

The Hague Convention on the Civil Aspects of International Child Abduction 1980

Hong Kong

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Introduction

- The People's Republic of China is a Hague Conference member and has been one since 3 July 1987.
- However, only its 2 Special Administrative Regions, Hong Kong and Macao, are contracting states to the Child Abduction Convention.
- Hong Kong acceded to the Child Abduction Convention on 5 September 1997.

Regional office

- Hong Kong has been chosen as the location for the Regional Office for the Hague Conference on Private International Law in the Asia-Pacific. This was opened last December.
- The only other regional office is in Latin America, in Buenos Aires.

Regional Office

- To put forward the case for membership of Asian states in the Conference
- To provide assistance in order to lay the groundwork for adoption of a given convention by any new state
- To be the hub of a network through which Asian countries can communicate their legislative and administrative needs to one another

What has the Regional Office been doing

- Participating in presentations, seminars and workshops throughout the Asia Pacific to promote the benefits of Hague Conventions and to provide guidance on their implementation
- Working on setting up an organisation to be known as “Friends of HAPRO”. Persons interested in supporting the Regional Office can become members of the Friends

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- Establishing links and meeting with national organs, judiciaries, chambers of commerce, colleges and universities
 - Working to expand the number of Asian judges in the international Hague Network of Judges. This is a network of family law judges who liaise with each other in relation to the handling of child abduction and other family law matters

The Ordinance and Rules

- The Child Abduction and Custody Ordinance (Cap. 512) (the “Ordinance”) was enacted for the Convention to enter into force in our domestic law.
- Order 121 of the Rules of High Court (Cap. 4A) provides the procedural rules for the applications and proceedings under our Ordinance to assist with the effective operation of the Ordinance and the Convention.

Objects

- The objects of the Convention are to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure the rights of custody and of access of one Contracting State are effectively respected in other Contracting States.

Central Authority

- Under section 5 of the Ordinance, the Secretary for Justice acts as the Central Authority in Hong Kong and shall discharge the functions of a Central Authority.
- Even though the Secretary of Justice will act as the applicant in the proceedings, in normal course, the Secretary will be replaced by an applicant parent.

Application

- To the Central Authority of the child's habitual residence; or
- To the Central Authority of a contracting state to which the child has been wrongfully removed to or in which the child has been wrongfully retained.

(Article 8 of the Convention)

Application

- **Criteria:**
 - the child is under 16;
 - either (i) Hong Kong was the place of the child's habitual residence before the removal or retention and the child has been wrongfully removed to or retained in a contracting state of the Convention or (ii) one of the contracting states was the place of the child's habitual residence before the removal or retention and the child has been wrongfully removed to or retained in Hong Kong; and
 - the removal or retention occurs on or after 5 September 1997, the date of coming into force of the Convention in Hong Kong.

Application

- “Request for Return of Child” Form (FORM DJ-C30(E)) & supporting documents
- Affidavit sworn by the applicant
- Indication of whether voluntary return is feasible
- Evidence to deal with the defence, if it is anticipated

Outgoing cases

- Central Authority may make enquiry with the Immigration Department for departure details
- If there is reason to believe that the child is in another contracting state, it will transmit the application to and liaise with the Central Authority of that contracting state
- Where appropriate, it can also assist in making an application to the Hong Kong courts for a declaration that the removal or retention of a child outside Hong Kong is wrongful.
- Applicant may also report the child as missing to the HK Police.

Incoming cases

- It is preferable to have the applicant parent applying to the Central Authority of the place of the child's habitual residence which will then transmit the application to the Central Authority in Hong Kong.

Incoming cases – Locating a child

- Return proceedings can be commenced as long as it is confirmed that the child is within Hong Kong even the exact location is not known;
- Applicant parent is required to provide information as to why he/she believes the child is in Hong Kong;
- Central Authority of Hong Kong may seek assistance from various departments such as the Immigration Department, the Hong Kong Police Force and the Social Welfare Department.

Incoming cases – Initiate proceedings

- Once the child is located, the Central Authority will initiate Hague proceedings and arrange for an early hearing date.
- Every application may be made by originating summons. An application for the return of a child shall be supported by an affidavit sworn by the applicant parent.

Incoming cases – Seek voluntary return

- Progress of the proceedings will not be held in abeyance while attempting to secure a voluntary return.
- Central Authority will enlist the assistance of the social welfare officers to provide counseling and social services and recommend mediation.
- If abducting parent is willing to cooperate, the arrangements for the voluntary return will be embodied in a consent order.

Incoming cases – Preventing removal

- Central Authority may make an ex parte application to the court for an order directing the child's travel document to be deposited with the court and obtain orders to prevent removal of the child.
- It may issue border and port alerts to prevent the child from crossing the border.
- The applicant parent may apply for interim care and control of the child.

Judicial Authority

- Under section 6 of the Ordinance, the Court of First Instance shall have the jurisdiction to hear and determine an application under the Hague Convention.
- Section 7 of the Ordinance confers powers on the court to give interim directions for securing the welfare of the child in question or preventing changes in the circumstances relevant to the determination of the application.

Judicial Authority

- Under Article 11 of the Convention, the judicial or administrative authority has to reach a decision within **six weeks** from the date of commencement of the proceedings after which the Central Authority may request a statement of the reasons for the delay.
- Order 121 of the Rules of the High Court provides for a tight timetable for filing evidence and every effort will be made by the court to fix a date for the hearing within the shortest possible time frame.

Costs of applications

- Article 26 of the Convention provides that each Central Authority shall bear its own costs in applying the Convention and it may not require any payment from an applicant towards legal costs. However, the Convention permits a contracting state to make a reservation on costs and Hong Kong has made such reservation.
- Under section 13 of the Ordinance, the legal costs for such proceedings shall not be borne by the Secretary of Justice or any other authority in Hong Kong except insofar as those costs may be covered by the grant of legal aid under the Legal Aid Ordinance (Cap.91).

AC v PC [HCMP1238/2004]

- The mother was of Malaysian origin and raised in Perth. The father was from Hong Kong.
- The parties married in 1990 and spent much of their married life in Perth.
- Two children were born in 1991 and 1994 respectively.
- The couple divorced in April 1999.
- The mother applied for day-to-day care and control of the children in July 1999 and hearing fixed in August in Perth.
- Before the hearing, the father flew to Hong Kong with the children.
- They remained for less than a month in Hong Kong and then moved to China, which is not a member of the Hague Convention.
- In March 2000, the Australian Central Authority made an application to the Hong Kong Central Authority and the children were placed on a 'watch list' of the immigration.
- In December 2002, the father smuggled the children back to Hong Kong by a vessel and bypassed immigration controls.

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- It was not until April 2004 when the father sought to obtain permanent resident status for his elder child and an application had to be made to the Hong Kong Immigration authorities who notified the Central Authority.
 - Father's concealment of the children resulted in them being wrongfully removed and retained for a period of 4 years and 9 months before the commencement of the proceedings.
 - Although unfair to the mother, Judge held that the concealment did not suspend the passing of time of 1 year under Article 12(1)
 - The Judge also found that the children were settled in their new environment and the application for the return of the children was declined.

EW v LP [HCMP1605/2011]

- The father and the mother are from Slovakia.
- Father is a professional ice hockey player and Mother used to be work as a model.
- They formed a relationship in about 2004/2005 but did not marry. Their son was born in Slovakia in May 2007.
- Relationship ended in about January 2009.
- Mother removed the child to Hong Kong in September 2010.
- Formal application for the child's return was taken out by the Father 11 months after removal.
- Substantive hearing took place 17 months after the formal application.

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- Under Slovak law, “parental rights and obligations” in relation to a child belong to both parents jointly, irrespective of whether the child was born in or out of wedlock or whether they live together or not.
 - They include the right to determine where a child shall live.
 - The Slovak Central Authority confirmed that consent of the Father or the court permission was obligatory and in the absence of such consent or court permission, the removal was considered wrongful.

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- The Mother relied on both the consent and/or acquiescence of the Father.
 - The Judge ruled in favour of the Mother inferring that the Father had come to accept the status quo and has made a choice not to assert his rights seeking the child's prompt return.
 - There was also unexplained delay on the part of the Father in instituting and later in prosecuting this application.
 - Further, the Judge found that there was a grave risk that the child will be placed in an intolerable situation if a return order was made.

Current Development

- To better support the operation of the Hague Convention, the Child Abduction Legislation (Miscellaneous Amendments) Bill 2013 was introduced on 12 July 2013.
- The Law Reform Commission has reviewed the existing legislation in Hong Kong relating to child abduction as well as the relevant laws of England and Wales, Scotland, Ireland and Australia and made a total of **six** recommendations.
- The legislative amendments will minimize the likelihood of parents absconding with the child to another jurisdiction when a relationship between two parents breaks down.

Current Development

- a prohibition order against removing a child out of Hong Kong without consent;
- a location order for the disclosure of the whereabouts or other circumstances relevant to locating the child;
- a recovery order which may require the return or delivery of a child to a specified person, and may authorize a police officer to recover the child;
- a prohibition order against removing a child out of Hong Kong except to the child's habitual residence when Hong Kong is acting as a place of transit on return to the child's home state;
- notification of a stop order to be given to the Director of Immigration and a specific power to the local law enforcement agencies to hold a child suspected of being abducted at any border control points so that the child can be returned to the custodial parent or taken to a place of safety;
- stay of local custody application pending the result of any proceedings for the return of the child.