The 1996 Hague Convention

Richard Harrison QC

Bloomsbury Family Law Conference

June 2021

**Introduction**

1. The *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (‘HC96’) first came into force in the UK on 1 November 2012.
2. Post-Brexit, HC96 has been incorporated into domestic law by s.1 of the Private International Law (Implementation of Agreements) act 2020, which has amended the Civil Jurisdiction and Judgments Act 1982 so as to give it ‘the force of law in the United Kingdom’, subject to various declarations made in 2012.
3. The jurisdictional provisions of HC96 are referred to as a basis for jurisdiction in the Family Law Act 1986. The effect of section 2 of the 1986 Act is that in a case to which HC96 applies the court is precluded from making the following orders unless it has jurisdiction under HC96:
4. an order under section 8 of the Children Act 1989 (other than an order varying or discharging such an order);
5. a special guardianship order;
6. a contact order under section 26 of the Adoption and Children Act 2002 (other than an order varying or revoking such an order);
7. an order for post-adoption contact under section 51A of the ACA 2002 (other than an order varying or revoking such an order);
8. an order under the inherent jurisdiction ‘*so far as it gives care of a child to any person or provides for contact with, or the education of, a child*’ (excluding an order varying or discharging such an order).
9. For cases commenced before 11pm on 31 December 2020, Council Regulation (EC) 2201/2003 (‘Brussels IIa’) continues to have effect (see Art 67 of the Withdrawal Agreement).
10. Article 61 of Brussels IIa provide that it takes precedence over HC96:
11. where the child concerned is habitually resident in a Brussels IIa Member State;
12. as concerns recognition and enforcement of judgments given in a Brussels IIa Member State.
13. Article 62 of Brussels IIa provides that HC96 continues to have effect in relation to matters ‘not governed by’ Brussels IIa. In *Re AA* [2021] EWFC 17, it was held that an issue as to which court is first seised for the purposes of Art 13 of HC96 is not a matter governed by Brussels IIa and therefore HC96 was the relevant instrument, even though the proceedings in question were issued before 31 December 2020. This case is subject to a pending appeal in the Court of Appeal.
14. Although Brussels IIa will become increasingly less relevant, practitioners should first check whether it continues to apply or whether the relevant instrument is HC96. The following should be considered:
* Does the case concern proceedings commenced before 11pm on 31.12.20?
* If an order is in existence which requires recognition or enforcement, was it made by a Brussels IIa Member State in proceedings commenced before 11pm on 31.12.20?
* Does the case involve a matter ‘governed by’ Brussels IIa?

If the answer to any of these questions is ‘no’, then HC96 will be the relevant instrument, provided that the subject matter of the proceedings falls within its scope.

**Scope**

1. Art 1 sets out the objects of the Convention. They relate to the following:
	1. To determine which state has jurisdiction
	2. To determine which law is to be applied in exercising jurisdiction
	3. To determine the law applicable to parental responsibility
	4. Recognition and enforcement
	5. Co-operation between the authorities of Contracting States
2. HC96 applies to children from birth until the age of 18.
3. For the purposes of the Convention ‘*parental responsibility'* includes parental authority, or any similar relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child (Art 1(2)).
4. The term ‘*measures*’ must be construed broadly rather than narrowly and includes undertakings: *Re Y (A Child)* [2013] EWCA Civ 129, [2013] 2 FLR 649. Art 3 provides that measures may deal with the following ‘*in particular*’ (i.e. the list is not exhaustive):
5. the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
6. rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
7. guardianship, curatorship and analogous institutions;
8. the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
9. the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
10. the supervision by a public authority of the care of a child by any person having charge of the child;
11. the administration, conservation or disposal of the child's property.
12. Art 4 sets out matters falling outside the scope of HC96:
13. the establishment or contesting of a parent-child relationship;
14. decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
15. the name and forenames of the child;
16. emancipation;
17. maintenance obligations;
18. trusts or succession;
19. social security;
20. public measures of a general nature in matters of education or health;
21. measures taken as a result of penal offences committed by children;
22. decisions on the right of asylum and on immigration.

The exclusion of maintenance is significant as it means that financial undertakings given in support of an order for relocation or for the return of a child under the 1980 Hague Convention may not be enforceable in the other State.

**Jurisdiction**

1. There are seven bases for jurisdiction under HC96 (which equate to but are not identical to the grounds for jurisdiction under Brussels IIa):
2. Habitual residence (Art 5)
3. Presence, in the case of refugee children, children who are internationally displaced and children whose habitual residence cannot be established (Art 6)
4. Cases of child abduction (Art 7)
5. Transfer of jurisdiction to State ‘better placed’ (Arts 8 and 9)
6. Acceptance of jurisdiction (Art 10)
7. Cases of urgency (Art 11)
8. Provisional measures (Art 12)

**Habitual residence**

1. Art 5(1) sets out the primary basis for jurisdiction: ‘*The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property*’.
2. Art 5(2) provides that ‘*in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction*’. This is subject to Article 7 which is concerned with cases where the change of habitual residence has occurred as a result of the wrongful removal or wrongful retention of the child.
3. There is an important distinction between Art 5 and the equivalent article in Brussels IIa (Article 8). Under Article 8 of Brussels IIa, the court’s jurisdiction is based upon the child’s habitual residence at the time the court is seised of proceedings. That jurisdiction continues until the conclusion of the proceedings notwithstanding a change in habitual residence in the meantime (the principle known as ‘*perpetuo fori*’).
4. Art 14 of HC96 provides that a change in the child’s habitual residence, does not render an existing order obsolete. The Explanatory Report[[1]](#footnote-1) suggests that such a change would not be a change of circumstances justifying a challenge to a pre-existing order.
5. Article 13 contains a lis pendens provision which precludes a State with jurisdiction from exercising it, if at the time of commencement of proceedings corresponding measures have been requested from another Contracting State with jurisdiction and these remain ‘under consideration’. The effect of this provision is that following a change of habitual residence, the new State cannot automatically assume jurisdiction, if a case remains pending in the former State of habitual residence; an application should be made in the old State to terminate the proceedings on the basis that jurisdiction has moved to the new State. This provision was subject to consideration in *Re AA* [2021] EWFC 17 (which is subject to a pending appeal in the Court of Appeal).

*Meaning of habitual residence*

1. The concept of habitual residence has been considered in several decisions of the CJEU (in relation to Art 8 of Brussels IIa) and the UK Supreme Court, which has held that the European definition of the term applies in relation to its meaning for the purposes of domestic law and the 1980 Hague Convention.
2. The relevant Supreme Court cases are:

*A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2014] AC 1, [2013] 3 WLR 76, [2013] 3 FCR 559, [2014] 1 FLR 111

*Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1017, [2014] 1 FCR 69, [2014] 1 FLR 772

*Re LC (Children)* [2014] UKSC 1, [2014] AC 1038, [2014] 1 FCR 491, [2014] 1 FLR 1486

*Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2016] AC 76, [2015] 2 FCR 570, [2015] 2 FLR 503

*Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4,[2016] AC 606, [2016] 2 FCR 307, [2016] 1 FLR 561 [2016] UKSC 4, [2016] AC 606, [2016] 2 FCR 307, [2016] 1 FLR 561

*Re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2018] UKSC 8, [2019] AC 1, [2018] 2 FCR 733, [2018] 1 FLR 861

The relevant CJEU cases are:

*Proceedings Brought by A* (C-523/07) [2010] Fam 42, [2010] 2 WLR 527, [2009] 2 FLR 1

*Mercredi v Chaffe* (C-497/10) [2012] Fam 22, [2011] 3 WLR 1229, [2011] 1 FLR 1293

*Proceedings Brought by HR* (C-512/17) [2018] Fam 385, [2018] 3 WLR 1139

1. The habitual residence of a child is "**the place which reflects some degree of integration by the child in a social and family environment**" in the country concerned. This is an essential factual question, the answer to which depends upon numerous factors, including the reasons for the family's stay in the country in question: *A v A*.
2. There does not need to be full integration, only ‘some degree’ of it; in certain circumstances the requisite degree can occur quickly: *Re LC @ §39.* In *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187, [2020] 4 WLR 149, [2021] 1 FCR 105 the relevant degree of integration was achieved very shortly following a move to France from Australia, where the move was a planned relocation and the family had substantially severed their ties with Australia.
3. In *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam), [2016] 4 WLR 156 at §17 Hayden J summarised the relevant principles as follows (case references are to the UKSC and CJEU decisions set out above):
4. The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A , adopting the European test).
5. The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re L).
6. In common with the other rules of jurisdiction in [Council Regulation (EC) No 2201/2003](https://uk.westlaw.com/Document/I58F87412888D44819172A784859B755C/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) (“Brussels IIA”) its meaning is “shaped in the light of the best interests of the child, in particular on the criterion of proximity”. Proximity in this context means “the practical connection between the child and the country concerned”: A v A , para 80(ii); Re B , para 42, applying *[Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22](https://uk.westlaw.com/Document/I80EF9E00623911E0AC45A6618FA75819/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))* , para 46.
7. It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R).
8. A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.
9. Parental intention is relevant to the assessment, but not determinative (Re L, Re R and Re B).
10. It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B).
11. In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B —see in particular the guidance at para 46).
12. It is the *stability* of a child's residence as opposed to its *permanence* which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re L and Mercredi).
13. The relevant question is whether a child has achieved *some degree of* integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (Re R) (emphasis added).
14. The requisite degree of integration can, in certain circumstances, develop quite quickly ([article 9](https://uk.westlaw.com/Document/I58F87412888D44819172A784859B755C/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson JSC referred (para 45) to those “*first roots*” which represent the requisite degree of integration and which a child will “*probably*” put down “*quite quickly*” following a move.
15. Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).
16. The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, “if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former” (Re B supra).
17. In *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, [2020] 4 WLR 137, [2021] 1 FCR 155 this was described by Moylan J as a helpful summary, save for (viii) which ‘*should be omitted so that the court is not diverted from applying a keen focus on the child's situation at the relevant date*’.

**Jurisdiction based upon presence**

1. Article 6 of HC96 confers a limited jurisdiction based upon a child’s presence in respect of three categories of children:
2. Refugee children;
3. Children who, due to disturbances in their country, are internationally displaced;
4. Children whose habitual residence cannot be established.
5. Cases in which a child’s habitual residence cannot be established will be highly unusual: see *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4 *(supra)* Lord Wilson held:

‘I conclude that the modern concept of a child’s habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo [of being found to have no habitual residence] in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new State, up will probably come the child’s roots in that of the old State to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.’

**Child Abduction**

1. Where a child is the subject of a ‘wrongful removal’ or a ‘wrongful retention’, the authorities in the country of habitual residence immediately prior to that wrongful removal or retention retain jurisdiction pursuant to Art 7, until the child has acquired a habitual residence in another State, and

either

1. Each person institution or other body having rights of custody has acquiesced in the removal or retention;

or

1. the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
2. The term ‘State’ for the purposes of Art 7 clearly means the same as ‘Contracting State’. This means that the conditions in Art 7(1) could never been fulfilled in a case where a child was subject to a wrongful removal to or retention in a jurisdiction not a party to HC96. On one reading (previously accepted by the English courts in relation to Art 10 of Brussels IIa), this might mean that jurisdiction was retained indefinitely: see *Re H (Children) (Reunite International Child Abduction Centre Intervening)* [2014] EWCA Civ 1226, [2018] 4 WLR 108, [2018] 2 FCR 313.
3. In *SS v MCP* Case C-603/20 PPU (24 March 2021), a case involving Art 10 of Brussels IIa (the equivalent to Art 7), the CJEU rejected an argument that Art 10 jurisdiction endured indefinitely. It was held that the article was concerned solely with internal questions of jurisdiction as between Member States and did not apply to questions of jurisdiction arising between a Member State and a Third State. Article 7 of HC96 is likely to be interpreted in the same way.
4. Wrongful removals and retentions are defined in Art 7(2):

The removal or the retention of a child is to be considered wrongful where -

*a)* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

*b)* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

There is a significant body of caselaw relating to the 1980 Hague Convention in relation to the meaning of ‘wrongful removal’ and ‘wrongful retention’: see, for example, *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 319, [2006] 3 WLR 989, [2007] 1 FCR 1, [2007] 1 FLR 961.

1. Under Art 7(3) the only jurisdiction in the State to which the child has been wrongfully removed, or in which the child has been wrongfully retained is the jurisdiction to take “*such urgent measures as are necessary for the protection of the person or property of the child*” under Art 11.

**Transfer of jurisdiction**

1. Articles 8 and 9 of HC96 contain a mechanism by which proceedings may be transferred from one Contracting State to another provided both States agree to the transfer and the conditions in Art 8 are met. The equivalent provision in Brussels IIa is Article 15.
2. The process by which a transfer takes place begins with a request from the authorities in one Contracting State to those in another. In order for a transfer to take place it is necessary to demonstrate that:
3. the second State is ‘better placed’ in the particular case to assess the best interests of the child, and
4. the transfer is in the child’s best interests.
5. These provisions permit what is essentially a ‘*forum conveniens’* basis for the transfer of jurisdiction, albeit the transfer must also accord with the best interests of the child concerned. A transfer cannot be based solely upon the second State being the more convenient or appropriate location for the litigation.
6. It is not permissible to transfer proceedings to *any* Contracting State. Art 8 provides that a transfer from the State of habitual residence can only take place to another State which falls into one of the following categories:
7. A State of which the child is a national;
8. A State in which property of the child is located;
9. A State whose authorities are seised of an application for divorce or legal separation of the child's parents; or
10. A State with which the child has a ‘substantial connection’
11. Art 9 allows a request to be made *to* the State of habitual residence requesting that the authorities in another State be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary. Arts 9(1) provide that the request may be made by a State falling within one of the categories specified in Art 8(2):

1. A State of which the child is a national;
2. A State in which property of the child is located;
3. A State whose authorities are seised of an application for divorce or legal separation of the child's parents; or
4. A State with which the child has a ‘substantial connection’
5. An example of a case in which the court submitted a request under Art 9 is *Re M and L* [2016] EWHC 2535 (Fam), [2017] 1 FCR 33, [2017] 2 FLR 250. Baker J was concerned with two children, one of whom lived in England with the father; the other in Norway with the mother. It was crucial that one court should deal with both children. As no request for a transfer to Norway had been made by the mother, the court held that it was appropriate to request the Norwegian authorities to transfer proceedings to England.
6. Rules 12.61 to 12.68 of the Family Procedure Rules 2010 set out the domestic rules under which the English court deals with transfers under Arts 8 and 9. Applications must be heard on notice in the High Court.

**Acceptance of jurisdiction by a court dealing with divorce or legal separation proceedings**

1. Article 10 of HC96 is the equivalent of Art 12 of Brussels IIa (which deals with ‘prorogation of jurisdiction’). It provides that a court exercising jurisdiction with respect to divorce, legal separation or annulment proceedings concerning the parents of a child may take jurisdiction over matters connected with parental responsibility under Art 10 provided that all of the following conditions are met:
2. One of the child’s parents is habitually resident in the State concerned when proceedings are commenced;
3. One of the child’s parents has parental responsibility for the child when proceedings are commenced;
4. The jurisdiction is accepted by both parents and by any other person who has parental responsibility for the child; and
5. It is in the best interests of the child for the authorities in that State to assume jurisdiction.
6. The circumstances in which a court can assume jurisdiction by agreement under HC96 Art 10 are more limited than those under Art 12 of Brussels IIa.

**Urgent measures**

1. Article 11 provides that:

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

1. This provision allows the State to which a child has been abducted (and which is precluded from exercising substantive jurisdiction) ‘***to take any necessary measures of protection***’.
2. The Explanatory Report specifically refers to the example of urgent measures taken in abduction proceedings which will remain in force until the situation is “*under the control of*” the authorities which normally have jurisdiction, and there is no longer any reason to maintain the jurisdiction of the authorities of the State of the child’s presence[[2]](#footnote-2).
3. The meaning of “urgency” was considered by the Supreme Court in *Re J (A Child) (1996 Hague Convention: Cases of Urgency)* [2015] UKSC 70, [2016] AC 1291, [2015] 3 WLR 1827, [2016] 1 FCR 481, [2016] 1 FLR 170. It was held that the majority of cases involving the abduction of a child will be ‘urgent’ for the purposes of Art 11, thus allowing the court to make orders for the return of the child to the country of habitual residence by exercising a substantive welfare jurisdiction: Per Baroness Hale at §§38-39:

‘It would be extraordinary if, in a case to which HC80 did not apply, the question of whether to order the summary return of an abducted child were not a case of ‘urgency’ even if it was ultimately determined that it was not ‘necessary’ to order the return of the child. While I would not, therefore, go so far as to say that such a case is invariably one of ‘urgency’, I find it difficult to envisage a case in which the court should not consider it to be so, and then go on to consider whether it is appropriate to exercise the article 11 jurisdiction.’

1. Under Art 23(1), urgent measures will be recognised ‘by operation of law’ in the country of habitual residence until the authorities in that State of habitual residence put in place their own measures.

**Provisional measures**

1. The courts of a Contracting State in which a child is present may take measures of ‘a provisional character’ under Art 12 even where there is no urgency.
2. Such measures have ‘*a territorial effect limited to the State in question*’.
3. The measures must not be incompatible with measures already taken in the State of habitual residence and will lapse once the authorities in the State of habitual residence have taken a substantive decision in relation to the child.
4. Article 12 cannot be used in a case where a child has been wrongfully removed or retained: see Art 12(1) and Art 7(3); the latter provides that only measures pursuant to the urgency jurisdiction in Art 11 can be taken in those circumstances.

**Impact of the jurisdictional provisions of HC96**

1. Where another Contracting State has substantive welfare jurisdiction, the English court has no power to make orders apart from the limited jurisdiction arising under Arts 11 and 12.
2. In *Re I-L (Children) (1996 Hague Child Protection Convention: Inherent Jurisdiction)* [2019] EWCA Civ 1956, [2020] 1 FCR 35, [2020] 1 FLR 656the Court of Appeal considered whether the English court had jurisdiction to make orders for the return of a child to Russia in a case where the Russian courts were already seised of proceedings in relation to the child. It was held that on the facts of the case there was no power to make such an order exercising substantive as welfare proceedings in Russia remained ‘under consideration’ for the purposes of Art 13. It was ‘not appropriate’ to exercise the power pursuant to Art 11 as the Russian courts were seised and in a position to make welfare orders. As the mother had already obtained a return order from the Russian court, the appropriate jurisdictional course was to seek recognition and enforcement of that order.

**Applicable law**

1. Chapter 3 of HC96 sets out the circumstances in which the laws of one country (i) may be applied and exercised by the courts of another country; and (ii) may be relevant to the application of the law in another country by reason of a child’s move across a national border.
2. Art 21(1) provides that for the purposes of Chapter 3, ‘law’ means the law in force in a State other than its choice of law rules. This is subject to a limited exception in Art 21(2) where the applicable law under Art 16 is that of a non-Contracting State.
3. The applicable law rules can be refused only if an application of the rules would be manifestly contrary to public policy, taking into account the best interests of the child[[3]](#footnote-3). This is a very high threshold: see, for example, Munby LJ in *Re L (A Child) (Recognition of Foreign Order)* [2012] EWCA Civ 1157, [2013] Fam 94, [2013]2 WLR 152, [2013] 2 FCR 195, [2013] 1 FLR 430:

“The use of the word “manifestly” connotes a very high degree of disparity between the order’s effects if now enforced and the child's current welfare interests … The test is stringent, the bar, as I have said, is set high”.

See also *Re D (Recognition and Enforcement of Romanian Order)* [2016] EWCA Civ 12, [2016] 1 WLR 2469, [2016] 3 All ER 770, [2016] 2 FCR 1, [2016] 2 FRL 347 where Ryder LJ described the public policy ground for non-recognition of a judgment under Art 23 of Brussels IIa as ‘*an exceptional remedy’*, requiring ‘*something more*’ than the breach of a fundamental principle.

1. Art 15(1) provides that in exercising their jurisdiction under Arts 5-14 of HC96, the authorities of the Contracting States shall apply their own law. The only exception to this rule is provided for by Art 15(2) which allows the court, exceptionally, to take into consideration the law of another State “*with which the situation has a substantial connection*” in circumstances where it is required to do so to secure the protection of the person or the property of the child.
2. Art 16 is concerned with the applicable law for the attribution or extinction of parental responsibility. Its provisions can be summarised as follows:
3. The attribution or extinction of parental responsibility by operation of law is governed by the law of the habitual residence of the child.
4. The attribution or extinction of parental responsibility by agreement or unilateral act is governed by the law of the child's habitual residence when the agreement or unilateral act takes effect.
5. Parental responsibility existing under the law of the child's habitual residence subsists after a change of habitual residence to another State.
6. If a child’s habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have parental responsibility is governed by the law of the new habitual residence
7. Art 18 provides that parental responsibility may be terminated or its exercise modified by measures taken under HC96.
8. Art 17 is concerned with the *exercise* of parental responsibility (as opposed to its attribution or extinction). This is governed by the law of the State of the child’s habitual residence. If the child's habitual residence changes, the exercise of parental responsibility is governed by the law of the State of the new habitual residence.
9. Under Art 20, the rules as to applicable law apply even if the law designated by them is the law of a non-Contracting State.

**‘Protective measures’ and the reinforcement of the 1980 Hague Convention**

1. An important purpose of HC96 is to support and supplement the effective operation of the 1980 Hague Convention on International Child Abduction. Certain undertakings given to the English court to facilitate the making of a return order have been held to be ‘measures’ for the purposes of Art 11 of HC96 which are capable of recognition and enforcement in other Contracting States: *Re Y (A Child)* [2013] EWCA Civ 129, [2013] 2 FLR 649.
2. In order to be enforceable under HC96 the measures adopted must fall within the scope of the Convention. This would not include financial provisions.
3. Art 50 of HC96 makes it clear that the substantive application of the 1980 Hague Convention is not affected by its provisions. A parent who alleges that their child has been abducted from, or retained outside, the State of habitual residence may bring proceedings under either or both Conventions.
4. The Practical Handbook on the operation of HC96[[4]](#footnote-4) provides an example of a situation in which HC96 can be used to complement a return order made under the 1980 Convention. The example involves a case in which allegations are made that a father poses a risk of sexual harm to the child and the judge considers it necessary that any contact between the child and the father take place in a supervised environment until a substantive welfare decision can be taken in the State of habitual residence. The judge can order the return of the children but also takes an urgent measure to protect the children by providing that the father’s contact with the children must be supervised until a decision on the matter can be taken in the State of habitual residence. This urgent measure will be recognised by operation of law but will lapse as soon as the State of habitual residence takes the necessary measures of protection required by the situation upon the return of the child.

**Recognition and Enforcement**

**Recognition and the grounds for the refusal of recognition**

1. Art 23 sets out the basic principle that a measures taken in one Contracting State shall be recognised by operation of law in all other Contracting States.
2. Recognition by operation of law means that no proceedings are required to obtain recognition. However, if a party seeks to *enforce* an order obtained in an overseas jurisdiction, this will require proceedings and within these another party may challenge recognition. In such proceedings, documents (including orders) are exempt from any requirement for legalisation or other analogous formality[[5]](#footnote-5).
3. The authorities of the State in which recognition is sought are bound by any findings of fact made in the State where measures were taken[[6]](#footnote-6).
4. The grounds upon which recognition ‘may be refused’ are limited to those in Art 23(2):

 *a)* if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

*b)* if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

*c)*on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

*d)* if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

*e)* if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

*f)*  if the procedure provided in Article 33 has not been complied with.

1. In *Uhd v KcKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam), [2019] 2 FLR 1559, MacDonald J rejected various arguments raised by the mother as grounds for non-recognition of orders made in Australia in her absence. The orders had been made following the abduction of a child; this was held to be ‘a case of urgency’ such that Arts 23(b) and (c) did not apply. Moreover, although personally absent, M had been represented in Australian proceedings and had been served by email. The public policy exception was also not engaged.
2. It is very difficult to establish that an order made in a Contracting State is manifestly contrary to public policy: see *Re D (Recognition and Enforcement of Romanian Order)* [2016] EWCA Civ 12, [2016] 1 WLR 2469, [2016] 2 FCR 1, [2016] 2 FLR 347 at § 50 (dealing with the equivalent exception under Brussels IIa); cases falling within Art 23(2)(b) are ‘*exceptional*’.
3. The fact that orders are enforceable in another Contracting States under HC96 may be of importance in relocation applications: see, for example, *S v G* [2015] EWFC 4.

**Declaration of enforceability**

1. Art 26 requires that each Contracting State must apply a “*simple and rapid process*”[[7]](#footnote-7) to an application by any interested party for a declaration of enforceability. The requested court is not permitted ‘to review’ the merits of the decision taken (Art 27).
2. Once habitual residence has transferred to the new Contracting State, that State may make orders based on its own substantive jurisdiction, even if those orders conflict with an earlier order in the State in which the child was formerly habitually resident. However, the court must be cautious before embarking upon a welfare assessment in relation to matters already determined by a foreign court; it is necessary to give ‘full weight’ to the findings of the foreign court: see *Re E (BIIa: Recognition and Enforcement)* [2020] EWCA Civ 1030, [2021] 2 WLR 213, [2021] 1 FLR 747 at §73, a case concerned with Art 23(e) of Brussels IIa (which does not have a direct equivalent in HC96).

**Enforcement**

1. In an enforcement application, the measures to be enforced are treated as equivalent to a domestic order (Art 28). If the measure has no equivalent in the law of the Requested State, the Requested State may adapt the measures to fit what can be achieved under domestic law.
2. Art 28 also provides that:

‘enforcement takes place in accordance with the law of the requested State to the extent provided by such law, *taking into consideration the best interests of the child*’,

It is unlikely that the highlighted words confer an unfettered discretion as to *whether* the order should be enforced; more likely the discretion relates to the manner of enforcement.

1. Part 31 and PD31A of the FPR set out the domestic rules for recognition and enforcement of orders under HC96. Applications are made initially to a DJ in the principal registry. PD31A sets out detailed guidance as to the evidence required on an application for registration, recognition or non-recognition of a judgment generally and specifically on applications under HC96.

**Co-operation**

1. Chapter V of HC96 aims to improve the exchange of information between Contracting States. Two lines of communication are provided for by Arts 29 to 39:
2. Designation of a Central Authority to discharge HC96 duties;
3. Direct communication between competent authorities including courts and relevant public bodies

The designated Central Authority in England and Wales is the Lord Chancellor.

1. A Central Authority (or other competent authority) may make a request under Art 32 for a report on the situation of the child to another Central Authority in respect of a child who has a substantial connection with the Requesting State but who is habitually resident and present in the Requested State. In addition to the request for a report, the Requesting State may make a request of the State in which the child is habitually resident that protective measures are taken.
2. Article 35(1) supplements Art 21 of the 1980 Hague Convention by requiring authorities to assist in the implementation of measures of protection especially as regards access rights.
3. Art 35(2) enables a left behind parent who seeks access to his child (who is habitually resident in another Contracting State) to ask the authorities of his country to carry out an assessment of him for use in proceedings in the State of habitual residence. That report may both gather information and also assess the left behind parent’s suitability to have access and under what conditions. The report shall be admissible as evidence in proceedings over access in the other country. A court considering such an application may adjourn pending the outcome of a request under paragraph 2.

June 2021

Richard Harrison QC

1 King’s Bench Walk

1. Explanatory Report to HC96 by Paul Lagarde, § 81 [↑](#footnote-ref-1)
2. Explanatory Report by Paul Lagarde paragraphs 71-72 [↑](#footnote-ref-2)
3. Art 22 of HC96 [↑](#footnote-ref-3)
4. Published by the Hague Conference on Private International Law Permanent Bureau, 2014 [↑](#footnote-ref-4)
5. Article 43 [↑](#footnote-ref-5)
6. Article 25 [↑](#footnote-ref-6)
7. [↑](#footnote-ref-7)