Recognition and Enforcement of Foreign Child Custody Orders

by
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There are many benefits to the recognition and enforcement of foreign judgments. Included among these benefits are a reduced burden on judiciaries that do not need to devote significant resources to a subsequent consideration of a matter that has already been litigated, costs savings on the parties who do not need to retain counsel to relitigate the matter, reduced stress on persons who will not be asked to provide evidence for a subsequent civil action, and the elimination or reduction of inconsistency resulting from the execution of multiple judgments.

Despite these benefits, there exist some potential risks associated with the recognition and enforcement of foreign judgments. For example, the judgment may order measures that are available in the State[1] in which the judgment is issued, but not in a State in which recognition or enforcement might be sought; the judgment might be based on cultural norms of the issuing State that do not match the norms of a State in which recognition or enforcement might be sought; the court issuing a judgment might show favor to one of the litigating parties for reasons unrelated to the merits of the matter before it (e.g., favoring local nationals over non-nationals); or there may have been some procedural flaw in the proceeding that resulted in the judgment.

These benefits and risks apply to all civil judgments, whether they relate to commercial disputes, family law issues, or other matters. This article addresses the recognition and enforcement of child custody judgments. It presumes that the parents, or at least one of the parents, would prefer to litigate child custody once and would like to have the resulting judgment recognized and enforced subsequently when any of the parents or the child

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1 In this article, "State" has the same meaning as "country." When modified by "U.S.," a "U.S. state" is a state within the United States.

find themselves in a State other than the State in which the judgment was issued.

This article will not answer the question whether a child custody judgment will be recognized or enforced elsewhere. This question, unfortunately, cannot be answered definitively in advance of an attempt to have the judgment recognized or enforced. Instead, this article focuses on the pragmatic question – what steps can be taken to increase the likelihood that a child custody judgement issued in one State will be recognized or enforced in a foreign State.

This article focuses on family lawyers licensed to practice in the United States. It should, however, benefit foreign family lawyers considering whether a child custody determination might be recognized or enforced in a U.S. state. In Part I, this article discusses rules applied by foreign States to the recognition and enforcement of child custody judgments from other States. Part II addresses steps that can be taken when litigating child custody in a court in the United States to increase the chance that the resulting judgment might be recognized or enforced in a foreign State. Part III identifies steps that can be taken when litigating child custody in a foreign State to increase the chance that the resulting judgment might be recognized or enforced in a U.S. state.

To learn about the relevant law and practice in a foreign State, a prudent step would be to consult with an attorney who practices in that State. Similarly, should a foreign attorney wish to learn about the law and practice in a particular U.S. state relevant to the recognition or enforcement of a foreign child custody judgment, the foreign attorney should consider consulting with an attorney who practices in the that U.S. state. As discussed below, to benefit a future or pending custody action, this approach works best when the parties have a sense of the States in which the members of the family may find themselves in the future before a custody judgment is issued. However, given global movement, it is possible that a family member might end up in a State not contemplated at the time of the child custody proceeding. Thus, it is helpful to have a good understanding of general State practice as it relates to the recognition and enforcement of child custody determinations.

I. Rules Applied by Foreign States to the Recognition and Enforcement of Child Custody Judgments

The domestic law applied by each State relating to the recognition and enforcement of foreign child custody judgments varies. However, many States have entered into a treaty establishing certain rules in this area. This treaty is the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the "Child Protection Convention").[2] The Child Protection Convention is presently in force in 54 States.[3] The United States signed the Child Protection Convention October 22, 2010, but has not deposited its instrument of ratification to bring the Convention into force for it.[4]

One of the objects of the Child Protection Convention is "to provide for the recognition and enforcement of . . . measures of protection in all Contracting States."[5] The covered "measures of protection" include measures dealing with:

> rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence.[6]

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2 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter "Child Protection Convention"), Oct. 19, 1996, 2204 U.N.T.S. 503, 35 I.L.M. 1391, https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf.

3 A complete list of States that have brought the Child Protection Convention into force is available from the Treaty Database of the Kingdom of the Netherlands, which is the depositary for the Convention, at *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, https://treatydatabase.overheid.nl/en/Treaty/Details/007396 (last visited Oct. 25, 2023), as well as from the website of the Hague Conference on Private International Law, at *Status Table*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=70 (last visited Oct. 25, 2023).

4 *Id.* The President has not transmitted the Child Protection Convention to the Senate for its advice and consent to ratification.

5 Child Protection Convention, *supra* note 2, art. 1(1)(d).

6 *Id.* art. 3(b).

The Child Protection Convention requires that "[t]he measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States."[7] There are several elements to this requirement. First, the measure must be taken by the authorities of a State. Thus, this obligation would not extend to, for example, an agreement entered into by private parties without an associated measure taken by a State authority. Second, the provision applies only where the State that took the measure is a Contracting State. A Contracting State is a State that "has consented to be bound by the treaty, whether or not the treaty has entered into force."[8] Although a State may be considered to be a "Contracting State" after it has consented to be bound but before the Convention enters into force for that State, the Convention "appl[ies] to measures only if they are taken in a State after the Convention has entered into force for that State."[9] The obligation does not extend to a measure taken by an authority of a State that has not signed the Child Protection Convention or a State that has signed but not ratified the Child Protection Convention, even if that State is a member of the Hague Conference on Private International Law.[10] Finally, the recognition

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7 *Id.* art. 23(1).

8 *See* Vienna Convention on the Law of Treaties (hereinafter "VCLT") art. 2(1)(f), May 23, 1969, 1155 U.N.T.S. 331. Many provisions of the Vienna Convention on the Law of Treaties are considered to reflect customary international law. Thus, many of the rules contained in the VCLT apply to States that are not party to the VCLT. *See, e.g.,* Restatement (Fourth) of U.S. Foreign Relations Law § 306, cmt. a (Am. L. Inst. 2018).

9 Child Protection Convention, *supra* note 2, art. 53(1). This article does not address the fascinating issue of the application of the Child Protection Convention between Contracting States that accede to the Convention and other Contracting States. For the benefit of the reader, first, thank you for reading the footnotes, and, second, please note that the Child Convention might not apply with respect to all Contracting States. *See id.* art. 58.

10 For matters involving Washington State, the Court of Appeals of Washington was mistaken in *In re Long*, 421 P.3d 989 (Wash. Ct. App. 2018). The United States is not a Contracting State to the Child Protection Convention merely as a result of its membership in the Hague Conference on Private International Law. (Similarly, the United States is not a party to the United Nations Convention on the Rights of the Child merely because the United States is a member of the United Nations.) As the Fourth Restatement of the Foreign Relations Law of the United States observes:

> An international agreement enters into force as an international obligation for a state, including the United States, when: (a) the state has

is to occur "by operation of law." Because recognition occurs as a matter of law, "it will not be necessary to resort to any proceeding in order to obtain such recognition."[11]

The process for enforcing a child custody judgment pursuant to the Child Protection Convention is slightly more complicated. Here, the Convention provides that "[i]f measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State."[12] As with the recognition requirement, there are several elements to this obligation. First, the measure must be taken in a Contracting State. Although this provision does not state explicitly that the measure must be taken by an authority of a Contracting State, this would seem to be the proper reading of the provision.[13] Second, the measure must be enforceable in the Contracting State in

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expressed its consent to be bound by means consistent with the agreement; and (b) the other conditions established by the agreement, including consent by the requisite number of states, have been satisfied.

RESTATEMENT (FOURTH) OF U.S. FOREIGN RELATIONS LAW, *supra* note 8, at § 304(1) (Section 304 addresses the "Entry into Force of International Agreements").

11 Paul Lagarde, Explanatory Report, Protection of Children, *in* 2 Proceedings of the Eighteenth Session, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 585, ¶ 119 (1998), https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf (hereinafter "Lagarde Report"). Consistent with longstanding practice at the Hague Conference on Private International Law, the Explanatory Report was drafted by a Reporter who participated in the negotiations of the Child Protection Convention. Note that the U.S. Supreme Court declined to decide "whether [a similar Explanatory] Report should be given greater weight than a scholarly commentary." Abbott v. Abbott, 560 U.S. 1, 19 (2010).

12 Child Protection Convention, *supra* note 2, art. 26(1).

13 It would not be logical to require that a measure be taken by an authority for purposes of recognition but not for enforcement. Moreover, the relevant part of Article 1(1) of the Child Protection Convention provides: "The objects of the present Convention are – a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child; . . . d) to provide for the recognition and enforcement of *such* measures of protection in all Contracting States." *Id.* art. 1(1) (emphasis added).

Reading subparagraphs (a) and (d) of Article 1(1) together, the negotiators of the Convention appear to have intended that the provisions on recognition and enforcement apply to measures taken by authorities of States that have jurisdiction to take those measures.

which it was taken. In the case of a child custody judgment, that judgment must be enforceable in the Contracting State of the court that issued the judgment. Third, there must be a need for enforcement of the relevant measure in another Contracting State as the measure must "require enforcement." Fourth, any person may request that the foreign measure be declared enforceable or registered for the purpose of enforcement. This person need only be "interested" and might be someone other than a parent.[14] Finally, the process for declaring the measure enforceable or registering it for the purpose of enforcement is governed by the procedural rules of the State in which enforcement is sought.

The Child Protection Convention provides a list of reasons for which one Contracting State may refuse to recognize or enforce a measure taken by an authority in another Contracting State, to include a child custody judgment issued by a court of the latter State.[15] The following bases for refusal to recognize or enforce are identified in the Child Protection Convention:

> a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in [the Convention's Chapter identifying jurisdictional rules for the taking of measures];
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> b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
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> c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

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14 The Child Protection Convention does not define, or provide guidance in interpreting, the term "interested party." Presumably, an interested party might be any party that would wish to have a measure enforced, including a government authority in the other Contracting State.

15 The list of bases upon which one Contracting State may refuse to recognize a measure taken by an authority of another Contracting State is provided in Article 23(2) of the Child Protection Convention. The same list provides the exclusive bases upon which one Contracting State may refuse to declare enforceable or register for the purpose of enforcement a measure taken by an authority of another Contracting State. Child Protection Convention, *supra* note 2, art. 26(3).

> d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
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> e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
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> f) if the procedure provided in Article 33 [relating to the placement of a child in a foster family or institutional care, or the provision of care by kafala or an analogous institution] has not been complied with.[16]

Many of these bases that permit a Contracting State to refuse to recognize or enforce a measure from another Contracting State can be identified and addressed, with some degree of comfort, before and during the initial child custody proceeding. In particular, jurisdictional rules and due process rights generally can be addressed at the outset. Other bases cannot be known until the recognition or enforcement stage. For example, the public policy or fundamental rules of procedure of a State cannot be known before the State is identified. Finally, one category does not involve actions that might be addressed leading to the issuance of the child custody judgment and involves a State other than a Contracting State to the Convention. This article will discuss each category of bases for the refusal of recognition or enforcement of a foreign child custody judgment.

A. Bases Relating to Actions That Can Foreseeably Be Addressed in the State Taking the Measure

The first reason for not recognizing or enforcing a foreign measure, as allowed by Article 23(2)(a) of the Child Protection Convention, is that the measure was taken by an authority not exercising jurisdiction pursuant to the relevant provisions of the Child Protection Convention. As a general matter, "[t]he judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."[17] The Child Protection Convention does not contain a definition for "habitual residence." An interpretation

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16 *Id.* art. 23(2).

17 *Id.* art. 5(1).

of the term should develop over time.[18] The Child Protection Convention also includes jurisdictional rules applicable to refugee children and internationally displaced children;[19] children who have been wrongfully removed or retained;[20] situations in which a court might be better placed to address the matter than the court that might otherwise have jurisdiction;[21] certain measures taken in the context of divorce or legal separation of parents;[22] cases of urgency;[23] and situations necessitating provisional measures.[24]

In Article 23(2)(c), the Child Protection Convention permits a Contracting State to refuse to recognize or enforce a measure that restricts a person's ability to exercise parental responsibility[25]

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18 According to the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VCLT, *supra* note 8, art. 31(1). The Convention on the Civil Aspects of International Child Abduction also uses the term without a definition. Convention on the Civil Aspects of International Child Abduction (hereinafter "Abduction Convention"), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. The context and the objects and purposes of the Conventions are different, thus the term might be interpreted differently in each. Although the term might be interpreted differently in each Convention, it is worth noting that many courts have attempted to interpret the term in the context of the Abduction Convention. *See, e.g.,* Monasky v. Taglieri, 140 S. Ct. 719 (2020). These interpretations have considered a variety of factors and have shown that, in the context of the Abduction Convention, the term is much broader than "home state" as it appears in the Uniform Child-Custody Jurisdiction and Enforcement Act. Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA"), 9(1A) U.L.A. 649, § 102(7) (Unif. Law Comm'n 1997).

19 Child Protection Convention, *supra* note 2, art. 6.

20 *Id.* art. 7.

21 *Id.* arts. 8, 9.

22 *Id.* art. 10.

23 *Id.* art 11.

24 *Id.* art. 12.

25 The Child Protection Convention does not define the term "parental responsibility." The Lagarde Report provides the following guidance in interpreting the term: "It covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and, generally, the legal representation of the child, whatever be the name which is given to the legal institution in question: parental responsibility, parental authority, paternal authority, as well as guardianship, curatorship, legal administration, tutelle, curatelle. The rights and responsibilities to which reference is made are those which belong to the father and mother under the law with a view to raising their children and ensuring their development, whether the question involved

when the authority making the measure did not provide that person an opportunity to be heard. Several treaties negotiated at the Hague Conference on Private International Law permit a State to refuse to recognize or enforce a foreign order as a result of the lack of due process.[26]

The exception contained in Article 23(2)(f) is specific to measures taken relating to the placement of a child in a foster family or institutional care, or the provision of care by kafala or an analogous institution. These would not be expected to involve custody orders.

B. Bases Relating to the State Requested to Recognize or Enforce a Foreign Measure

Two of the bases depend on the policies of the State requested to recognize or enforce a measure. One, Article 23(2)(b), looks to the fundamental principles of procedure of the requested State. The second, Article 23(2)(d) considers the public policy of the requested State.

Articles 23(2)(b) and 26(3) allow a requested State to refuse to recognize and enforce, respectively, a measure taken in another Contracting State "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State."[27] This provision recognizes that each Contracting State will have its own "principles of procedure."[28]

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is custody, education, determination of the residence or the supervision of the child's person and in particular his or her relationships." Lagarde Report, *supra* note 11, at 543, 545 ¶ 14.

26 *See, e.g.,* Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter "Child Support Convention") art. 22(e), Nov. 23, 2007, 2955 U.N.T.S. 81 (addressing lack of notice); Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter "Judgments Convention") art. 7(1)(a), July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137) (addressing lack of notice and ability to defend). As the Lagarde Report notes, "[t]his is another manifestation of procedural public policy, which sanctions the violation of the defendant's right to due process of law." Lagarde Report, *supra* note 11, at 585 ¶ 124.

27 Child Protection Convention, *supra* note 2, art. 23(2)(b).

28 The Lagarde Report observes:

As a result, this ground for refusal is applied differently in each Contracting State.

Multiple Special Commissions,[29] convened by the Hague Conference of Private International Law to review the practical operation of the Abduction Convention and the Child Protection Convention, have considered how authorities in States hear children. In June 2011, the Special Commission considered the child's voice and opinions in return and other proceedings pursuant to both Conventions. In the Conclusions and Recommendations adopted by the June 2011 Special Commission,

> [t]he Special Commission note[d] that States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasise[d] the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognize[d] the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity.[30]

> This ground for refusal is directly inspired by Article 12, paragraph 2, of the United Nations Convention on the Rights of the Child. It does not imply that the child ought to be heard in every case. It was pointed out, with good reason, that it is not always in the interest of the child to have to give an opinion, in particular if the two parents are in agreement on the measure to be taken. It is only where the failure to hear the child is contrary to the fundamental principles of procedure of the requested State that this may justify a refusal of recognition.

Lagarde Report, *supra* note 11, at 585, ¶ 123.

29 According to the website of the Hague Conference on Private International Law, "Special Commissions, composed by governmental experts, meet in between Plenary Sessions to prepare draft Conventions to be considered for adoption, as well as to review the practical operation of existing Conventions and recommend improvements in their implementation." *About the HCCH*, Hague Conference on Private International Law, https://www.hcch.net/en/about (last visited Oct. 25, 2023).

30 *Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (1-10 June 2011), Conclusions and Recommendations* ¶ 50, Hague Conference on Private International Law, https://assets.hcch.net/upload/wop/concl28sc6_e.pdf.

A subsequent Special Commission considered the matter in October 2017. According to the Conclusions and Recommendations of that Special Commission,

> [t]he Special Commission note[d] that, in order to facilitate the recognition and enforcement of an order for measures, where a competent authority decides to hear a child, there are a range of ways in which it may do so within the diversity of legal systems and approaches. The competent authority should incorporate into the order for measures a record of the way the child was heard, or if a decision is made not to hear the child, an indication that consideration was given to doing so and the reasons for the decision not to hear the child.[31]

Although the experts at the Special Commissions concluded, correctly, that there is no single way to hear a child, it is for the courts of the Contracting States to the Child Protection Convention being asked to recognize or enforce a foreign child custody judgment to decide whether a child was heard in a manner that would not violate fundamental principles of procedure of that State. Because the reference is to "principles" and not to "rules," they are not necessarily written anywhere. As a result, it is for each judge asked to recognize or enforce a measure to determine whether the child was properly heard. This might result in inconsistency globally as well as within each Contracting State, if judges within that State identify different fundamental principles or apply the same fundamental principles differently.

The Contracting States and the Permanent Bureau of the Hague Conference on Private International Law have recognized the varying practice in applying this provision of the Convention. As a result, the Permanent Bureau has included in recent questionnaires, circulated to Child Protection Convention Contracting States in preparation for Special Commission meetings, questions relating to the application of this provision of the Convention. Several Contracting States have responded to

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31 *Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (10-17 October 2017), Conclusions and Recommendations* ¶ 50, Hague Conference on Private International Law, https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf.

this question, including Estonia,[32] Finland,[33] Germany,[34] and the United Kingdom.[35]

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[32] In response to a 2022 questionnaire question asking whether there have been any significant developments in your State regarding the legislation or procedural rules applicable in cases of international child protection, Estonia reported that "Changes according to the BIIB changes in our national legislation (Code of Civil Procedure), for example about the hearing of a child." [sic] *Questionnaire Concerning the Practical Operation of the 1996 Child Protection Convention,* 5, Hague Conference on Private International Law, https://assets.hcch.net/docs/882185b0-5c77-4f97-8fb4-7b23b4444606.pdf.

[33] In response to a 2016 questionnaire, Finland reported:

> Helsinki District Court is the competent court for trying the requests for recognition and enforcement under the 1996 Convention as the first instance court. When handling these requests, the court has considered e.g. whether the non-hearing of the child in the foreign custody proceedings affects the recognition and enforcement in the requested state (article 23(2) b).

Questionnaire Concerning the Practical Operation of the 1996 Convention, 5, Hague Conference on Private International Law, https://assets.hcch.net/docs/242a8b48-32cb-45ee-a021-fc07bd814e62.pdf.

[34] Germany has provided responses to multiple questionnaires addressing this matter. In responding to the 2016 questionnaire, Germany observed "From the courts, point of view, difficulties have repeatedly arisen in determining whether the child has been provided the opportunity to be heard pursuant to Art. 23 (2) c) [sic] 1996 Hague Convention." *Questionnaire Concerning the Practical Operation of the 1996 Convention,* 7, Hague Conference on Private International Law, https://assets.hcch.net/docs/bad81b31-fedc-4522-870d-825450dd7fca.pdf. In its response to a 2022 questionnaire, Germany noted that "Problems also very frequently arise in the context of recognition of foreign decisions under Article 23 para. 2 lit. b) in child custody proceedings because of the strict German standard applying to child hearings." *Questionnaire Concerning the Practical Operation of the 1996 Convention*, 9, Hague Conference on Private International Law, https://assets.hcch.net/docs/9650768f-80c3-45d1-8d8a-f8cc9fbe8142.pdf. In response to the same 2022 questionnaire, Germany provided the following summary for case 12 UF 60/20 from OLG Hamburg, a court of second instance:

> The child's opportunity to be heard as stated in Art. 23 para. 2 b) of the1996 Convention may be given in cases where the child has been heard by an authority that was competent for the hearing under national law and where a report of the hearing was submitted to the court.

Id. at 5.

[35] In response to a 2016 questionnaire, the United Kingdom provided the following information on two cases:

> In NG v OG [2014] EWHC 4182, the English court declined to recognize a Russian custody order because the Russian court had not given the child an opportunity to be heard. In Re D (recognition of Foreign

The other basis for the refusal to recognize or enforce a foreign child custody judgment included in this category is that recognition and enforcement "is manifestly contrary to public policy of the requested State, taking into account the best interests of the child."[36] Many of the treaties negotiated at the Hague Conference on Private International Law that provide for recognition and enforcement of foreign judgments contain a public policy exception.[37] The Child Protection Convention does not provide guidance in the determination of the public policy of a State. It does, however, provide two qualifications. First, recognition or enforcement of the foreign child custody judgment must be "manifestly" incompatible with the public policy of the State being asked to recognize or enforce the judgment. Second, the best interests of the child must be taken into account.[38] In general, States are encouraged to limit their reliance on this provision as over-reliance could render meaningless the obligation to recognize or enforce measures.

C. Bases Involving States That Are Not Contracting States to the Child Protection Convention

Article 23(2)(e) applies to a situation that might not be foreseen at the time of the filing of a child custody action in a court,

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Order) [2016] EWCA Civ 12, a decision under the BIIA Regulation not the 1996 convention, the English Court of Appeal upheld the decision not to recognize a Romanian custody order because it is a fundamental principle of procedure of English law that a child has a right to be heard.

Questionnaire Concerning the Practical Operation of the 1996 Convention, 8, Hague Conference on Private International Law, https://assets.hcch.net/docs/0d21bfc7-d48c-471d-99f3-3ec1187d5b14.pdf.

36 Child Protection Convention, *supra* note 2, art. 23(2)(d).

37 *See, e.g.,* Child Support Convention, *supra* note 27, art. 22(a); Judgments Convention, *supra* note 26, art. 7(1)(c); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167, Art. 24 (relating to the recognition of an adoption). Similarly, the Restatement, Third, Foreign Relations Law of the United States states that a court in the United States must not recognize a foreign judgment where "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought." Restatement (Third) Foreign Relations Law of the United States § 482(2)(d) (Am. L. Inst. 1987).

38 The Child Protection Convention does not indicate whether a consideration of the best interests of the child should serve to expand or limit the application of this ground for refusal to recognize or enforce a foreign judgment.

although it might be foreseeable that another parent might file an action in a court in a different State. In particular, this provision may be relied upon where the child custody judgment would be "incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State."[39] There are several requirements that would need to be satisfied. First, the child custody judgment sought to be recognized or enforced must be incompatible with a measure taken by another State. Second, the latter measure must have been taken by an authority of a State that is not a Contracting State to the Child Protection Convention. Third, the State in which the latter measure was taken must be the habitual residence of the child. Fourth, the latter measure must satisfy the requirements for recognition in the State being asked to recognize or enforce the earlier child custody judgment. Although many of these factors might not be known or considered at the time of the filing of the initial proceeding, they would need to be considered when requesting recognition or enforcement of any resulting child custody judgment.

The domestic law of Contracting States to the Child Protection Convention should be expected to reflect these provisions of that Convention.[40] There might, however, be peculiarities specific to each domestic statute or code. Moreover, the domestic law of States that are not Contracting States to the Child Protection Convention might not resemble these provisions in any way. As a result, it might be prudent to consult with counsel practicing in the State where recognition or enforcement is being, or might be, sought.

II. Increasing the Chance that a U.S. Child Custody Judgment Might Be Recognized or Enforced in a Foreign State

If it is foreseeable that a party might seek to have a child custody judgment issued by a court in the United States recognized or enforced in a foreign State, it would be prudent to consult with

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39 Child Protection Convention, *supra* note 2, art. 23(2)(e).

40 See *supra* note 3 for websites that will assist in identifying Contracting States.

counsel practicing in that foreign State as early as possible.[41] Foreign counsel can help to identify matters that a court in the United States might helpfully consider and address in order to increase the chances for recognition and enforcement of the resulting judgment.

In the United States, child custody jurisdiction, recognition, and enforcement is generally addressed in the Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA").[42] In anticipation of possible ratification of the Child Protection Convention by the United States, the Uniform Law Commission in the United States[43] drafted amendments to the Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter "Amended UCCJEA"). The Uniform Law Commission has not recommended that any U.S. state enact the Amended UCCJEA, and no U.S. state has done so.[44]

> Section 211 of the Amended UCCJEA contains the following:
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> (a) If requested by a party, a court of this state that makes or modifies a child-custody determination or orders or modifies a decision . . . shall include in the determination or decision the court's findings and conclusions on the following:
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> (1) the basis for the assumption of jurisdiction by the court;
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> (2) the manner in which notice and opportunity to be heard was given to each person entitled to notice of the proceeding;

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41 Repetition of this point throughout this article should be taken to suggest its reasonableness, at least in the opinion of the author of this article.

42 In the United States the District of Columbia and all U.S. states other than Massachusetts have enacted versions of the UCCJEA. UCCJEA, *supra* note 18.

43 The Uniform Law Commission is a U.S. state-supported organization that "provides [U.S.] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of [U.S.] state statutory law." *About Us*, Uniform Law Commission, https://www.uniformlaws.org/aboutulc/overview (last visited Oct. 26, 2023).

44 The text of the Amended UCCJEA can be obtained at *Act Archive—Child Custody Jurisdiction and Enforcement Act*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&libraryentry=2f1bed91-5c3b-4a00-8438-73022aa94218&librarykey=25727ebd-ddee-4ed3-b875-855dffe8622d&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=row (last visited Oct. 26, 2023). It should be noted that the Uniform Law Commission has "released [this text] for informational purposes only." *Id.* Legislators, or others, considering enactment of the Amended UCCJEA are encouraged first to "contact the Uniform Law Commission for further information." *Id.*

> (3) the opportunity for the child to be heard or the reasons why the child was not heard; and
>
> (4) the country of the habitual residence of the child.
>
> (b) A child-custody determination or a decision . . . may be supplemented at any time to include the findings and conclusions described in subsection (a) without the supplement being construed as a modification.[45]

As the drafters of the Amended UCCJEA stated, this provision "is meant to help those parents who contemplate possible foreign enforcement of a child custody determination, or measure of protection, under Article 4 [of the Amended UCCJEA], that, when entered, is a solely domestic United States proceeding."[46]

Although a U.S. state court is not currently required to implement Section 211 of the Amended UCCJEA, because, as stated above, no U.S. state has enacted it, a litigant could now request that a court include the information identified in that provision. This might assist in efforts to seek to have the judgment recognized or enforced. While a U.S. state court would not presently be in a position to determine the habitual residence of a child pursuant to the Child Protection Convention,[47] a treaty to which the United States is not presently a party, it could address the matters identified in subsections (a)(1), (a)(2), and (a)(3) of Section 211 of the Amended UCCJEA.

Separately, and independent of issues presented by the Child Protection Convention, the Uniform Law Commission established a Drafting Committee on Judicial Interview Procedures for Children.[48] The Drafting Committee has been authorized to:

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45 *Id.* § 211.

46 *Id.* cmt. ¶ 2.

47 It would be premature for a U.S. state court to attempt to interpret this treaty term. Should the United States become a party to the Child Protection Convention, courts would be expected to have the benefit of the interpretation(s) of relevant provisions of the Convention by the Executive and the Senate. Some of these interpretations might be shared, with some possibly included in the U.S. instrument of ratification or in any federal implementing legislation.

48 *ULC to Appoint New Study and Drafting Committees*, Uniform Law Commission (May 22, 2023, 4:10 PM), https://www.uniformlaws.org/discussion/ulc-to-appoint-new-study-and-drafting-committees#bm02cf575e-8381-4827-8479-beddd20365ae.

> draft a uniform or model act addressing custody, visitation, parentage, and related proceedings in which other law permits or requires the child's views to be heard. The act should address (1) the factors to be considered when the law accords judicial discretion as to whether a child's views should be heard, and (2) the procedures to be used when either (a) the law requires or (b) a judge determines to permit a child's views to be heard. The procedures should explicitly address due process rights of parents, including access to the results of the interview.[49]

If the Drafting Committee develops a uniform or a model act,[50] this might facilitate recognition and enforcement of U.S. child custody judgments. First, with respect to those U.S. states that enact the act, such enactment would inform foreign courts of the procedures applied by U.S. state courts in hearing children prior to issuing child custody judgments.[51] If a judge in a foreign State believes that the procedures contained in any act drafted by the Uniform Law Commission are sufficient, and that those procedures are followed, that judge might be more likely to recognize or enforce the judgment from the U.S. state court.[52] Second, it might encourage U.S. state court judges to address in their opinions the manner in which they have heard the views of the child.

An additional benefit of the drafting of an act by the Uniform Law Commission relating to judicial consideration of the views of children, in child custody proceedings or otherwise, is that it might assist the United States as it participates in international discussions relating to the proper ways in which the views of children might be heard. Addressing the matter in U.S. state law could be beneficial in reflecting State practice.[53] Moreover, it could be

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49 *Id.*

50 This author has worked with at least one of the co-chairs and with the reporter of the Drafting Committee. Therefore, this author is optimistic that the Committee will develop a good and helpful product.

51 This presumes that U.S. state court judges will implement these procedures in a manner that will be satisfactory to the foreign judge.

52 Hopefully, the Drafting Committee will consider foreign practice in recognizing and enforcing child custody judgments as it develops any procedure(s) for hearing a child. *See supra* discussion in text at note 50.

53 This State practice by the United States might, or might not, be relevant in the development over time of customary international law. This author does not consider whether there exists sufficient State practice or *opinio juris* for the crystallization of a rule of customary international law on this topic.

helpful in assisting other States as they consider, or reconsider, their practices in this important area.

In an attempt to eliminate potential competition for recognition and enforcement of child custody judgments, a party might want to work with the opposing party to avoid the possibility of multiple, competing judgments. This might involve concessions on the part of one or both parties, although it might result in an agreement by the other party not to file, or not to proceed with, a claim in another State where the domestic law of that State provides its courts with jurisdiction over the matter.

III. Increasing the Chance that a Foreign Child Custody Judgment Might Be Recognized or Enforced in a U.S. State

If it is foreseeable that a party might seek to have a child custody judgment issued by a foreign court recognized or enforced in the United States, it would be prudent for foreign counsel to consult with counsel practicing in the relevant U.S. state as early as possible.[54]

Recognition and enforcement of foreign child custody orders in the United States is almost entirely governed by U.S. state enactments of the UCCJEA.[55] Pursuant to Section 105(b) of the UCCJEA, "Except as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3."[56] Subsection (c) of Section 105 provides an exception to this requirement "if the child custody law of a foreign country violates fundamental principles of human rights."[57]

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54 *See supra* discussion in note 41.

55 *See supra* discussion in text at note 42.

56 UCCJEA, *supra* note 18, § 105(b).

57 *Id.* § 105(c). Several U.S. states have varied their enactment of this provision. For example, Connecticut creates an additional exception to the obligation to recognize and enforce where the foreign judgment "is repugnant to the public policy of this state." Conn. Gen. Stat. § 46b-115ii (2020). New Jersey creates an additional exception where the foreign custody law "does not base custody decisions on evaluation of the best interests of the child." N.J. Stat. Ann. § 2A:34-57 (2013). Washington State creates an additional exception for the application of

Thus, before requesting that a foreign child custody judgment be recognized or enforced, counsel should review the child custody law of the State that issued the judgment. It might be difficult to know whether a U.S. state court judge will determine that the child custody law of a foreign State violates fundamental principles of human rights. However, counsel should look to decisions within that U.S. state or from other U.S. state courts that have analyzed the matter. In addition, counsel might want to review any academic writing about the child custody law of that State.

Similarly, where a U.S. state has added to the exceptions included in Section 105(c) of the UCCJEA, counsel should consider how these additional exceptions might apply to any attempt to have a foreign child custody judgment recognized or enforced.

Additionally, counsel should review the bases upon which the foreign court exercised jurisdiction. Section 105(b) requires recognition and enforcement if the foreign court exercised its jurisdiction "under factual circumstances in substantial conformity with the jurisdictional standards."[58] Here, counsel should look to the jurisdictional rules contained in the UCCJEA to determine whether a U.S. state court would have exercised jurisdiction to issue a child custody judgment had the same jurisdiction-related facts existed in the U.S. state.

Before a foreign child custody judgment may be recognized or enforced in the United States, the judgment must be registered in a U.S. state court.[59] Section 305 of the UCCJEA identifies the procedures for registration of a foreign child custody judgment.[60]

Section 305(b)(2) requires service of notice upon, and an opportunity to contest registration by, "any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered."[61] In practice,

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the entire UCCJEA with respect to a State "if the law of a foreign country holds that apostasy, or a sincerely held religious belief or practice, or homosexuality are punishable by death, and a parent or child may be at demonstrable risk of being subject to such laws. For the purposes of this subsection, 'apostasy' means the abandonment or renunciation of a religious or political belief." Wash. Rev. Code § 26.27.051 (2022).

58 UCCJEA, *supra* note 18, § 105.

59 *Id.* § 305.

60 *Id.* § 308, for procedures applicable to the expedited enforcement of a foreign child custody judgment.

61 *Id.* § 305(b)(2), which refers to persons identified in § 305(a)(3).

this provision should apply to a person who otherwise has custody or visitation rights that would somehow be affected by the foreign child custody judgment. To apply any other practice might deny persons having custody or visitation rights an opportunity to contest any alteration of these rights. Such a person would have twenty days to contest registration.[62]

Registration of a foreign child custody judgment may be contested on three grounds. First, the registration of the judgment may be contested if the court that issued the judgment would not have had jurisdiction, if it were a U.S. state court, based on one of the grounds identified in Article 2 of the UCCJEA.[63] Second, registration may be contested if the foreign judgment has been vacated, stayed, or modified by a court that has or would have jurisdiction based on the jurisdictional grounds identified in Article 2 of the UCCJEA.[64] Finally, registration may be contested by a person who was entitled to, but did not receive, notice in the foreign proceedings that resulted in the child custody judgment sought to be enforced.[65]

If the request to register the foreign child custody judgment is not challenged within twenty days or the party contesting registration is unsuccessful in persuading the U.S. state court that one of the grounds for contesting registration has been satisfied, the request for registration of the foreign judgment will be confirmed. Once a foreign child custody judgment is confirmed, registration

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62 *Id.* § 305(d).

63 *Id.* § 305(d)(1).

64 *Id.* § 305(d)(2).

65 *Id.* § 305(d)(3). Section 305(d)(3) states that notice must have been provided "in accordance with the standards of Section 108" of the UCCJEA. Section 108 applies to notice to persons outside of the U.S. state in which a child custody proceeding occurs. In particular, Section 108(a) provides "Notice required for the exercise of jurisdiction when a person is outside this State may be given in a manner prescribed by the law of this State for service of process or by the law of the State in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective." *Id.* § 108(a). Although Section 305(d)(3) does not explicitly address this limitation, it would seem that the better reading of Section 305(d)(3) is that it would only apply where the person challenging registration was outside of the foreign State if a court of that foreign State commenced a child custody proceeding resulting in the judgment sought to be registered.

of the judgment may no longer be contested "with respect to any matter that could have been asserted at the time of registration."[66]

Pursuant to Section 306 of the UCCJEA, a U.S. state court "may grant any relief normally available under the law of this State to enforce a registered child-custody determination made by a court of another State."[67]

The Amended UCCJEA would adjust the rules applicable to the recognition and enforcement of foreign child custody judgments. In particular, that Act would establish separate rules that would apply to foreign child custody judgments where the Child Protection Convention applies and where it does not. Because this is not presently the law in any U.S. state, this article does not address those rules.

Conclusion

When seeking a child custody judgment in one State, it is important to consider whether that judgment might need to be recognized or enforced in another State. The rules applied by each State may vary. For example, some foreign States might apply the recognition and enforcement rules contained in the Child Protection Convention, while other States that are not Contracting States to that Convention might apply different rules. Most U.S. states will apply the recognition and enforcement rules found in the UCCJEA, although some U.S. states have modified these rules. Even where the rules are identical, the practice of foreign States and U.S. states in implementing them may vary. Therefore, if it seems likely, or even possible, that recognition or enforcement might be sought in the future, counsel practicing in the foreign State should be consulted as early as possible.

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66 *Id.* § 305(f).

67 *Id.* § 306.