

WHY THE CHILD ABDUCTION PROTOCOL NEGOTIATIONS SHOULD NOT DEFLECT SINGAPORE FROM ACCEDING TO THE 1980 HAGUE ABDUCTION CONVENTION

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Presently, there are active negotiations concerning the creation of a Child Abduction Protocol between Singapore, Australia, Hong Kong, Malaysia and New Zealand. Although signing up to this proposed Protocol would be an important step for Singapore in combating international parental child abduction, it is argued in this article that it should not be regarded as a substitute for Singapore acceding to the *Hague Convention on the Civil Aspects of International Child Abduction 1980*. The article draws on a study made at the Singapore Family Registry in 2006 and makes a statistical comparison between those cases and those made under the *Hague Abduction Convention* in 2003. The *Hague Abduction Convention* is considered and compared with the proposed Protocol. Finally, the article discusses the pros and cons of Singapore acceding to the Convention as well as the practical aspects involved in acceding.

I. INTRODUCTION

At the time of writing, Singapore is not a party to any international instrument dealing with international child abduction, but, having been close to acceding to the *Hague Convention on the Civil Aspects of International Child Abduction 1980* (hereafter “the *Hague Abduction Convention*”) nearly a decade ago,¹ accession is once again on the agenda.² In addition, there are active negotiations concerning the creation of a Child Abduction Protocol between Singapore, Australia, Hong Kong, Malaysia and

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¹ See *The Straits Times* (27 October 1997), as cited by Debbie S. L. Ong in Debbie Ong, “Parental Child Abduction in Singapore: The Experience of a Non-Convention Country” (2007) Int’l J.L. Pol’y & Fam. 220 [Ong], in which it was reported that the Ministry of Foreign Affairs (MFA) was considering signing the *Hague Abduction Convention*. *The Straits Times* (9 August 2007) H2, reported that the Ministry of Community Development, Youth and Sports, in response to an article on child abduction in *Law Gazette* (August 2007) 24 at 24-28, has said: “Singapore supports the objectives of the Convention. We are examining the details of the [Hague Convention] carefully before making a decision on its final adoption. Singapore takes all its international obligations very seriously and makes every endeavour to implement our commitments fully. We are also mindful that there are limitations to the Convention in that they apply only to Convention states.” It is understood that the relevant offices in Malaysia are also presently considering the case for Malaysia to become a party to the Convention.

² For the precise meaning and effect of accession, see further below at Section A of Part V.

New Zealand. Although signing up to this proposed Protocol would be an important step for Singapore in combating international child abduction it will be argued in this article that it should not be regarded as a substitute for Singapore acceding to the *Hague Abduction Convention*. Indeed, quite the contrary, it will be argued that there remains an urgent need to do so. Parental child abduction is a global and growing phenomenon. There was, for example, a 27% rise (14% if newly Contracting States between 1999 and 2003 are excluded) in the number of applications made under the *Hague Abduction Convention* between 1999 and 2003.³ It is a phenomenon from which Singapore is not exempt. Furthermore with the growing ease of international travel and the consequent increasing mobility of families, it is a phenomenon which is likely to continue to grow.

To substantiate the main argument, we first draw on a study made at the Family Registry in Singapore to provide some background information about the number and type of abduction cases involving Singapore. We then make a statistical comparison between these cases and those made under the *Hague Abduction Convention* drawing upon a statistical survey of all applications made there under in 2003. Thirdly, we consider the proposed 2007 Protocol pointing out its advantages and limitations. In this respect we compare the experience of the not dissimilar Anglo-Pakistani Protocol. We then consider the *Hague Abduction Convention*, again pointing out its advantages and limitations, and compare it with the proposed Protocol. Finally, we consider the pros and cons of Singapore acceding to the convention as well as pointing up some of the practical aspects involved in acceding.

II. BACKGROUND INFORMATION ON ABDUCTIONS TO AND FROM SINGAPORE

There are no officially published statistics on Singapore abduction cases and, until recently, the number of cases was unknown. However, in 2006, Associate Professor Ong conducted a study (hereafter “the Singapore Study”) of abduction cases via an examination of the records of the Singapore Family Court Registry. The Singapore Study examined records dating from January 2001 to September 2006.⁴ It aimed to investigate the number and characteristics of parental child abduction cases as recorded in court proceedings. Whilst not claiming to provide a comprehensive collection of all instances of child abduction (there are, of course, other instances of child abduction, even high profile media reported cases, where no court proceedings

³ See Nigel Lowe *et al.*, “A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, Prel. Doc. No. 3 to the 5th Special Commission (October 2006), online: <<http://www.hcch.net>> (hereafter “the 2003 survey”).

⁴ Where a case began before 2001, it was included if there were any proceedings involving or alleging wrongful removal of a child out of the jurisdiction recorded in 2001 or after. Categories of files covered in this research: all “OSF” (Originating Summons Family issue) files in EFS (the Electronic Filing System) since Dec 2003 till September 2006; all “DP” (Divorce Petition) files in EFS with at least one foreign party since Dec 2003 till September 2006; all DP files prior to the use of EFS with at least one foreign party since Jan 2001 till Nov 2003; all files in the past 5 years personally identified as having elements of child abduction by a group of family judges and lawyers.

are brought), the Study nevertheless provides the only source of statistical data on Singapore abduction cases.⁵

A fuller analysis of the Study's findings has been published elsewhere⁶ but for the purposes of this article we need to say the following.

A. *The Number of Abductions and the Countries Involved*

Overall, the Singapore Study identified 26 cases of parental child abduction dealt with by the Family Court during the five year period. In 20 of these cases the applicant was seeking the child(ren)'s return and in 6, access. Most of the cases, in fact 22 (85%) out of the 26, concerned abductions out of Singapore (outgoing abductions) and only 4 involved abductions into Singapore (incoming abductions). Of these, 20 were return cases of which 16 cases were outgoing abductions and 4 incoming. All 6 access cases were outgoing cases and none were incoming.

Details of the other countries involved Singapore abduction cases are given in the Table 1.

From the Table above it can be seen that while abductions to and from Singapore involve many countries, 5 involved China and 3 each Australia and the United Kingdom.⁷

B. *Outcome and Timing*

So far as return cases were concerned, 10 (38%) of the sample cases ended in the return of the child. Of these, five cases or 19% of the total were resolved by court order and three (12%) were resolved by agreement or consent order. Overall, 16 cases or 62% remained unresolved. The 10 cases took an average of 15.3 months to resolve. Of those resolved by an agreement or a consent order, one case took two months, one took 18 months and one, 30 months—an overall average of 16 months. The five cases resolved by court order took an average of 8 months. 9 out of 20 or 45% of return cases ended in the child's return. 1 out of the 6 (17%) access cases was successfully resolved by court order.

C. *Profile of the Abductor and of the Children Involved*

The Singapore Study found that of the overall sample of 26, 19 (73%) were mothers and of these, 18 (95%) were primary or joint carers. 7 (27%) were fathers and of

⁵ This is not to say that the issue has not been discussed before, see in particular Leong Wai Kum, "The Convention on the Civil Aspects of International Child Abduction—A Case for Singapore to be a Member State" *Law Gazette* (July 2005) 19 at 19-26, online: <<http://www.lawgazette.com.sg/2005-7/>> [Leong]; Chan Wing Cheong, "The Law in Singapore on Child Abduction" [2004] S.J.L.S. 444 and Leong Wai Kum, "International Co-operation in child abduction across borders" (1999) 11 *Sing. Ac. L.J.* 409.

⁶ See *Ong, supra* note 1.

⁷ In *Ong, supra* note 1, it was recorded that there were 2 cases each involving UK and Indonesia. One of these cases which involved an abduction to both Indonesia and UK has been reclassified in this article to record the latter place to which the child has been abducted as the country involved for the purpose of this study. Thus this table shows 3 cases involving UK and 1 involving Indonesia.

Table 1.
The Countries Involved in Singapore Abduction Cases.

Country	Outgoing Cases (Countries to which child was removed from Singapore)		Incoming Cases (Countries from which child was removed to Singapore)		Total
	Return	Access	Return	Access	
Australia	1	1	1		3
Canada	1				1
China	4	1			5
Egypt		1			1
India	1				1
Indonesia	1				1
Malaysia	1				1
Netherlands	1				1
New Zealand	1				1
Norway			1		1
Thailand		1	1		2
United Kingdom	2	1			3
USA	1		1		2
Vietnam	1	1			2
Unknown	1				1
TOTAL	16	6	4	0	26

these, 1 (14%) was their primary or joint carer. In the 20 return cases, 13 (65%) were mothers and 7 (35%) were fathers. 13 (65%) were primary or joint carers. In all 6 of the access cases, the abductors were mothers, all of whom were primary carers. 20 (77%) had the same nationality as the state to which the child has been allegedly abducted and might reasonably be presumed to be going home.⁸ 5 out of the 6 access cases or 83%, had the same nationality as the child. 15 out of the 20 return cases, or 75%, had the same nationality as the child.

So far as the children were concerned, 23 or 56% were boys and 18 or 44% were girls. 9 children were involved in access cases; of these 6 or 66% were boys and 3 or 33% were girls. Of the 32 children in return cases, 17 or 53% were boys and 15 or 47% were girls. The overall average age was 6.8 years; 6.1 when abducted by mothers and 8.3 when abducted by fathers. In the 6 access cases which all involved abductor mothers, the average age was 5.2 years. The average age in return cases

⁸ In their child abduction research, Geoffrey L. Greif & Rebecca L. Hegar, *When Parents Kidnap* (New York: Free Press, 1993) identified two types of international abductions, namely, those where the abducting parent with no close foreign ties attempts to throw off pursuers by escaping abroad, and those involving a foreign-born parent who, on the breakdown of their marriage or relationship, returns with the children to a culturally familiar country where family and legal support is available. Nigel Lowe & Alison Perry, "International Child Abduction — The English Experience" (1999) 48 I.C.L.Q. 127 at 134 simply called the latter "going home" abductions.

was 6.5 years when abducted by mothers and 8.3 years when abducted by fathers. In total, 17 or 65% involved a single child. Of these, 4 out of the 6 access cases or 66% involved a single child while 13 or 65% of the return cases involved a single child.

III. A COMPARISON OF THE SINGAPORE AND GLOBAL STATISTICAL STUDIES

It is interesting to compare the findings of the Singapore Study with those found in global studies of applications made under the *Hague Abduction Convention*. The latest such study was the 2003 statistical survey which comprised a survey of all applications made under the *Hague Abduction Convention* (to or through a Central Authority) in 2003. The study was conducted by the Centre of International Family Law Studies at Cardiff University Law School in collaboration with the Permanent Bureau of the Hague Conference.⁹ The survey was based on answers provided by Central Authorities to a detailed questionnaire (sent to every Central Authority) designed to collect information about the number of applications; details about those who abducted the children and about the children involved; details about the outcome of the application and on the length of time to reach an outcome. Details were required of every application (note, that the data collected was per application rather than per child) made to or through a Central Authority in 2003 regardless of when, or even if, a final resolution was reached. The cut-off for the survey was 30 June 2005, that is, between 18 months and two and half years after the application was made. Applications still unresolved after this date were classified as “pending”.

A. *The Number of Abductions and the Countries Involved*

The 2003 Survey was a large study comprising an analysis of 1269 return applications made to 45 Contracting States by 53¹⁰ States and of 238 access applications made to 27 Contracting States by 39 States. It will be noted that like the Singapore Study's findings, the vast majority (84%) of applications were for return and only a minority (16%) were for access.

Perhaps not surprisingly, a substantial proportion, 23% of return and 25% of access application were made to the USA. More surprisingly, perhaps, the second highest proportion, 11% of return and 7% of access applications, were received by the English Central Authority. The next busiest Authorities were Germany, Australia and Spain. At the other end of the scale, several Central Authorities handled no applications and it was quite common for Authorities to handle fewer than 10 applications. There were 16 such Authorities in the 2003 Survey. Singapore seems likely to fall into the last category.

⁹ *Supra* note 3. The report of the survey (generously funded by the Nuffield Foundation) was formally presented to the Fifth Special Commission to review the *Hague Abduction Convention* held in October/November 2006. The 2003 survey was a follow up to the 1999 survey, see Nigel Lowe, Sarah Armstrong & Anest Mathias, “A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction” Prel. Doc. No. 3 (Revised Version, November 2001). For a detailed discussion of these surveys, see Nigel Lowe & Katrina Horosova, “The Operation of the 1980 Hague Abduction Convention—A Global View” (2007) 41 Fam. L.Q. 59.

¹⁰ Including two non-Convention States.

B. *Outcome and Timing*

A higher proportion, 51%, of applications in the 2003 Survey ended with the child being returned by agreement or by court order than in the Singapore Study. Of these returns, 22% were made voluntarily and 29% by court order. A further 13% were refused, 15% withdrawn, 6% rejected and 9% were pending. Of cases going to court 66% ended in an order for return, 5% in access and 29% were refused.

In the 2003 study, voluntary returns took, on average, 98 days; judicial returns, 125 days, and judicial refusals: 233 days, which seems a little quicker than that found in the Singapore Study, though the data is not exactly comparable.

So far as access applications are concerned, only a minority, 33%, ended in access being obtained (in 13 % of cases it was agreed voluntarily and in 20% it was ordered by the court). A further 22% of applications were withdrawn, 13% were rejected and 22% were pending.

71% of voluntary access cases and 66% of those judicially ordered took over 6 months to conclude.

C. *Profile of the Abductor and of the Children Involved*

Like the Singapore Study, the 2003 Survey found that the majority of abductors in return cases were mothers. In the case of the 2003 Survey, 68% were found to be mothers and of these 85% were primary or joint primary carers. In contrast, 29% were fathers and of these 14% were primary or joint primary carers. The remaining 3% comprised grandparents (2%), other relatives (1%), and, in one case, an institution. 55% had the same nationality as the request State and might therefore be presumed to be going home.

So far as access was concerned the 2003 Survey found that 79% of respondents were mothers and 53 % had the same nationality as the requested State.

So far as the children were concerned, the 2003 Survey found that in return applications 49% involved boys and 51% girls, which is interestingly different from the findings of the Singapore Study. The overall average age of children was 5.1 years (4.7 when abducted by mothers but 7.6 when abducted by fathers). 67% involved a single child.

So far as access applications were concerned, the 2003 Survey found that in contrast to return applications, a majority, 55%, concerned boys and 45% girls. The overall average age of children was 7.3 years (9, where the applicant was the mother and 6.9 where the applicant was the father). 71% of cases involved a single child.

IV. THE CHILD ABDUCTION PROTOCOL

A. *Background to the Discussions*¹¹

As mentioned in the Introduction, a Child Abduction Protocol is currently being negotiated between Australia, Hong Kong, Malaysia, New Zealand and Singapore

¹¹ We are indebted to the Hon Judge Peter Boshier, Principal Judge of the Family Court of New Zealand, for providing us with the following information.

(“the protocol countries”). The idea of creating what was envisaged to be a “Presumption of Return” Protocol originated at an Australian organised regional Hague symposium held in Sydney in June 2007. One of the purposes of the conference was to foster awareness of the Hague Conventions generally amongst those regional States who were not members of the Hague Conference nor parties to the particular treaties. The specific idea of the Abduction Protocol came from an Australian barrister.

At the time of writing negotiations are continuing.

B. *The Proposed Terms*

As currently worded the proposed Protocol is said to have been agreed upon after “consultation with the family law judiciary and senior members of the legal profession in each of the protocol countries and is expressed to last until such time as Malaysia and Singapore become members” of the *Hague Abduction Convention*.

The kernel of the agreement is that:

without derogating from judicial discretion to review any case concerning child abduction in accordance with the domestic law of each protocol country IT IS AGREED:

1. In normal circumstances the welfare of a child is best determined by the courts of the country of the child’s habitual/ordinary residence.
2. If a child is removed from one protocol country to another:
 - (a) without the consent of the parent
 - (i) with whom the child ordinarily lives,
 - (ii) with a custody/residence order,
 - (iii) with visitation/access/contact rights, or
 - (iv) with other relevant parental rights conferred by operation of law; or
 - (b) contrary to restraint/interdict order from the court of the child’s habitual/ordinary residence,

then the judge of the court of the country to which the child has been removed shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child’s habitual/ordinary residence.

3. If a child is taken from one protocol country to another by a parent with visitation/access/contact rights:
 - (a) with the consent of the parent with a custody/residence order,
 - (b) with a restraint/interdict order from the court of the child’s habitual/ordinary residence (or vice versa), or
 - (c) in consequence of an order from that court permitting the visit, and the child is retained in that country in which the child has been retained shall not ordinarily exercise jurisdiction over the child, save in so far as it is necessary for the court to order the return of the child to the country of the child’s habitual/ordinary residence.

It also states that the foregoing principles apply “without regard to the nationality, culture or religion of the parents or either parent and to children of mixed marriages”. Point 5 of the proposed Protocol preserves the right of the court to determine the child’s habitual/ordinary residence if that is in dispute before applying the protocol principles. Point 6 provides for cases to be listed by the court and to be decided expeditiously.

C. Commentary

1. Comparison with the Anglo-Pakistani Protocol

The proposed Protocol is clearly modelled upon the Anglo-Pakistani Protocol concluded in January 2003 between Pakistan and the United Kingdom (hereafter “the 2003 Protocol”).¹² Indeed, in most respects the wording is identical save for the not unimportant (see further below) qualification that the agreement is “without derogating from judicial discretion to review any case concerning child abduction in accordance with the domestic law of each protocol country” and its greater emphasis on the child’s welfare and the judge’s discretion not to order the child’s return. However, as things currently stand, a key difference between the two instruments is that there is no equivalent in the proposed 2007 Protocol to the Guidance subsequently issued to the English judges on the implementation of the 2003 Protocol.¹³ This explains, *inter alia*, that while the Protocol itself “applies within the relatively narrow parameters” [*viz.* breach of orders]

[i]n analogous cases which do not fall within the strict terms of the Protocol it would be consistent with the predominant approach of the Court of Appeal similarly to apply the presumption of return ‘in the spirit’ of the Protocol, provided it is not contrary to the best interests of the child.

By way of example, it instances the case where there was no pre-existing order but the child was habitually resident in England and Wales and the removal was unilateral and appeared to be in breach of the Child Abduction Act 1984 (which criminalises, *inter alia*, parental child abduction).

2. The pros and cons of signing up to the proposed protocol

Given, as has been said, that Singapore is not a party to any international instrument specifically governing international child abduction,¹⁴ signing up to the proposed Protocol would be a significant step. It would have the clear advantage of creating common arrangements and understandings (*viz.* that, subject to the child’s welfare, custody and access orders are to be respected) further augmented, if the Anglo-Pakistani example is followed, by the creation of a network of liaison judges,¹⁵

¹² For more details of which see Richard White, White & Sherwin, eds., *Clarke Hall and Morrison on Children*, 11th ed. (LexisNexis Butterworths) at 2[34.1] [*Clarke Hall*]; Nigel Lowe & Gillian Douglas, *Bromley’s Family Law*, 10th ed. (Oxford: Oxford University Press, 2006) at 627-628.

¹³ Reproduced in *Clarke Hall, ibid.* at 2 [5221].

¹⁴ Singapore is, of course, a signatory to the United Nations *Convention on the Rights of the Child 1989*, which does have some abduction provisions, see further below.

¹⁵ Through whom judicial enquiries and requests can be channelled, enabling cases to be better managed.

between a cluster of neighbouring States which will be of obvious benefit both to abducted and potentially abducted children¹⁶ within the region. Moreover, judging by the success of the Anglo-Pakistani Protocol, there is every reason to believe that it would work between the five Protocol countries. According to the latest statistics,¹⁷ as of May 2007, there have been at least 13 cases (in which 7 return orders were made) that have been dealt with by the English courts under the strict terms of the 2003 Protocol, with 36 (of which 17 return orders were made) being dealt with under the spirit of the Protocol with a further so-called 35 “holiday” cases (of which 27 return orders were made) also being dealt with under the Protocol.

Another advantage of the proposed Protocol is that unlike acceding to the *Hague Abduction Convention* (discussed below), once the wording has been agreed upon and signed up to, nothing else has to be done to put the agreement into force. That said, there are some limitations. Firstly, of course, the agreement only applies as between the other Protocol Countries, which according to the Singapore Study only accounted for five of the 26 cases involving Singapore between 2001 and 2006. Secondly, as presently worded, the proposed Protocol is limited, at any rate on its face, effectively to breaches of custody and access orders. However, it may be that the Protocol countries will follow the English example (discussed above) and apply the spirit of the agreement to cases (i.e. where there are no formal orders) falling outside its strict terms. Thirdly, and importantly, there is no administrative body, akin to Central Authorities that are mandatory under the *Hague Abduction Convention* (see below), through which Protocol cases can be handled. Finally, there is no agreement concerning the bearing of costs in bringing Protocol proceedings.

The Anglo-Pakistani Protocol has had to face the difficulty of squaring it with the application of the principle of the paramountcy of the child’s welfare, particularly in the light of the House of Lords’ decision in *Re J (A Child) (Custody Rights: Jurisdiction)*¹⁸ which specifically applied the paramountcy principle to non *Hague Abduction Convention* abduction cases. Indeed, in the subsequent decision, *In the Matter of Z (A Child)*,¹⁹ the Court of Appeal could not fault (and therefore refused permission to appeal against) a first instance decision holding, *inter alia*, that the existence of Pakistani residence and contact orders did not oust the application of the welfare principle. Although, in fact the child was ordered to be returned to Pakistan, it was because of the application of the welfare principle rather than of the Protocol.

Although some might argue that *Re J* and *Re Z* have sounded the death knell for the Protocol, in our view these decisions do not undermine the fundamental common understanding between the two States that their custody and access orders are to be respected albeit subject to the child’s welfare; nor do they impair the valuable direct judicial links developed through the Protocol.

Given that the proposed Protocol already mentions the paramountcy of the child’s welfare, there is less of a problem of squaring it with *Re J*, though to turn the argument

¹⁶ By which is meant that the Protocol might deter some parents from abducting in the first place.

¹⁷ We are indebted to Lisa Jennians, of the Foreign and Commonwealth Office, London, for supplying us with these statistics.

¹⁸ [2005] UKHL 40; [2006] 1 A.C. 80.

¹⁹ [2006] EWCA Civ 1219. Unusually, the application for permission to appeal was brought by the 13 year old child involved in the case.

on its head, the more the Protocol preserves both the welfare principle and more generally domestic law powers to refuse a return, the more diluted the agreement becomes, save perhaps for all the important promotion of common understandings on how the welfare principle might be applied.²⁰

A second criticism of the Anglo-Pakistani Protocol, which may equally be said of the proposed Protocol, is a constitutional argument that such an international agreement ought to be made by the Executive and in fact lies outside the province of the judiciary. While it is not altogether easy to gainsay this argument, given the clear preservation of judicial discretion, it may be thought that the proposed Protocol does not step over the line, at any rate, to the extent that the Anglo-Pakistani Protocol may do. It may perhaps be best thought of as an international *Practice Direction*. Pragmatically, such an agreement may be thought to be justified in the interests of children generally. Nevertheless, formally acceding to the *Hague Abduction Convention* would avoid any such argument.

V. THE HAGUE ABDUCTION CONVENTION

A. *Origins of the Hague Abduction Convention*²¹

The proposal to have an international treaty specifically dealing with the abduction of children by one of the parents was first made by the Canadian expert, T. Bradbrooke Smith, at a Special Commission held in The Hague in January 1976. This led first to a preliminary study being prepared and presented to the Thirteenth Session of the Hague Conference in October 1976²² and, following approval by that Session to pursue the topic, to a second more formal and detailed study conducted by Adair Dyer, the then First Secretary to the Conference.²³ The Dyer report was submitted to Governments in 1978 and drew largely favourable comments. It led to two Special Commissions being held in 1979, the second of which approved a draft Convention. Following a further round of consultation the final draft was unanimously approved at the Fourteenth Session of the Hague Conference in October 1980.

²⁰ It is an interesting question as to how uniform the Protocol Countries' approach to non-Convention cases is. According to Singapore's leading cases, for example, *AB v. AC* [2004] SGDC 6 (discussed further below) such cases are treated as quasi-Hague cases—an approach now firmly rejected in England by *Re J (A Child) (Custody Rights: Jurisdiction)*, *supra* note 18. In Australia the courts apply a general welfare test (see *ZP v. PS* (1994) 181 C.L.R. 639) while in New Zealand the courts use more of a *forum conveniens* test, namely, to take a preliminary look at the case and to decline to conduct a general welfare enquiry if that is thought to be better conducted in the country whence the child was taken (see *M v. G* (1996) 14 F.R.N.Z. 531; *CG v. SG* (2005) 24 F.R.N.Z. 502). In Hong Kong the court generally applies the Hague notion that children should not be abducted across international boundaries subject to the application of the paramountcy principle in the particular case: *ADB v. RM* [2001] H.K.C.U. 1234. The courts in Malaysia also support the principle of swift return of the child (see *Nedunchelivan Balasubramaniam v. Kohila a/p Shanmugam* [1997] 4 A.M.R. 3643).

²¹ See generally Nigel Lowe, Mark Everall & Michael Nicholls, *International Movement of Children—Law Practice and Procedure* (Family Law, 2004) 12.1-12.3 and A.E. Anton, "The Hague Convention on International Child Abduction" (1981) 30 I.C.L.Q. 537.

²² Georges Droz, "Notes on Legal Kidnapping", Prel. Doc. No. 9 of September 1976, Acts and Documents of the Thirteenth Session, Vol. 1 at 121.

²³ "Report on international child abduction by one parent ('legal kidnapping')", Prel. Doc. No. 1 of 1978, Acts and Documents of the Fourteenth Session, Vol. 3 at 12.

The *Hague Abduction Convention* first came into force on 1 December 1983 when the ratification of Canada, France and Portugal came into effect. Since then there has been a steady growth of Contracting States climbing, as has been said, to a current total (i.e. as of July 2007) of 79 States, comprising most of Europe and the Americas (including, crucially, the USA) parts of Africa, Asia and Australasia.²⁴ It may be noted, however, that the only Contracting State from South East Asia is Thailand. Singapore's immediate neighbours, Malaysia and Indonesia, are not yet Contracting States, nor more importantly, given the number of abductions from Singapore (see the Table in Section A of Part II above), is Mainland China. On the other hand, three of the proposed "Protocol Countries", Australia, Hong Kong and New Zealand, are Contracting States.

B. *What the Hague Abduction Convention is Trying To Do*

1. *Securing prompt returns and respect for rights of access*

One of the beauties of the 1980 *Hague Abduction Convention* is the simplicity of its obligations which are set out in Article 1:

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States.

These objectives are based, as the Preamble explains, upon the firm conviction "that the interests of children are of paramount importance in matters relating to their custody" and upon the desire "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".

Although there is no formal hierarchy of objectives under this Convention,²⁵ as has been seen, the vast majority of applications (84% according to the 2003 survey) are for return.

2. *The relevance of the child's welfare and compatibility with the UN Convention on the rights of the child*

Although the Preamble refers to the "paramount" importance of the interests of the children in matters relating to their custody this should not be taken to mean that an *individual* child's welfare is paramount in a Hague return application. As the

²⁴ As of July 2007, after the *UN Convention on the Rights of the Child 1989*, the *Hague Abduction Convention* is the most widely accepted international family law instrument, though the *Hague Convention on Intercountry Adoption 1993* (to which Singapore is not a signatory) is catching up fast with 75 Contracting States.

²⁵ See the *Explanatory Report on the Convention* by Professor Pérez-Vera (hereafter "the Pérez-Vera Report") at para. 18; but cf. *Thomson v. Thomson* [1994] 3 S.C.R. 551 (S.C.C.), in which La Forest J. commented that it was clear "that the primary object of the Convention is the enforcement of custody rights".

Canadian Supreme Court pointed out,²⁶ the Preamble “speaks of the ‘interests of children’ generally, not the interest of the particular child before the court”. Furthermore, Article 16 expressly forbids the court of the requested State from deciding on the merits of the rights of custody until it has been determined that the child is not to be returned under the *Hague Abduction Convention*.²⁷ In summary, the *Hague Abduction Convention* is predicated upon the premise that children’s interests are generally best served in cases of wrongful removal or retention by promptly returning them to the State of their habitual residence.

The fact that an individual child’s interest is not the paramount consideration when determining a return application prompts the question as to the 1980 Convention’s compatibility with the requirement under Article 3 of the UN Convention on the Rights of the Child 1989 that in all actions concerning children “whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*” [emphasis added].

This issue has been expressly litigated in Australia²⁸ where the charge of incompatibility was rejected *inter alia* on the ground that Article 11 of the UN Convention entreats States “to take measures to combat the illicit transfer and non-return of children abroad”. It may also be pointed out that Article 35 of the UN Convention requires States to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or in any form”. In any event, surely the most persuasive argument is that by providing admittedly limited exceptions to the obligation to return,²⁹ the *Hague Abduction Convention* does, in principle, pay sufficient regard to the interests of each individual child especially as it is not determining the merits of any custody dispute but rather the forum in which that dispute must be determined. At any rate, it was upon this basis that the German Constitutional Court ruled in *G and G v. Decision of OLG Hamm*³⁰ that the Abduction Convention was compatible with the UN Convention.

Given that Singapore is a signatory to the UN Convention, it is obviously important that it should be satisfied that the *Hague Abduction Convention* is not inconsistent with it. The foregoing rulings should therefore be reassuring on that point. Indeed it could be argued that Articles 11 and 35 of the UN Convention requires accession to the 1980 *Hague Abduction Convention*.

²⁶ *Per* La Forest J. in *Thomson v. Thomson*, *ibid.* See also *e.g. Re M (A Minor) (Child Abduction)* [1994] 1 F.C.R. 390 at 392-393, *per* Butler-Sloss L.J. (England); *De Lewinski v. Director General, NSW Department of Community Services* (1996) 70 A.L.J.R. 932 at 941 (Australia); *Clarkson v. Carson* [1996] 1 N.Z.L.R. 349 (New Zealand); and *Currier v. Currier* 845F. Supp. 916 at 920 (1996) (USA). Note that the English courts take the view that even where an exception to the obligation to return has been established the child’s welfare is still not paramount in deciding whether to order a return. This has been questioned by Peter Nygh, “The international abduction of children” in Jaap Doek, Hans van Loon & Paul Vlaardingerbroek, eds., *Children on the Move* (The Hague: Martinus Nijhoff, 1996) 29 at 36. For a critical examination of the welfare principle under the Convention, see R Schuz, “The Hague Abduction Convention: Family Law and Private International Law” (1995) 44 I.C.L.Q. 771.

²⁷ See also Article 19 which provides that a decision to return the child under the Convention “shall not be taken to be a determination on the merits of any custody issue”.

²⁸ *In the Marriage of Murray and Tam* (1993) 16 Fam. L.R. 982, discussed by Nygh, *supra* note 26 at 40-41. See also *McCall and the State of the Central Authority* (1994) 18 Fam. L.R. 307.

²⁹ *Viz.* those under Articles 12(2), 13 and 20.

³⁰ (1996) 35 I.L.M. 529 (18 January 1995).

One of the few reported cases in Singapore on child abduction can be read as supporting the principle that the individual child's welfare is subjected to the higher goal of preventing future abductions. In *AB v. AC*³¹ the Singapore Family Court relied on the then English approach set out in *Re F (A Minor) (Abduction: Custody Rights)*³² that the:

general principle to be applied, following the policy of the Hague Convention, is that any long term decision as to the custody of the child should be determined in the courts of its residence and an English court is likely only to refuse the order to return of a child if circumstances exist similar to those provided for in the Hague Convention.

The court took account of the policy of discouraging future abductions rather than focus solely on the welfare of the individual child before it.³³

Such an approach is consistent with Hague Convention but not common law principles. Indeed, in *Re J (A Child) (Custody Rights: Jurisdiction)*³⁴ the House of Lords has now ruled that it is not open to apply quasi Hague rules in non Convention cases but instead courts must apply the paramountcy of the child's welfare principle. On this basis, *AB v. AC* may now be regarded as wrong.³⁵

C. How the Hague Abduction Convention Seeks to Attain Its Objectives

1. The basic scheme

(a) *Protecting rights of custody*: Applicants seeking a child's return must first establish that the removal or retention is "wrongful" as defined by Article 3, namely, that "(a) it is in breach of rights of custody 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 ... or would have been so exercised but for the removal or retention". For these purposes such rights of custody can arise "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".

Establishing a breach of rights of custody for the purposes of proving wrongful removal or retention does not necessarily depend upon there being a breach of a court order, but can instead be established by reference to the applicant's rights under the law of the habitual residence.

³¹ [2004] SGDC 6 at para. 17. The court quoted from *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 742.

³² [1990] 3 All E.R. 97.

³³ The court decided that:

With globalisation, the courts were increasingly dealing with highly mobile parties. Adopting a test whereby the court in the country in which the child was habitually resident should be the most appropriate forum to determine the custody dispute would promote certainty and avoid an awkward situation whereby contradictory orders were made by different courts. More importantly, it would dissuade parties from unilaterally removing a child from the place where he was most familiar, in order to gain some perceived personal or juridical advantage. See *supra* note 31 at para. 19.

³⁴ [2005] UKHL 40; [2006] 1 A.C. 80.

³⁵ See *Ong, supra* note 1.

Provided the hurdle of establishing a wrongful removal or retention is overcome, and provided the application is *made within one year*, then under Article 12 the authorities of the requested State must “order the return of the child forthwith”. Returns may be effected voluntarily (under Article 10 Central Authorities are under an obligation to take all appropriate measures to secure voluntary returns) or by court order. *Limited* exceptions to this obligation to return are provided for by Articles 13 and 20. Where an application is brought more than one year after the wrongful removal or retention then, under Article 12, there is still an obligation to return unless the child is “now settled in its new environment”.

(b) *Protecting rights of access*: The scheme for protecting rights of access is less clear than for protecting rights of custody. Unlike the latter, it is not necessary to establish a wrongful removal or retention but, applicants must prove a breach of their access rights. Provided this hurdle can be overcome, then applicants can look to the Central Authorities “to make arrangements for organising or securing the effective exercise of rights of access”,³⁶ but the *Hague Abduction Convention* appears to place no obligation upon the courts to enforce access.³⁷

2. *Child must be 16 and habitually resident in a Contracting State before breach*

As Article 4 makes clear, for the *Hague Abduction Convention* to apply, the child must be under 16 and habitually resident in a Contracting State *before* there has been any breach of custody or access rights.

3. *Who can invoke the Hague Abduction Convention?*

(a) *Applications for return*: Commonly, applicants are left-behind parents but it is clear from Article 8 that *any* person, institution or body may seek a return provided it can be shown that the child’s removal or retention is “wrongful” within the meaning of Article 3.

(b) *Applications for access*: The *Hague Abduction Convention* does not deal directly with who can apply for access. Instead, Article 21 simply says that applications can be presented to Central Authorities “in the same way as an application for the return of the child”. Whether this means that an applicant need not have the rights of access claimed to be broken is perhaps an open point, though given the nature of the remedy sought there would seem less scope for arguing that they need not.

4. *How the Hague Abduction Convention may be invoked*

(a) *Applying for a return*: Under Article 8, an applicant “claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other

³⁶ See Art. 7f.

³⁷ See Art. 21. But note there are conflicting interpretations of this Article, see *infra* note 38.

Contracting State for assistance in securing the return of the child". However, pursuant to Article 29, this right is without prejudice to an applicant's right to apply "directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention".

Although Article 8 leaves the applicant free to apply to whichever Central Authority he or she considers most appropriate, in practice it is easiest, and normally most efficient, to apply to the home Authority which will then transmit the application to the Central Authority of the State to which the child has been said to be taken or detained.

(b) *Applying for access*: Article 21 provides that applications for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for a return. Article 29 similarly preserves the right to apply to access directly to the court of where the child is located. Although Central Authorities can play a significant role in securing access, given that many States, including England and Wales,³⁸ do not consider that the *Hague Abduction Convention* imposes any duties on courts to deal with access issues, there may be some point in directly applying to a foreign court under their domestic law. It has to be said that the access provisions of the *Hague Abduction Convention* are not particularly successful. According to the 2003 Survey only 33% of applications ended in access being agreed or ordered.

5. *The role of central authorities*³⁹

An integral part of the *Hague Abduction Convention* machinery and one which has been instrumental in its success are the Central Authorities which each Contracting State is obliged to establish.⁴⁰ Central Authorities are administrative bodies or offices through which applications can be made and received⁴¹ and which are generally

³⁸ In England and Wales it is established that Article 21 imposes no obligation upon the court, see *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam. 216 (but note the comments of Thorpe L.J. in *Hunter v. Murrow (Abduction: Rights of Custody)* [2005] EWCA 976; [2005] 2 F.L.R. 1119 at para. 31, and of Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2006] 3 W.L.R. 989 at para. 67, signalling a potential change of approach). A similar position is taken in, for example, the USA (see *Bromley v. Bromley* 30 F.Supp. 2d 857 (ED Pa 1998); *Fernandez v. Yeagar* 121 F.Supp.2d 1118 (W.D. Mich. 2000); and *Cantor v. Cohen* 442 F.3d 196 (4th Cir. 2006)), though this is not borne out by our statistics. Others, Australia for example (see the *Family Law (Child Abduction Convention) Regulations 1986* as amended), deal with access cases under the *Hague Abduction Convention* rather than domestic law, and still others take something of a mid-way position (in allowing action to be instituted under the Convention but not to apply the Convention to the proceedings themselves), as in Scotland (See *Donofrio v. Burrell* [2000] S.L.T. 1051). Civil Law jurisdictions take a similarly varied approach. For a full analysis see Nigel Lowe & Katarina Horosova, *Good Practice Report on Access* (Virginia: NCMEC, 2007) and William Duncan, "Transfrontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction"—Final Report (Prel. Doc. No. 5 of July 2002 prepared for the Special Commission of September/October 2002).

³⁹ For an excellent discussion of the history and role of Central Authorities, see Carol S. Bruch, "The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed" (1994) 28 Fam. L.Q. 35. See also *supra* note 21, Lowe, Everall & Nicholls, *International Movement of Children* at c. 13.

⁴⁰ See Art. 6.

⁴¹ But applicants are not obliged to use Central Authorities and can instead make applications direct to the relevant foreign court, see Art. 29.

charged to co-operate with one another so as to ensure that the *Hague Abduction Convention's* objects are achieved.⁴²

Although it is mandatory to establish a Central Authority, neither its location nor structure is dictated by the *Hague Abduction Convention*. This was deliberate as it was recognised⁴³ when drafting the instrument that given that the internal organisation of States differed greatly it would be beneficial to leave undefined the structure and capacity of Central Authorities. In the result there is considerable diversity in location, structure, personnel who work in them and resources with which they work. Furthermore States are free to determine whether the obligation imposed, *inter alia*, by Article 7 are discharged by the Central Authority itself or by what are described as “intermediaries”. Consequently, the very role played by Central Authorities varies enormously. In Australia, for example, the Central Authorities act as the applicant in any court case whereas in the United Kingdom and Ireland, the Central Authorities have a strictly administrative role.

6. *The role of the courts in return applications*

To facilitate the child's return, applications may be made to a competent authority (normally, in most systems, a court) of the requested State. Article 16 forbids that authority from investigating the merits of the rights to custody until it has been determined that the child is not to be returned under the *Hague Abduction Convention* or unless the application has not been lodged within a reasonable time following receipt of the notice. Equally, as Article 19 provides, a decision to return the child is not to be taken to be a determination on the merits of any custody issue. In other words, the merits of custody is an issue for the child's home court.

Article 12 directs the competent authority, if the application is brought within one year of the wrongful removal or retention, to “order the return of the child forthwith”. If more than a year has elapsed, then the child should still be returned “unless it is demonstrated that the child is now settled in its new environment”. Article 12, however, is subject to Article 13, which provides specific exceptions to the obligations to return. Article 13(a) provides three separate exceptions, namely, the left-behind parent's non exercise of rights of custody, consent to and acquiescence in the child's removal or retention. As the Pérez-Vera Report puts it,⁴⁴ these exceptions arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the *Hague Abduction Convention*, has taken place”. In addition to these adult centred exceptions, there are two further exceptions deriving from a consideration of the interests of the child. Under Article 13(b) the court is not bound to return the child where “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 position”. Finally, Article 13 permits a refusal to return where “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”. It is to be stressed that these child related exceptions are considerably

⁴² See Art. 7.

⁴³ See the Pérez-Vera Report, *supra* note 25 at para. 45.

⁴⁴ *Ibid.* at para. 115.

narrower than a simple application of the welfare principle.⁴⁵ Furthermore, even if an exception is established, and the burden of doing so lies on the defendant, the court retains a discretion not to order the child's return. Even when exercising this discretion, the child's welfare is not paramount but instead must be weighed against the fundamental purpose of the *Hague Abduction Convention*, namely, to order the child's return.⁴⁶

Article 20 provides an additional ground for refusing a return where to do so "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms".

It is to be emphasised that notwithstanding these exceptions (and in the author's view they are better described as "exceptions" rather than as "defences" as they are commonly referred to, so as to reflect their exceptional nature) the basic principle of the *Hague Abduction Convention* is that returns should be the norm. This indeed is broadly reflected in the statistics. According to the 2003 Survey, refusals accounted for 29% of cases determined by a court, representing 13% of all applications made under the *Hague Abduction Convention*.⁴⁷

VI. THE PROS AND CONS OF ACCEDING TO THE HAGUE ABDUCTION CONVENTION

A. Advantages

The obvious advantage of accession is that Singapore would thereby gain the assistance of a global community to obtain the return of children wrongfully removed or retained abroad. Although in return Singapore would have similarly to return children wrongfully brought to or kept in the country, that would pose few problems since following *AB v. AC*,⁴⁸ the Singapore Family Court already applies quasi-Hague principles to incoming child abduction cases. In addition to the return obligations, although not altogether so successfully, the *Hague Abduction Convention* would also help Singapore based parents to secure access rights to children taken abroad. From the individual's point of view, an important advantage is that applications under the *Hague Abduction Convention* can be made via a Central Authority which will then at its own costs have to transmit the application to the relevant Central Authority which in turn will be responsible for trying to locate the child, seek an amicable solution or, failing that, initiate or facilitate the institution of judicial proceedings, and in many countries for example, in Australia, New Zealand and the United Kingdom court proceedings will be free, while in many others advantage can be taken of legal aid schemes. Given that, as the Singapore Study shows,⁴⁹ the substantial proportion of

⁴⁵ For a detailed discussion of the exceptions see Lowe, Everall & Nicholls, *supra* note 21 at c. 17, and Lowe & Douglas, *Bromley's Family Law*, *supra* note 12 at 648-664.

⁴⁶ See, at any rate, in England and Wales, *Re A (Minors) (Abduction: Acquiescence)* (No. 2) [1993] Fam. 1 (C.A.).

⁴⁷ Though it may be noted that the local level of refusals was higher than that found in the 1999 Survey. Refusal "rates" of course vary from State to State. For a detailed analysis see both the 2003 Survey, *supra* note 3, and the commentary by Lowe & Horosova, "The Operation of the 1980 Hague Abduction Convention—A Global View", *supra* note 9.

⁴⁸ *Supra* note 31 and discussed above in Section B of Part V.

⁴⁹ Refer to the Table in Section A of Part II.

abductions are outgoing from Singapore, there seems much to be gained and little to be lost by acceding. This argument is strengthened by the current disadvantages that Singapore based victims of abduction suffer, namely, by having to undertake *on their own initiative*, the problem of tracing the child and, where necessary, instituting their own proceedings which is not only complicated, time-consuming and with less guarantees of success but also costly. Other options such as seeking through informal diplomatic channels assistance, for example, from police or immigration agencies is often ineffective, while the option for re-abduction is not only objectionable in principle, not least because that will often mean acting criminally, but often very expensive to arrange and frequently beyond the individual's resources. In a case from the Singapore study, OS 5036/1999, the mother removed the child out of Singapore while the father was serving prison in 2000. The father sought custody and applied to vary the custody order. As the child was out of the jurisdiction, the hearing was adjourned to enable the father to seek the assistance of the Ministry of Foreign Affairs to locate the mother so that the papers may be served on her. At the Pre-Trial Conference before the court in May 2002, the father reported that the Ministry of Foreign Affairs was working with the Consulate in San Francisco to obtain the mother's address but this was unsuccessful and service of documents could not be effected and the case remain unresolved.

There is one other argument for saying that Singapore should accede to the *Hague Abduction Convention*, namely, that it is their duty to do so under the UN Convention on the Rights of the Child (CRC). As it has been put elsewhere:⁵⁰

By becoming a signatory to the CRC, Singapore has by Article 11, 'committed to take measures to combat the illicit transfer and non-return of children abroad' and '[t]o this end [to] promote the conclusion of bilateral or multilateral agreements or accession to existing agreements'. It is not unreasonable to suggest from this commitment that Singapore may be required to take greater steps to engage in any international move(s) to ensure protection of children from the 'modern' ill of their own parental abduction of them?

Of course, it may be said that signing up to the proposed Protocol will satisfy the CRC commitments, but while that might serve a useful interim purpose, particularly with regard to Malaysia which is also not a Contracting State to the *Hague Abduction Convention*, as we have already argued, because of the limited number of States involved, the lack of an administrative body and the possible Constitutional arguments, such a commitment cannot be regarded as an adequate substitute to acceding to the convention.

B. *Some Counter Arguments*

1. *General issues*

For all the above arguments there are some counter points that can be made. First, wide though the Contracting States are, they do not include Mainland China (to which State the largest number of abductions from Singapore took

⁵⁰ *Ong, supra* note 1 at 239, citing *Leong, supra* note 5.

place between 2001 and 2006),⁵¹ nor neighbouring Malaysia, Indonesia or Vietnam. In other words, acceding to the *Hague Abduction Convention* would not solve all the problems and indeed might argue for extending the proposed Protocol instead. Secondly, acceding to the *Hague Abduction Convention* is not a simple matter; it involves the policy issue of deciding how to accommodate Muslim or Syariah law and the practical issues of having to pass implementing legislation, setting up and funding of a Central Authority, training of the judiciary and practitioners and deciding what legal aid to offer applicants seeking the return of children wrongfully brought to or retained in Singapore.

Without gainsaying their importance, we do not regard the practical matters involved in acceding as fundamental obstacles and will discuss these in the next section. Accommodating Syariah law does, however require immediate discussion.

2. Accommodating Syariah law

Singapore has two systems of family law: non-Muslim and Muslim. The non-Muslim system, governed largely by the *Women's Charter*,⁵² applies to the majority of Singaporeans in respect of laws regulating marriage, divorce and ancillary relief, while the Muslim system of marriage, divorce and ancillary relief are regulated by the *Administration of Muslim Law Act*.⁵³ Applications for orders relating to a child may be made under the *Guardianship of Infants Act*⁵⁴ which is available to both Muslims and non-Muslims and applies to disputes independent of divorce proceedings. This Act enables the civil court to apply substantive non-Muslim family law to Muslims in such applications. However, where there are divorce proceedings, non-Muslim parties generally apply for custody under the *Women's Charter* while Muslims make applications under the Muslim law regime regulated by the *Administration of Muslim Law Act*. More recently, there have been increasing numbers of cases where non-Muslim law on custody has been applied to Muslim parties involved in Muslim divorces. In these cases, the Muslim parties have consented to have the civil Family Court hear the dispute. This is possible due to the amendment to the *Administration of Muslim Law Act* in 1999 to provide that any person in proceedings for divorce in the Syariah Court may apply for leave to commence proceedings in the civil court. These proceedings are in respect of any matter relating to the disposition or division of property on divorce or custody of any child.

A concern for a country such as Singapore where Muslim law governs some of its Muslim children is that the *Hague Abduction Convention* principle could conflict with the Islamic laws on guardianship and custody. For instance, if a Muslim father abducts his child abroad, the left-behind mother in Singapore would benefit from the summary return of the child if the *Hague Abduction Convention* machinery was

⁵¹ Refer to the Table in Section A of Part II.

⁵² Cap. 353, 1997 Rev. Ed. Sing. This is the main statute governing family law in Singapore.

⁵³ Cap. 3, 1999 Rev. Ed. Sing. Muslim law governs a minority in Singapore. In 2000, 14.9% of resident population in Singapore were Muslims: Department of Statistics, Ministry of Trade and Industry, *Singapore Census of Population 2000: Statistical release 2—Education, Language and Religion* (October 2001).

⁵⁴ Cap. 122, 1985 Rev. Ed. Sing.

available. There may be concerns that this may be in conflict with Muslim law on guardianship and custody. However, it has been suggested that the welfare principle in Muslim law may not be that dissimilar to the common law concept of the welfare principle.⁵⁵

It is unlikely that the Muslim position on parental authority, custody and guardianship rights over children are so dissimilar to the non-Muslim laws that a conflict will always arise in most cases if the *Hague Abduction Convention* principles are followed. In fact, the Singapore MUIS Appeal Board, which is the appellate court of the Syariah Court, has applied a landmark civil Court of Appeal decision on custody in *Zaini bin Ibrahim v. Rafidah binte A. Rahman*:

We have set out the reasoning of the Court of Appeal at length because we are of the view that the Muslim law on custody of children as administered under the Act is no different from that set out in *CX v CY*. We say this because under both Muslim and the civil law the interest or welfare of the child is of the paramount consideration.⁵⁶

Although it is true that unlike some other Islamic jurisdictions, the Muslim family system does not govern all of Singapore, but only a small proportion, it does not seem open to Singapore to accede unless all its courts will apply Convention principles. In fact Singapore is not the first State to face this type of dilemma. Israel, for example, similarly, has parallel family law systems, the secular governed by the civil courts and the religious governed by the various religious courts. However, only the civil courts have jurisdiction to decide Hague abduction cases.⁵⁷ Furthermore, the religious courts are bound by the *Hague Abduction Convention* to the extent that they are not allowed to decide the merits of a custody dispute in relation to a child who had been abducted into Israel where an application under the convention is pending.⁵⁸ It is respectively suggested that Singapore adopts a similar solution and provide that all *Hague Abduction Convention* applications must be dealt with only in the civil Family Court and not the Syariah Court.

Although the potential application of Syariah law may be a sensitive issue, given that non-Muslim law on custody has always been applied with ease to Muslim parties under the *Guardian of Infants Act* and, more recently, under the *Women's Charter*, coupled with the paucity of Convention cases likely to be dealt with in Singapore, hopefully providing for the uniform application of the *Hague Abduction Convention* will not pose an insuperable problem.

⁵⁵ While the House of Lords in *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] 3 W.L.R. 14 noted that a group of states which adopted some form of Shariah law was conspicuously absent from the Convention (at para. 21), suggesting that Islamic law may have dissimilar concepts of custody, see the Singapore Syariah Court case, *infra* note 56, which held that the same principles apply. See also Najibah Mohd Zin, "How the Best Interest of the Child is Best Served in Islamic law with Special Reference to Its Application in the Malaysian Syariah Court" [2005] 9 I.K.I.M. Law Journal 323 which presents Islamic concepts of custody. See also *infra* note 56 and accompanying text.

⁵⁶ Appeal Case No. 26/2006, In the matter of Syariah Court Summons No. 20802/VO/04 & 20802/VO/05 at para. 29. The Court of Appeal case of *CX v. CY* [2005] 3 Sing. L.R. 690 is a landmark decision on custody in Singapore.

⁵⁷ *The Hague Abduction Convention (Return of Abducted Children) Law 1991*, s. 6.

⁵⁸ HC, 6056/93 *Eden v. Eden* 51 (4) P.D. 197. For a full discussion of the application of the Hague Convention in Israel, see Nigel Lowe & Rhona Schuz, *Country Report: Israel* (Virginia: NCMEC, 2005).

VII. THE PRACTICAL ASPECTS OF ACCEDING

A. *Meaning of Accession*

In common with other Hague Conventions, the *Hague Abduction Convention* makes a distinction between ratifications and accessions inasmuch as all Contracting States, both present and future, are obliged to accept all ratifying States but have a choice as to whether to accept an acceding State. Unusually, Article 38 provides for an “opt in” system by which each existing Contracting State must formally accept an accession before it can come into force between the two States. In other words, even after accession, the *Hague Abduction Convention* will only come into force with another Contracting State when that State formally decides. Some States such as Australia, Canada, Israel and the Netherlands seem ready to accept most accessions. Others such as France, UK and the USA, are more circumspect.⁵⁹ Since the power of ratification only extends to States that were members of the Hague Conference on Private International Law at the time of its Fourteenth Session (i.e. when the 1980 Convention was concluded), Singapore can only accede.

B. *The Mechanics of Accession*

To effect accession, the instrument of accession has to be deposited with the Ministry of Foreign Affairs of the Netherlands and will come into force three calendar months after the deposit. Likewise, declarations of acceptance have to be deposited with the Dutch Ministry and will come into force three calendar months later.⁶⁰

C. *The Standard Questionnaire for Newly Acceding States*

At the Fourth Meeting of the Special Commission to review the operation of the Abduction Convention held in 2001, it was resolved that newly acceding States have to complete a standard questionnaire, which is intended both to provide an aid memoir to those new States and also to provide information to existing Contracting States to enable them to decide whether or not to accept the accession. Many States, particularly the UK and USA, pay particular attention to the questionnaire response.

The questionnaire seeks the following information:

1. Whether any necessary implementing legislation is in force with copies of relevant legislation either being provided or indications given as to where copies may be obtained.
2. The processes available for locating missing children.
3. Details about the Central Authority.
4. Details about the judicial procedures.
5. Details about enforcement procedures.

⁵⁹ For a discussion of the issue of accepting accessions, see Nigel Lowe & Sarah Armstrong, *Good Practice in Handling Hague Abduction Convention Return Applications* (Virginia: NCMEC, 2002) at para. 2.3.

⁶⁰ Article 38.

6. Details about substantive law and in particular as to whether there is a difference between the legal status of mothers and fathers in custody or contact cases.
7. Details about social services and child protection services.
8. Details about the training of persons responsible for implementing the *Hague Abduction Convention*.

The underlying rationale of the questionnaire (and an issue upon which existing Contracting States need assurance) is that the newly acceding State has in force a working system to implement the *Hague Abduction Convention* and a commitment to applying its principles.

Syariah law apart, none of the questionnaire's requirements should pose insuperable problems for Singapore. We have already suggested that Convention applications should only be heard by the Family Court. This not only "solves" the Muslim issue but has the added advantage of concentrating jurisdiction in a single court. Experience suggests that the *Hague Abduction Convention* works best in States that concentrate jurisdiction⁶¹ particularly if jurisdiction is given to a limited number of highly trained judges. This is now specifically recommended at paragraph 5.1 of the *Guide to Good Practice—Part II—Implementing Measures*⁶² produced by the Permanent Bureau.

It is neither our intention nor our place to make detailed suggestions on all aspects of how Singapore should, if it chooses to accede, implement the *Hague Abduction Convention*. There are, in any event, numerous statutory models and now the Guides to Good Practice drawn up by the Permanent Bureau, including in particular, guidance on Implementing Measures, mentioned above, and guidance on Central Authority Practice,⁶³ to which reference can usefully be made. We would just, however, conclude this section by making the following points. First, the implementing legislation will need to incorporate the *Hague Abduction Convention* to make it internally binding. This can be done simply by reciting the *Hague Abduction Convention* in a Schedule to the implementing Act, as for example, has been done by the United Kingdom, through its *Child Abduction and Custody Act 1985*. Alternatively, it can be done by means of Regulations as in Australia via the *Family Law (Child Abduction Convention) Regulations 1986*. Since the latter can be amended more easily there is something to be said for adopting that method. What is not recommended, however, is to re-write the *Hague Abduction Convention* as both Australia and New Zealand have done⁶⁴ since that can and has caused additional problems of interpretation.⁶⁵

So far as the Central Authority is concerned, as has been said, neither its location nor structure is dictated by the *Hague Abduction Convention*. It may be that in Singapore, the Immigration & Checkpoints Authority ("ICA"), which is a government

⁶¹ Lowe & Armstrong, *supra* note 59 at para. 4.1.

⁶² Published by Jordans in 2004, and available on the Hague website.

⁶³ This is Part I, also published by Jordans in 2004 and available on the Hague website. *Part III—Preventive Measures*, published by Jordans in 2005 is the other one. Others are in the process of being drafted.

⁶⁴ See respectively the 1986 Regulations cited above, and the *New Zealand Care of Children Act 2004* (N.Z.), 2004/90.

⁶⁵ See Lowe & Armstrong, *supra* note 59 at para. 1.1, and for further analysis, Nigel Lowe, Sarah Armstrong & Anest Mathias, *Country Report: Australia* (Virginia: NCMEC, 2002) and Nigel Lowe & Kathryn Hollingsworth, *Country Report: New Zealand* (Virginia: NCMEC, 2005).

agency under the Ministry of Home Affairs, is best placed to act as the Central Authority. As its website says:

ICA has brought together the former Singapore Immigration & Registration (SIR) and the enforcement work performed by the former Customs & Excise Department (CED) at the various checkpoints. Operational on 1 April 2003, ICA is responsible for the security of Singapore's borders against the entry of undesirable persons and cargo through our land, air and sea checkpoints. ICA also performs other immigration and registration functions such as issuing travel documents and identity cards to Singapore citizens and various immigration passes and permits to foreigners. It also conducts operations against immigration offenders.⁶⁶

What also has to be decided is its precise role in bringing proceedings. In some States, for example, New Zealand and the United Kingdom, the Central Authority simply passes cases to firms of solicitors drawn from a nominated panel. In others, such as Australia and the Netherlands, the Central Authority acts as the applicant in Hague cases. Although this has advantages so far as the applicant is concerned since the hassle and costs of court proceedings are borne by the Authority, there can be apparent conflicts of interest concerning possible appeals against a refusal to return.⁶⁷ Careful thought therefore needs to be given whether this rather unusual model should be adopted.

VIII. CONCLUDING REMARKS

In this article we have strongly advocated that Singapore accede to the *Hague Abduction Convention*. Indeed we have suggested that it has a duty to do so under the United Nations *Convention on the Rights of the Child 1989*. In urging implementation, however, we have not suggested that the *Hague Abduction Convention* is a panacea nor without problems, both in its implementation and operation, nor are we saying that Singapore should not pursue negotiations to conclude the proposed abduction Protocol with Australia, Hong Kong, Malaysia and New Zealand. However, in weighing the pros and cons we believe that Singapore has everything to gain and little to lose by acceding to the *Hague Abduction Convention*. As the Singapore Study shows, the vast preponderance of abductions are out of Singapore, so acceding to the *Hague Abduction Convention* will help Singapore based citizens to recover children they might otherwise not be able to do. We acknowledge that some important States to which a number of children are taken from Singapore, in particular Mainland China, are not Contracting States to the *Hague Abduction Convention* which might argue for pursuing a bilateral agreement. We also acknowledge that at least as an interim step the proposed Abduction Protocol may well serve a useful purpose, not least because it does not involve the need for legislation nor the setting up of an administrative body akin to the Central Authority required under the *Hague Abduction Convention*, yet might help in securing children's return from those States. But, as we have argued, the proposed Protocol has its limitations and is no substitute for the *Hague*

⁶⁶ Online: <http://app.ica.gov.sg/about_ica/about_ica.asp>.

⁶⁷ See the comments by Lowe *et al*, *Country Report: Australia*, *supra* note 65 at para. 3.3 and Nigel Lowe & Geeske Ruitenber, *Country Report: Netherlands* (Virginia: NCMEC, 2005) at para. 3.3.

Abduction Convention. It only applies to a limited number of States; because of its preservation of domestic law it offers less guarantee of securing children's return and is constitutionally questionable given that it has been negotiated by the judiciary.

Finally, while accession to the *Hague Abduction Convention* may not be problem free, we believe that directing all convention cases to the Family Court provides an acceptable solution while all other implementation problems seem relatively easy to overcome, albeit at some cost. We accordingly urge Singapore to accede to the *Hague Abduction Convention* as soon as possible.