

## COVID-19 and the 1980 HCCH Child Abduction Convention: pertinent issues

Since the COVID-19 outbreak has been declared a pandemic by the WHO, numerous States have implemented travel bans to contain its spread. For example, on 17 March 2020, the EU announced a decision to close all external borders and restrict non-essential travel between Member States. Other States took similar steps. At the national level, similar measures have also been taken to prevent the entry of travelers from places severely affected by the virus. Moreover, States have closed courts and adjourned or even cancelled hearings.

Such restrictions cause direct impacts on transnational families and may hinder, in particular, the prompt return of children in cases of international child abduction. Parents may encounter difficulties in commencing proceedings before the competent authorities, as well as complying with an agreement or return order. This Client Brief raises some of the issues, parents will need to consider in this regard.

### The 1980 HCCH Child Abduction Convention

The 1980 HCCH Child Abduction Convention is the most widely adopted international treaty which seeks to protect children from being wrongfully removed or retained by establishing a procedure to ensure their summary return to their State of habitual residence. The courts of the State where the child is present after the abduction are bound to issue a return order, provided that the case does not fall under the exceptions listed in Articles 12, 13 and 20.

Article 12 states that the competent authorities of the place where proceedings have been commenced can decide not to order the return if it can be proved that there has been a change in the child's habitual residence; therefore, the passage of time has critical importance. By contrast, Article 13(1)(b) provides an exemption based on the existence of a grave risk that could expose the child to harm or place him or her in an intolerable situation.

The Convention further prescribes that, if:

- the applicant has consented or acquiesced to the removal or retention (Article 13 (1)(a));
- the child has attained an appropriate age and degree of maturity and objects (Article 13 (2)); or
- any human rights and fundamental freedoms are violated (Article 20),

the competent authority is not bound to determine the return.

Whenever an exception is raised, the competent authorities have the obligation to thoroughly analyse the particular circumstances of each case to decide if they will issue the return order or not. Nonetheless, the criteria used to determine factors such as habitual residence and what constitutes a grave risk are highly discretionary.



Janaína Albuquerque Azevedo Gomes  
Advogada | International Family Law (Brazil)



Melissa Kucinski  
Principal | MK Family Law (USA)



Thomas John ACI Arb  
Partner | Grotius Chambers (Netherlands)

### **COVID-19 and the 1980 Child Abduction Convention**

The upkeep of travel bans, and the shutdown of judicial systems, can result in delays which may be sufficient for the child to adapt to the new environment or prevent him or her from expressing their opinion on the return before a court. While some jurisdictions are still allowing emergency hearings for cases of international child abduction, others seem to be reluctant to do so.

Furthermore, competent judicial or administrative authorities may postpone rendering the decision or even rule against the left-behind parent's request if the child's State of habitual residence has been severely affected by the widespread of COVID-19, as the return would expose him or her to a grave risk of harm or violate their fundamental rights and freedoms.

#### **So, what does this mean for me now?**

The first step is to verify whether a return order has already been issued or if there is an agreement in place. Highly context-driven assessments are not limited to the determination of habitual residence and recognition of grave risk; authorities may render vastly different decisions when evaluating the violation of the terms of an arrangement on a case by case basis.

If there exists an order, or an agreement is in place, parents should undertake their best efforts to comply with the established terms; if not, left-behind parents should consider possible disruptions on courts and try to gather sufficient information in order to prove where the child habitually resides. For instance, when conducting a habitual residence determination to issue a return order, competent authorities tend to take into account factors such as the place where the child attends school. However, most States have closed education institutions to slow the spread of the virus, making it harder to obtain proof of enrollment.

In any case, cooperation is key. Alternative methods of conflict resolution, such as mediation, present themselves as a viable option in cases where access to courts have been halted. Additionally, the resource to online mechanisms in both contentious and amicable proceedings eliminates the need to hold in-person meetings and significantly reduces costs.

#### **And what do I need to know going forward?**

Forthcoming developments of the COVID-19 pandemic are unpredictable. It is impossible to foresee when and how States will lift contention measures. Family matters already comprise intrinsically sensitive issues; thus, especially in a context of global crisis, appropriate legal advice is indispensable. If circumstances worsen, more restrictions could be implemented. It is paramount that each case is handled in accordance with the corresponding crisis frameworks, as well as the factual situations of the States involved.

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