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## International Child Abduction and The Hague Convention

### What is International Child Abduction?

According to the Report on International Parental Child Abduction published by the Law Reform Commission of Hong Kong in April 2002, international child abduction is when a child has been wrongly removed or retained across an international border. It usually occurs when there is a relationship breakdown between the parents.

### What is The Hague Convention?

The Hague Convention is a multilateral treaty developed by the Hague Conference on Private International Law (HCCH), and it aims to provide a procedure to bring about the retained child's prompt return to the country of their habitual residence as well as ensuring the rights of custody and access under the law of one contracting state are effectively respected in other contracting states.

In determining whether an order for return is granted, the key question for the court is whether the child has habitual residence in the retained country i.e. whether the residence of a particular person in a particular place acquired the necessary degree of stability to become habitual (*JEK v LCYP [2015] 5 HKC*). It is a question of fact, taking the degree of integration and incorporation in a social and family environment into consideration. The quality of the child's residence, length of stay and reasons for being there are all relevant factors for consideration.

Another point to note is that the Hague Convention is only applicable to the 88 states and 1 Regional Economic Integration Organisation which are signatories to the Hague Convention. These such countries include the USA, the European Union and some countries in Asia. For non-signatories to the Hague Convention, neither visitation rights nor order of return can be granted.

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## Can any types of defence be established by the removing parent?

If wrongful removal is established, the removing parent may establish a defence. There are five types of defence available but whether or not they can be successful is in the entire discretion of the court:

1. The child is settled in its new environment and judicial proceedings have not been launched within 1 year of the wrongful removal;
2. The complaining party was not exercising his or her custody or access rights;
3. There was consent or acquiescence by the complaining party to the wrongful removal;
4. There is a grave risk of harm to the child if s/he is returned;
5. The child objects to being returned;

## Are there any recent Hong Kong cases that illustrate how applications under the Hague Convention may work?

A parent must have custodial rights over the child to make an application under the Hague Convention. However, this may prove difficult for unmarried fathers because they do not automatically have custodial rights in Hong Kong. Thus, they would usually first apply for the child to become a ward of Court and for the necessary custodial rights before making an application under the Hague Convention.

This was the case in *Re ALWB (Minor: Wardship) [2021] HKCI 899*, which was heard and decided during the Covid-19 pandemic. The child (referred to as "AB") was born, resided and educated in Hong Kong for 6 years while his parents were unmarried. The Mother took AB to Australia, kept him there against the Father's wishes and refused to respond to his requests for return to Hong Kong.

The Father commenced proceedings in Hong Kong for AB to be made ward of the Court of First Instance ("CFI") and for the return of AB to Hong Kong. Taking into consideration AB's situation and his relationship with his father, the CFI found that AB had a full degree of integration in a social and family environment in Hong Kong. Therefore, the CFI held that it was in the best interests of AB to legalise the rights of his Father and for AB to be returned to Hong Kong.

In relation to custody, care and control of AB, it is not disputed that a Hong Kong court's order over custody, care and control of a child will not be automatically recognised or enforced in Australia. The converse is also true. Accordingly, notwithstanding obtaining an order from the CFI, the Father may have to take out proceedings for a "mirror" order in Australia to be able to enforce it against the Mother.

In another case of *BMC v BGC [2020] HKCA 317* which was also heard and decided during the Covid-19 pandemic, the Father's appeal for return of his daughter ("B") from Hong Kong to the USA was dismissed as the judge was not satisfied that immediately prior to 8 October 2019 (being the date of wrongful retention of B in Hong Kong as alleged by the Father), the habitual residence of B was the USA. The judge held that B's habitual residence has all along remained in Hong Kong.

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## Can you share any insights on child abduction cases during the COVID-19 pandemic?

Compared to other countries, there were fewer international child abduction cases in Hong Kong this past year, but the court's decision in granting an order for return (vs. not granting such order) was quite evenly distributed. This shows that the Covid-19 pandemic has not had a significant impact on the courts in Hong Kong when deciding whether to grant an order of return.

As a result of the pandemic, HCCH has prepared a useful Toolkit to assist countries in returning children to their place of habitual residence. We expect that with this Toolkit a more 'child focused' approach may be taken to ensure that child abduction cases are dealt with as promptly as possible. This is being made possible through mediation and technology (such as virtual hearings and electronic filing of documents), as well as effective collaboration with the signatories to the Hague Convention to ensure the prompt return of children.

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