁰⁰ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) (staying order).

¹⁰¹ While some Courts of Appeals will defer to the district court’s determination and will reach a differing conclusion only if the district court abused its discretion, or if there were changed circumstances after the district court’s order, other courts have reasoned that Civil Rule 62 and Appellate Rule 8 should use the same test. Otherwise, it would not make sense to require the movant to apply first to the district court. See 16A FED. PRAC. & PROC. JURIS. § 3954 (4th ed. 2015) (explaining Motion for Stay or Injunction). “Thus, motions made in the court of appeals may be resolved by reference to the case law concerning Civil Rule 62” (which applies to requests made to the district court.). *Id.*

¹⁰² See FED. R. APP. P. 8(a) (explaining stay issued by appellate court suspends district court order). “While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. § 1651. . . . And the Supreme Court has termed the power ‘inherent’ and ‘part of its (the court of appeals) traditional equipment for the administration of justice.’” FED. R. APP. P. 8 advisory committee’s notes.

¹⁰³ See *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) (appealing district court’s ruling without more will not suspend order). According to the court,

[u]nless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative. To be sure, for as long as the appellate court retains its mandate it maintains its jurisdiction over the case, and thus the power to alter the mandate. But non-issuance of the mandate by the appellate court has no impact on the trial court’s powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendency of the appeal.

Id.

In determining whether to grant a stay in a return case ordered pursuant to ICARA, the U.S. Supreme Court in *Chafin v. Chafin* directed that four traditional stay factors must be met: (1) whether the stay is applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies.¹⁰⁴ Even absent a showing of a likelihood of success on the merits, a stay may be granted if the other remaining factors (“the equities”) strongly favor the movant.¹⁰⁵ These factors should be evaluated on a sliding scale such that a stronger showing on one element should excuse a lesser showing on other elements.¹⁰⁶ A stay order may prevent litigation to re-return a child if appellant prevails on appeal, but that factor alone is not sufficient to justify a stay.¹⁰⁷ Orders staying the enforcement of a return order under ICARA are conceptually incompatible with the clear dictates of both the Convention and ICARA.¹⁰⁸ As such, a party seeking to stay a return order should expect close judicial scrutiny of each stay-factor in the context of the Convention’s goal expeditious proceedings to promptly return victims of international child abduction.

A stay application and an appeal will necessarily go hand-in-hand. Unless a party challenging a return order plans to appeal the district court’s determination, a stay application will have limited utility. The same holds true for appellate court review: if the party challenging the return order is not moving forward with an appeal, there would be almost no basis for the appellate court to grant the stay. The motion for stay and notice of appeal are in lock-step and should be considered as part of the same process to obtain post-trial relief. While a stay is not a prerequisite to pursue appellate court relief, the district court will otherwise enforce its order and return the child during the appellate court process. Where no stay is entered pending appeal, the petitioner will be able to remove the child and return the child to the child’s habitual residence consistent with the return order. If the appellant

¹⁰⁴ See *Chafin v. Chafin*, 568 U.S. 165, 176-80 (2013) (explaining factors that must be met for stay order); see also *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (discussing issue of stay) See also *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (applying same factors in habeas proceedings as civil stay proceedings).

¹⁰⁵ See *Antonio v. Bello*, No. 04-12794-GG, 2004 U.S. App. LEXIS 18334, at *1-3 (11th Cir. June 10, 2004) (reiterating stay may be allowed if the remaining three factors are strongly present); *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901, at *9 (11th Cir. Apr. 19, 2000) (explaining movant need only show denial of stay would cause “substantial harm to non-movant”).

¹⁰⁶ See FED. R. CIV. P. 62(c) (providing equities that must be balanced and considered).

¹⁰⁷ See *Redmond v. Redmond*, 724 F.3d 729, 735 (7th Cir. 2013) (noting impossibility of providing relief to prevailing party when case becomes moot).

¹⁰⁸ See *Chafin*, 568 U.S. at 165 (noting difference between ICARA and Convention).

should ultimately prevail on appeal, there may be a significant challenge in retrieving a returned child especially from countries that have demonstrated patterns of non-compliance with their Convention obligations.¹⁰⁹

E. Appeal

For most aggrieved parties in Hague Abduction litigation, one of the most important decisions is whether to appeal an adverse final order. The appellate remedy clock begins to tick as soon as the U.S. district court enters the final order, absent the filing of a motion for rehearing.¹¹⁰ The district court must enter a final order to trigger potential remedies that may be available through appellate proceedings. As a matter of technical significance, a judgment is set forth “on a separate document” and entered on the court’s docket pursuant to FRCP 79(a). All time periods relevant to the appeal process begin to run when the clerk completes the task of creating a separate document and enters it into the docket.¹¹¹ The timely filing of the notice of appeal is critically important to properly invoke appellate court jurisdiction.¹¹² While federal rules provide a limited basis to extend the period to take an appeal, the expeditious nature of Hague cases suggest delay in judicial proceedings are generally harmful to children and should be avoided.¹¹³ The obligation to expedite proceedings in Hague Abduction litigation extends to the appellate process as well.¹¹⁴

¹⁰⁹ Each year the Department of State, Office of Children’s Issues is required to submit to Congress a report on U.S. treaty partner’s compliance with Convention. Importantly, the report identifies the Department’s concerns regarding countries where the implementation of the Convention is incomplete or in which a particular country’s executive, judicial, or law enforcement authorities do not properly apply the Convention. *See* U.S. DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, ANNUAL REPORT ON INTERNATIONAL PARENTAL CHILD ABDUCTION 33 (2016), <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2016%20Annual%20Report.pdf>.

¹¹⁰ *See Guide to Good Practice, Part I, supra* note 12, at 19 (explaining authorities of Convention signatories). Each signatory to the Convention has the authority to create its own procedural regulations to review orders entered on Hague petitions. *Id.* at 19-20. It therefore rests with each Contracting State to ensure that appeals proceed with dispatch. *Id.* at 20.

¹¹¹ *See* FED. R. CIV. P. 58 (governing how judgments shall be entered).

¹¹² *See* *United States v. Robinson*, 361 U.S. 220, 229 (1960) (holding timely filing of a notice of appeal is “jurisdictional”).

¹¹³ *See* FED. R. APP. P. 4(a)(5); 4(a)(5)(A)(ii) (providing expiration of time for motions and exceptions for filing of appeals).

¹¹⁴ *See Guide to Good Practice, Part I, supra* note 12, at 19 (“Expeditious procedures are essential at all stages of the Convention process”). *See also Guide to Good Practice, Part IV – Enforcement*, HAGUE CONF. ON PRIV. INT’L L. § 2.2 (2010) [hereinafter *Guide to Good Practice, Part IV*] (explaining no timeline for review of first-instance decisions). While “[the] obligation to process return applications expeditiously . . . extends to appeal procedures,” the Convention does not prescribe modes of, or time frames for, appellate review of first instance decisions. *Id.* at 13.

Unlike the express language of the Abduction Convention, which sets forth a six-week expedited timeframe for resolution of petitions for relief under the Abduction Convention, there is no corresponding expedited time frame set forth when appeals are taken of final orders.¹¹⁵ Even without an express mandate to do so, many Federal and state courts have adopted expedited procedures for handling return-order cases.¹¹⁶ The appeal will surely take both time and money whether it is truly expedited or not.

The U.S. District Court of Appeal has authority to reverse a trial court's order of return and issue a re-return order to the U.S. which is a plausible outcome sufficient to preserve jurisdiction in the appellate process.¹¹⁷ Although there may be significant practical impediments to enforcing a re-return order in a member state, those difficulties do not render the appeal moot.¹¹⁸ The subsequent task of unwinding the appellate court rulings is one that will fall to the state court where jurisdiction would be proper under the UCCJEA if the child is ordered to be re-returned to the U.S.¹¹⁹ Even though the Hague court proceedings would come to an end given limited federal court jurisdiction, the underlying custodial issues would then be ripe for state court proceedings.¹²⁰

¹¹⁵ See *Guide to Good Practice, Part IV*, *supra* note 12, at 13 (explaining how appellate matters should be handled). Neither the Convention nor ICARA prescribes the procedural aspects for time frames of appellate review, but the Convention clearly indicates that appellate matters should also be dealt with on an expedited basis. *Id.*

¹¹⁶ See Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child: A Guide for Judges*, FED. JUD. CTR. 162 (2015), <https://www.fjc.gov/sites/default/files/2015/Hague%20Convention%20Guide.pdf>. (“[e]xpedited procedures for briefing and handling of [return-order] appeals have become common in most circuits.”).

¹¹⁷ See generally *Knox v. Serv. Emps. Inter. Union, Local 100*, 567 U.S. 298 (2012) (discussing the powers of the U.S. Court of Appeals).

¹¹⁸ *Redmond v. Redmond*, 724 F.3d 729, 735–36 (7th Cir. 2013) (referring to U.S. Supreme Court case *Chafin v. Chafin*, 133 S. Ct. 1017 (2013)). The *Redmond* court stated the following:

The Court also brushed aside concerns about practical impediments to enforcing a re-return order. Jurisdictional continuation did not depend on the likelihood that a re-return order would be obeyed by the parent with custody or enforced by a foreign court; “difficulties in enforcement,” the Court said, do not render a case moot. Instead, the proper question is *if* the court issues a re-return order, and *if* the custodial parent complies with the order, will the aggrieved parent get the child back? Absent a “law of physics prevent[ing] [the child’s] return” or a similar impediment, the answer to that question is generally “yes.”

Id.

¹¹⁹ See *id.* at 736 (delegating the interpretation of appellate rulings to state courts).

¹²⁰ See *id.* (detailing challenges brought by reversal regarding child’s return and re-return and impact of litigation). “Reversal may precipitate new legal and practical challenges surrounding [the minor child’s] re-return, and if the child is returned to [this state], he may not stay for long. *id.* His

The decision to appeal is an important one, and for many litigants it is viewed as a last chance to obtain the judicial relief they seek. Appeals are also time consuming and expensive. In the event a return order is granted, not only will the abducting parent be ordered to pay the petitioner's attorney's fees and costs for trial court proceedings, they will also be ordered to pay the petitioner's attorney fees and costs on appeal.¹²¹

Neither the Convention nor ICARA provide authority to compel the return of a parent, which may result in a parent and child being separated due to a parent's immigration status, outstanding arrest warrant or criminal charges, financial resources, or pending civil process.¹²² Returning a child to their habitual residence may mean that the child will now lose contact and access to an abducting parent simply by virtue of the parent's inability to return to the child's habitual residence. Economics, immigration, familial ties, pending criminal or civil charges, and fear of reprisal may all serve as factors diminishing the likelihood of a parent returning to the child's habitual residence to pursue a relationship post return.¹²³ In some cases, a return order will likely end the parent-child relationship for those parents that cannot or choose not to return to the child's country of habitual residence.¹²⁴

IV. POST JUDGMENT CUSTODIAL DETERMINATIONS

Federal district courts have limited jurisdiction in Hague cases, they can grant or deny a petition for return but they cannot enforce custody orders or make custodial determinations regarding a child's best interests.¹²⁵ This

status will depend on the outcome of the presently pending litigation—and possible future litigation—in the . . . state courts." *Id.*

¹²¹ See Abduction Convention, *supra* note 2, at art. 26 (detailing the abducting parent's legal fee responsibilities). Any U.S. court that orders a child's return under the Convention "shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." 22 U.S.C.S. § 9007(b)(3) (LEXIS through Pub. L. No. 115-193)). This is true even where the petitioner is represented by *pro bono* counsel. See e.g., Wasniewski v. Grzelak-Johannsen, 549 F. Supp. 2d 965, 970–71 (N.D. Ohio 2008), and Antunez-Fernandes v. Connors-Fernandes, 259 F.Supp.2d 800, 816–17 (N.D. Iowa 2003) (finding respondent party responsible for fees even when represented by *pro bono* counsel).

¹²² See 22 U.S.C.S. § 9003(b) (LEXIS through Pub. L. No. 115-193) (explaining how to pursue judicial proceedings under the Convention).

¹²³ See Viragh v. Foldes, 612 N.E.2d 241, 250 (Mass. 1993) (holding no requirement for visitation of noncustodial parent). The court goes on to explain that the Convention contends that a visitation order is meaningless given the lack of sufficient funds. *Id.*

¹²⁴ Perez v. Rojas, unreported case on file with the author.

¹²⁵ See generally Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013) (discussing the limitations of The Hague Convention). The court writes the following:

limited authority means that at some point, The Hague litigation will end at the district court level with a final order granting or denying the child's return. In most cases, a child returned to their habitual residence will usually end U.S. court involvement.¹²⁶ When a return petition is denied, the child may remain in the forum state which will presumptively exercise jurisdiction over the child for custodial determination purposes.¹²⁷ In the U.S., that means the state court will have exclusive jurisdiction to determine the parties' respective custodial, access, and visitation rights.¹²⁸ Subject matter jurisdiction for child custody determinations over minor children in the U.S. is dictated by the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA).¹²⁹ The UCCJEA was designed to harmonize jurisdictional priorities for custodial determinations while also attempting to deter child abductions in custodial disputes.¹³⁰ The UCCJEA provides the jurisdictional

The Hague Convention targets international child abduction; it is not a jurisdiction-allocation or full-faith-and-credit treaty. It does not provide a remedy for the recognition and enforcement of foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally. Those rules are provided in the Uniform Child-Custody Jurisdiction and Enforcement Act.

Id.

¹²⁶ See *Chafin v. Chafin*, 568 U.S. 165, 168-71 (2013) (finding exception where return order is on appeal even though the child has been returned).

¹²⁷ See Abduction Convention, *supra* note 2, at art. 1(b) (explaining the results of a denied petition). "[S]ignatories to the Convention, while recognizing that 'the interests of children are of paramount importance in matters relating to their custody' did not necessarily agree to adopt the jurisprudence precepts of one signatory and thereby limit their own sovereignty." *Caro v. Sher*, 687 A.2d 354, 361 (N.J. Super. Ct. Ch. Div. 1996). "Article 1(b), to the contrary, makes it clear that an objective of the Convention is 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'" *id.* See also Abduction Convention, *supra* note 2, at art. 1(b) (explaining the results of a denied petition); 22 U.S.C.S. § 9001(b)(3) (LEXIS through Pub. L. No. 115-193) ("Congress recognizes the international character of the Convention and the need for uniform international interpretation of the Convention"). The exercise of state court jurisdiction will require the initiation of legal process at the state court level to adjudicate underlying custodial claims pursuant to the UCCJEA. See *Caro v. Sher*, 687 A.2d 354, 356-57 (N.J. Super. Ct. Ch. Div. 1996) (outlining legal process through state court).

¹²⁸ See *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999) (finding U.S. District Court must address abduction claim under ICARA, but lacks authority for custody claims). See also Abduction Convention, *supra* note 2, at art. 19 (emphasizing Convention decisions should not be construed as decision on the merits for custody); 22 U.S.C.S. § 9001(b)(4) (LEXIS through Pub. L. No. 115-193) (same).

¹²⁹ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 649 (1997) (replacing UCCJA as modern approach to provide uniformity).

¹³⁰ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, comment, § 101, 9 U.L.A. 649 (1997) (discussing goals of UCCJEA).

basis for establishment, modification, recognition, and enforcement of child custodial determinations in state court proceedings.¹³¹

In most post-adjudicatory Hague Abduction case, one parent is going to face the challenge of organizing custodial rights in a country where they do not presently reside.¹³² For the abducting parent, it means going back to the child's habitual residence to secure access rights. The practical effect of having a judicial determination that you abducted your child may result in such restrictive access, if any, that the parent's parental rights may be effectively terminated due to unrealistic restraints on contact and access.¹³³ This will necessarily include other complicating factors such as immigration issues, cost of international travel, visitation supervision to prevent flight, access to justice, attorney fees and costs incurred in a foreign court system to prosecute visitation rights and possibly criminal charges stemming from the child's initial wrongful removal or abduction.¹³⁴ For the left-behind parent, it means going to the country that has now assumed jurisdiction over the child to secure access rights.¹³⁵ U.S. courts have authority to limit international travel of children where there is sufficient evidence to support the threat of harm or child abduction during international travel.¹³⁶ This

¹³¹ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, § 105(a)–(c), 9 U.L.A. 649 (1997) (detailing how to apply Act to international cases). See *Arjona v. Torres*, 941 So. 2d 451, 456 (Fla. Dist. Ct. App. 2006) (finding home state jurisdictional requirements applicable to proceedings if home state has not declined jurisdiction).

¹³² Priscilla Steward, *Eighth Annual Philip D. Reed Memorial Issue: Note: Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on The Civil Aspects of International Child Abduction*, 21 *FORDHAM INT'L L.J.* 308, 336 (1997) (discussing procedure for parent to submit evidence and receive decision while in another jurisdiction).

¹³³ *Id.* at 322 (recognizing that access orders from abroad may be impracticable).

¹³⁴ See Abduction Convention, *supra* note 2, at art. 26 (describing where to allocate costs); PÉREZ-VERA REPORT, *supra* note 31, ¶ 136 (discussing liability for expenses for person who prevents access rights); *Viragh v. Foldes*, 612 N.E.2d 241, 249-50 (Mass 1993) (ordering custodial parent to pay travel expenses of non-custodial parent in order to facilitate visitation). See also Steward, *supra* note 132, at 327 (same). See

¹³⁵ See Steward, *supra* note 132, at 342–44 (citing England case dismissing father's access rights after children's habitual residence changed to United Kingdom). "An application for the procurement of access rights should not be brought under Article 21, but should be brought instead, as an independent request upon the court of the child's habitual residence." *Id.* at 345.

¹³⁶ *In re Marriage of Katare*, 283 P.3d 546, 553-54 (Wash. 2012) (determining travel restrictions based on risk of harm and child's best interest). Risk factors include:

- (1) whether there has been a prior threat of abduction; (2) whether the parent has engaged in planning activities that could facilitate removal of the child from the jurisdiction; (3) whether the parent has engaged in domestic violence or abuse; (4) whether the parent has refused to cooperate with the other parent or the court; (5) whether the parent is paranoid, delusional, or sociopathic; (6) whether the parent believes abuse has occurred; (7) whether the parent feels alienated from the legal system; and (8) whether the parent has a financial reason to stay in the area.

means that post abduction Hague cases will virtually always raise a red flag when it comes to organizing international visitation.

The left-behind parent will now face the burden of seeking judicial relief in a foreign country, which may present significant language, economic, legal, and cultural barriers to establishing custodial rights.¹³⁷ Left-behind parents are effectively placed in the position of resolving all post-trial rights and remedies in a foreign country. The consequences may effectively result in a de facto termination of parental rights for left-behind parents unless there is some meaningful way to establish and enforce their custodial rights.¹³⁸ Access cases present far more challenging dynamics than the decision to return a child under the Convention due to the nature of orchestrating ongoing contact and access between a child and parent who live in two different countries.¹³⁹

"Mirror custody orders" have become popular tools to support international visitation and access arrangements for minor children where concerns exist that child will not be returned after being sent abroad for

Id. at 554-55. See also *Marriage of Burrill*, 56 P.3d 993, 997-98 (Wash. Ct. App. 2002) (holding trial court need not wait for actual harm to accrue before imposing visitation restrictions).

¹³⁷ See Steward, *supra* note 132, at 354 (discussing burden on left-behind parent).

The cost of re-litigating to secure access in another nation, additionally, may prove to be enormously prohibitive to non-custodial parents. Under Article 35 of the Hague Child Protection Convention, an access order granted in the country of the non-custodial parent is not enough to ensure access in the new country. . . . This process may be so complex and expensive that it may extinguish the access rights of non-custodial parents who have already received access rights under the original custody order.

Id.

¹³⁸ See generally Thomas A. Johnson, *Symposium Issue Celebrating Twenty Years: The Past and Promise of The 1980 Hague Convention on The Civil Aspects of International Child Abduction: Articles And Remarks The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate For Americans*, 33 N.Y.U. J. Int'l L. & Pol. 125 (2000) (recognizing inherent unfairness for parents).

Unfortunately, except in a few common law countries with the means and the will to enforce visitation orders (such as the United Kingdom), refusal of a U.S. return application by another State Party, followed by its exercise of regular custody jurisdiction, means the total loss of the children concerned. At that point, American parents have a clear choice: abandon their children until they are older or conduct a rescue operation. But, in fact, it is probably already too late for the latter option in most cases, both from a practical standpoint (civil law countries typically have outrageous delays that assist the abducting parent in "resetting" the child and alienating.

Id. at 136.

¹³⁹ See generally Steward, *supra* note 132, at 357-58 (concluding that without modification Hague risks permanent alienation from parents unless access rights facilitated effectively).

visitation.¹⁴⁰ Mirror orders in the U.S. are anticipated through the UCCJEA process of registering foreign custody orders. Those orders, viewed through the lens of comity, must comply with substantive and procedural Due Process rights to be enforceable in the U.S.¹⁴¹ However, once a foreign child custody order is properly registered in a U.S. state court, that order becomes enforceable as any other U.S. child custody determination.¹⁴² While there may be simultaneous proceedings pending in different forums that involve the same child, the UCCJEA is designed to identify a singular forum as the exclusive source of jurisdiction over the child.¹⁴³ Once that forum is identified, that forum will generally have exclusive ongoing jurisdiction over the child.¹⁴⁴ The practical effect of registering a mirror child custody order is to recognize the child's home state as having the exclusive jurisdiction to modify the order thus preventing a modification of the order by any court.¹⁴⁵

¹⁴⁰ See Linda D. Elrod, *National Conference Of Commissioners On Uniform State Laws: Drafting Committee on Uniform Child Abduction Prevention Act*, 2007 41 A.B.A. FAM. L.Q. 23, 49–50 (2007) (advising obtainment of mirror order requiring the respondent to obtain a custody order from country).

¹⁴¹ See *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) (“[J]udgments rendered [in a] foreign country. . . are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs’ claim.”).

¹⁴² See Unif. Child Custody Jurisdiction & Enforcement Act § 105, 9 U.L.A. 649 (1997) (explaining significance of registering child custody orders in a United States state court). See also Zadora M. Hightower, *Caught in the Middle: The Need for Uniformity in International Child Custody Dispute Cases*, 22 MICH. ST. INT’L. L. REV. 637, 657 (2014) (explaining exclusivity of jurisdiction).

In regard to non-signatories of the Hague Convention, the comment to Section 105 explains that courts are to consider only the non-signatory state’s child custody laws, rather than the non-signatory state’s legal system as a whole. The comment does not specifically state which child custody related laws would violate the fundamental principles of human rights, however, the comment to Section 105 does clarify that Section 105(c) should only be utilized in “the most egregious cases.”

Id. See also *Dyce v. Christie*, 17 So. 3d 892 (Fla. Dist. Ct. App. 2009) (finding foreign country’s child custody law did not violate fundamental human rights). The foreign country’s child custody laws did not violate fundamental principles of human rights, as necessary to warrant a refusal to enforce a child custody judgment in Florida under the Uniform Child Custody Jurisdiction and Enforcement Act, despite father’s contention that foreign court failed to apply the principle of considering the best interests of the child. *Id.* The foreign law recognized the principle of considering the child’s best interest, regardless of whether foreign court correctly applied the principle. *Id.*

¹⁴³ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, *supra* note 129, § 105(a)–(c) (treating foreign nations as U.S. states for all purposes of the Act).

¹⁴⁴ See UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, *supra* note 129, §201 (discussing exclusive jurisdiction over the child).

¹⁴⁵ See generally *Child Custody Jurisdiction and Enforcement Act Summary*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Custody%20Jurisdiction%20and>

Even in emergency situations, the UCCJEA provides only a limited basis for the court to enter an emergency order when the child is physically present in the state and then to transfer the case back to the child's state of habitual residence for any other relief.¹⁴⁶ This prevents a child's home state from losing jurisdiction over the child where the child is out of the home state for temporary periods of visitation. Although the UCCJEA protections are clear, consistent, and predicable in the U.S., that is generally not true when it comes to the recognition and enforcement of child custody orders in most foreign courts.¹⁴⁷

Where a foreign court lacks a uniform registry system for child custody orders, parents contemplating sending their child abroad for international visitation should first confirm that a U.S. custody order would be recognized and enforced, but not modified in the foreign jurisdiction.¹⁴⁸ Here, details matter. The U.S. child custody order would generally have to be presented in advance to a court of competent jurisdiction in the foreign country for review to determine if each of the provisions in the order would be recognized and enforced as written.¹⁴⁹ Because domestic law will most likely vary from country to country, it's critically important to determine if the order will be enforced as written, harmonious with foreign law, and if the order would be modifiable in the foreign country.¹⁵⁰ Where the language is not harmonious or unenforceable, there may be an opportunity to amend the language of the order to make it enforceable in the foreign country. The least desirable outcome would be to first send the child abroad for visitation and then realize the U.S. order would not be enforceable or is subject to modification in the foreign country.

%20Enforcement%20Act. (last visited Apr. 7, 2018) (recognizing exclusivity of child's home state).

¹⁴⁶ See generally David A. Blumberg, *The Uniform Child Custody Jurisdiction and Enforcement Act: A Focused Introduction* (2016), <https://www.uccjea.net/Lecture-Outline-UCCJEA-Intro.pdf>. (detailing limited basis under UCCJEA to transfer children from present state to habitual residence).

¹⁴⁷ *Id.* (explaining UCCJEA protections)

¹⁴⁸ See Smita Aiyar, Comment, *International Child Abductions Involving Non-Hague Convention States: The Need for A Uniform Approach*, 21 EMORY INT'L L. REV. 277, 298-302 (2007) (discussing the complexity of dealing with non-Hague countries). See also Ericka A. Schnitzer-Reese, Note & Comment, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. U. J. INT'L HUM. RTS. 7 (2004) (harping need for International Family Court given potential for re-abduction when children visit non-Hague countries).

¹⁴⁹ See generally Blumberg, *supra* note 146 (explaining significance of U.S. child custody orders in foreign jurisdictions).

¹⁵⁰ See Johnson, *supra* note 138, at 156-57 (emphasizing no reciprocity between foreign court orders and mirror orders from states without enforcement mechanisms).

The U.S. State Department produces an annual country compliance report on The Hague Abduction Convention providing detailed information on member state compliance with treaty obligations.¹⁵¹ The Department's analysis of compliance with the Convention is largely based on the standards and practices outlined in the Permanent Bureau of The Hague Conference on Private International Law's Guide to Good Practice.¹⁵² The information provided by the Department can help parents appreciate individual country compliance records as determined by the U.S. State Department.¹⁵³ This information may be invaluable to parents considering the challenge of orchestrating international visitation arrangements in signatory countries.

V. CONCLUSION

U.S. federal district court judges have endeavored to remain faithful to the Hague Abduction Convention mandate requiring prompt resolution of international child abduction cases submitted to federal court jurisdiction for resolution. That commitment is reflected in trial court proceedings fashioned to expedite resolution of abduction cases even at the expense of procedural protections otherwise applicable through the Federal Rules of Civil Procedure. Consistent with the command of ICARA, expedient resolution of abduction cases demands a streamlined approach which may run roughshod on the timeframes set forth in the procedural aspects of post-trial remedies otherwise designed to challenge the propriety of trial court determinations. A parent challenging the propriety of a return order must be prepared to

¹⁵¹ See generally U.S. DEPARTMENT OF STATE BUREAU OF CONSULAR AFFAIRS, ANNUAL REPORT ON INTERNATIONAL PARENTAL CHILD ABDUCTION (2017), [https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2017%20ICAPRA%20Report%20-%20Final%20\(1\).pdf](https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2017%20ICAPRA%20Report%20-%20Final%20(1).pdf) [hereinafter 2017 ANNUAL REPORT] (detailing compliance with the Hague Abduction Convention).

¹⁵² See *Publications*, HCCH (last visited Apr. 7, 2018), [https://www.hcch.net/en/publications-and-studies/publications2\(explaining standards of Permanent Bureau of The Hague Conference on Private International Law's Guide to Good Practice\)](https://www.hcch.net/en/publications-and-studies/publications2(explaining%20standards%20of%20Permanent%20Bureau%20of%20The%20Hague%20Conference%20on%20Private%20International%20Law's%20Guide%20to%20Good%20Practice)).

¹⁵³ See generally 2017 ANNUAL REPORT, *supra* note 151, at 9 (explaining significance of different country compliance records).

Argentina - Country Summary: The United States and Argentina have been partners under The Hague Abduction Convention since 1991. In 2016, Argentina demonstrated a pattern of noncompliance when judicial and law enforcement authorities in Argentina persistently failed to implement and abide by the provisions of The Hague Abduction Convention. As a result of this failure, 100 percent of requests for the return of abducted children under the Convention remained unresolved for more than 12 months. On average, these cases were unresolved for 69 months. Argentina has been cited as non-compliant since 2014.

immediately respond post judgment if their strategy includes preventing the child's removal while appellate remedies are sought. There may be few post-trial procedural remedies to address an adverse ruling on a return petition. But, an order staying enforcement of the return order must be considered. While the stay will be the exception in Hague litigation, there are few palatable remedies available – if any at all. Even where a stay is not issued, appellate remedies will still exist even though it seems highly unlikely those remedies would deliver practical results to the extent a child would be re-returned to the U.S. pursuant to a favorable appellate outcome. For every child that is subject to a return order, and every child that is not ordered to be returned, there will be one parent now faced with the daunting task of establishing and enforcing custodial rights to their child who is now subject to jurisdiction in a country where the parent does not reside. Although there may be substantial impediments to organizing and enforcing access rights, those rights are a legitimate priority within the objects of the Convention even if they present incredibly difficult legal and practical impediments to maintain the parent-child relationship in post judgment Hague Abduction proceedings.