

NOTES

BRAZIL'S LEGACY OF INTERNATIONAL PARENTAL CHILD ABDUCTION: MEDIATION UNDER THE HAGUE ABDUCTION CONVENTION AS A SOLUTION

*Paula Shulman**

I. INTRODUCTION

International Parental Child Abduction (“IPCA”) is formally defined as the “wrongful removal or retention of a child, effected by a parent, outside the country of the child’s habitual residence and in violation of the other parent’s ‘rights of custody’ under the law of the country of habitual residence.”¹ IPCA has been an ever-increasing global problem since the 1970s² because of the increasing interaction between individuals from different countries, attributable to the advent of new technologies and forms of communication, the relative ease of world travel, and globalization of business.³ The growing number of bi-national marriages and relationships—complicated by differences in culture, ethnicity, and religion⁴—results in a heightened risk of IPCA when these mar-

* Editor-in-Chief, *Cardozo Journal of Conflict Resolution*; B.A. 2012, The George Washington University; J.D. Candidate, 2015, The Benjamin N. Cardozo School of Law. The author would like to thank her parents, Adel and Jacob, her brother, Matthew, and her friends, especially Richard (Eric) Brueckner, for their love, support, and encouragement.

¹ Caitlin M. Bannon, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. THIRD WORLD L.J. 129, 132 (2011).

² See Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM L. REV. 1, 4 (2008) (approximately 16,000 children have been abducted from the United States alone and taken to foreign countries since the 1970s).

³ See Elizabeth Cunha, *The Potential Importance of Incorporating Online Dispute Resolution into a Universal Mediation Model for International Child Abduction Cases*, 24 CONN. J. INT’L L. 155, 156–57 (2008). See also Wibo van Rossum, *The Clash of Legal Cultures Over the Best Interests of the Child Principle in Cases of International Parental Child Abduction*, 6 UTRECHT L. REV. 33, 33–34 (2010).

⁴ Saniya O’Brien, *The Trials and Tribulations of Implementing the Hague Convention on International Child Abduction: Improving Dispute Resolution and Enforcement of Parental Rights in the International Arena*, 35 GEO. WASH. INT’L L. REV. 197, 218–19 (2003).

riages end in divorce.⁵ Parents may have differing expectations about child custody or hope to return to their home countries, thereby making joint or shared custody difficult.⁶

The Hague Convention on Civil Aspects of International Child Abduction (“Hague Convention”) was concluded on October 25, 1980 and drafted with the goal of establishing an international protocol to address the problem of IPCA.⁷ It states its objective as the “prompt return of children wrongfully removed to or retained in any Contracting State” and the insurance of mutual respect for the rights of custody and access between Contracting States.⁸ There are currently ninety-one Contracting States that have either ratified or acceded⁹ to the Hague Convention.¹⁰ A fundamental principle embodied within the Hague Convention is that “save in exceptional circumstances, the child should have personal contacts and direct relations on a continuing basis with both parents, even where the parents live in different countries.”¹¹ The purpose of the Hague Convention is not to settle substantive issues of child custody, but to prevent the abducting parent from forum shopping or re-litigating child custody disputes in a foreign jurisdiction.¹² “[T]he Convention establishes a legal mechanism

⁵ Cunha, *supra* note 3, at 157.

⁶ O’Brien, *supra* note 4, at 197. See also Tom Harper, Comment, *The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction*, 9 EMORY INT’L L. REV. 257, 266 (1995) (“Parents often abduct their children to a country of which they hold dual-citizenship, from which they have recently emigrated [sic], or to which they have ethnic, cultural or religious ties.”).

⁷ Hague Convention on Private International Law, The Hague Convention on Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980 [hereinafter Hague Convention]. See also Barbara E. Lubin, *International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention*, 4 WASH. U. GLOBAL STUD. L. REV. 415, 417 (2005) (“The Hague Convention focuses on protecting children from abduction which, in itself, was viewed as harmful to children and adopted the dual approach of creating a disincentive for would-be abductors, while remedying abductions as swiftly as possible.”).

⁸ Hague Convention.

⁹ Accession to the Hague Convention discussed *infra* at p. 7.

¹⁰ *Status Table*, HAGUE CONVENTION ON PRIVATE INTERNATIONAL LAW (Jan. 1, 2014), available at http://www.hcch.net/index_en.php?act=conventions.status&cid=24.

¹¹ William Duncan, *Globalisation of the Hague Children’s Conventions with Emphasis on the Child Abduction Convention*, 63 OKLA. L. REV. 607, 609 (2011) (this underlying principle of the Hague Convention is the general principle found in the United Nations Convention on the Rights of the Child).

¹² James B. Kildunne, *The Difficulty of Enforcing American Family Law Judgments in Japan*, 36 HASTINGS INT’L & COMP. L. REV. 603, 607 (2013). See also Timothy L. Arcaro, *Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction*, 40 U. MIAMI INTER-AM. L. REV. 109, 113 (2008) (noting that the Hague Convention only addresses the remedy of return and directs the return of the child to the country of habitual residence, not a specific parent).

for determining where the ultimate question of custody will be decided.”¹³

According to the results of the 2008 questionnaire distributed by the Hague Conference, there were 2705 children for whom return applications were filed.¹⁴ The accuracy or truthfulness of IPCA statistics can be difficult to ascertain because the Central Authority of each Contracting State self-reports to the Hague Conference.¹⁵ The United States Department of State (“DOS”) issues an annual Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction that indicates given countries’ level of compliance, or lack thereof.¹⁶

Brazil acceded¹⁷ to the Hague Convention in 1999,¹⁸ but has been cited by the DOS Report every year since 2006, the first year in which complete data was available for Brazil, for demonstrating a pattern of non-compliance or only partial compliance with the Hague Convention.¹⁹ Noncompliance is defined as the failure to

¹³ Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1199–1200 (2011).

¹⁴ Nigel V. Lowe & Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41, 44 (2012) (there were 1961 applications, sixty-nine percent of which were only for one child).

¹⁵ Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM L. REV. 49, 55 (2008) (there is no system with which to audit or confirm the information submitted to the Hague Conference).

¹⁶ U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2013) [hereinafter DOS COMPLIANCE REPORT 2013].

¹⁷ For a discussion of Accession to the Hague Convention see note 62 and accompanying text.

¹⁸ *Status Table*, *supra* note 10. The Hague Convention is currently in force between Brazil and the following countries: Albania, Andorra, Argentina, Armenia, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bulgaria, Canada, Chile, China (Hong Kong and Macau only), Colombia, Croatia, Cyprus, Czech Republic, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Malta, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Russia, San Marino, Serbia, Seychelles, Slovakia, Slovenia, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, United Kingdom, United States, Uruguay, Uzbekistan, and Venezuela. See also *Spreadsheet showing acceptances of accessions to the Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/upload/abductoverview_e.pdf (last visited Feb. 7, 2014).

¹⁹ DOS COMPLIANCE REPORT 2013 3–4, 11–13 (cited for patterns of non-compliance and six cases open for more than eighteen months without resolution); U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 4–6, 9, 13–14 (2012) (cited for patterns of non-compliance, enforcement con-

take “effective steps to address deficiencies.”²⁰ Partial compliance or being “not fully compliant” indicates that a country falls into a gray area between full compliance and noncompliance and generally includes “those countries who used to be noncompliant, but who have taken steps to improve their status, yet have not had complete success in remedying all the problems.”²¹

This Note argues that Brazil’s failures to comply with the commands of the Hague Convention, to expeditiously return children abducted by a parent from their habitual residence to Brazil, can be remedied with the adoption of a new mediation model in lieu of its current system. This new mediation protocol can be modeled on those adopted in the United Kingdom²² and Germany.²³ Section II of this Note provides a history of IPCA and an analysis of the problems unresolved or springing from the Hague Convention. Section III examines Brazil’s accession to the Hague Convention, the Brazilian Central Authority, the body created for the purposes of complying with the Hague Convention, and Brazil’s failures to comply with the Hague Convention. Section IV addresses the current form and role of mediation within the Brazilian Central Authority and the larger Brazilian legal system as it relates to the Hague Convention, the role of mediation within the framework of the Hague Convention, and the various ways in which Contracting States have implemented mediation. Section V proposes a new

cerns, and seven unresolved cases) [hereinafter DOS COMPLIANCE REPORT 2012]; U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (2011) (cited for patterns of non-compliance and six unresolved cases) [hereinafter DOS COMPLIANCE REPORT 2011]; U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 18 (2010) (considered non-compliant) [hereinafter DOS COMPLIANCE REPORT 2010]; U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 16 (2009) (cited for demonstrating a pattern of non-compliance due to judicial performance and Central Authority performance) [hereinafter DOS COMPLIANCE REPORT 2009]; U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 10 (2008) (cited for demonstrating a pattern of non-compliance due to judicial performance) [hereinafter DOS COMPLIANCE REPORT 2008]; U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 10 (2006) (considered to be “not fully compliant” due to judicial performance and Central Authority performance) [hereinafter DOS COMPLIANCE REPORT 2006].

²⁰ Cunha, *supra* note 3, at 164. See also Laura C. Clemens, *International Parental Child Abduction: Time for the United States to Take a Stand*, 30 SYRACUSE J. INT’L L. & COM. 151, 164–65 (2003).

²¹ Clemens, *supra* notes at 164–65. See also Cunha, *supra* note 3, at 164.

²² Reunite, the English pilot, see *infra* notes 148–56 and accompanying text.

²³ MiKK e.V., the German pilot, see *infra* notes 157–67 and accompanying text.

mediation model for Brazil based on the pilot programs of the United Kingdom and Germany.

II. THE FAILURE OF THE HAGUE CONVENTION ABDUCTION CONVENTION TO ADDRESS THE PROBLEM OF INTERNATIONAL PARENTAL CHILD ABDUCTION

A. *International Parental Child Abduction is a Global Problem*

Since the 1970s, approximately sixteen thousand children have been abducted from the United States and taken to a foreign country,²⁴ with the National Center for Missing and Exploited Children (“NCMEC”) having maintained a caseload of over 1800 IPCA cases in the United States alone in 2007.²⁵ Similar statistics are commonly found in other western countries.²⁶ According to the 2008 survey conducted by the Permanent Bureau of the Hague Convention, in which sixty Contracting States, or seventy-five percent of Contracting States participated, there were 1965 return applications and 361 access applications filed.²⁷ The overall return rate fell from fifty-one percent in 2003 to forty-six percent in 2008.²⁸ Nineteen percent of cases were resolved via voluntary return.²⁹ As the numbers of children returned pursuant to the Hague Convention are declining, the average length of time to bring IPCA cases to conclusion has risen from 107 days in 1999 to 125 days in 2003 and to 166 days in 2008.³⁰

Family abduction is different from an ordinary custody dispute between parents in that the abducting family member “conceals the abduction or whereabouts of the child . . . [,] intends to prevent

²⁴ Zawid, *supra* note 2, at 4.

²⁵ Alanen, *When Human Rights Conflict*, *supra* note 15, at 56; *see also* Clemens, *supra* note 21, at 153 (estimating that of the 350,000 cases of child abduction in the United States annually, about 10,000 are IPCA).

²⁶ Harper, *supra* note 6, at 266.

²⁷ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, HAGUE CONFERENCE UPDATE BRIEFINGS 233 (2011).

²⁸ *Id.* (of the forty-four percent of cases decided in court, sixty-one percent of cases ended with judicial return, compared to the 2003 rate of sixty-six percent and the 1999 high of seventy-four percent). *See also id.* at 234 (rights of access agreed to voluntary or judicially ordered in twenty-two percent of cases in 2008 compared with thirty-three percent in 2003 and forty-three percent in 1999).

²⁹ *Id.* at 234.

³⁰ *Id.* (access applications averaged 357 days to reach judicial conclusion and 309 days when a voluntary agreement was reached between the parties).

contact between the child and anyone involved with the searching parent for an indefinite period of time . . . [and] transports the child out of state or out of the country to make recovery more difficult.”³¹ A parent abducts his/her child for a variety of reasons, such as a desire to return to his/her native country, a perceived fault with the other parent, the belief that he/she is acting in the best interests of the child because of societal or environmental problems, or the end of the relationship between parents.³² IPCA removes children from the world they know, creates a substantial risk of serious emotional and psychological harm, and can sever the relationship and bonds shared with the left-behind parent, resulting in the development of Parental Alienation Syndrome.³³

Prior to the Hague Convention, left-behind parents remained at the mercy of foreign courts.³⁴ Many times these proceedings operated under the doctrine of *parens patriae*, under which the courts assumed jurisdiction to make any and all decisions it felt were “in the child’s ‘best interests.’”³⁵ The “best interests of the child” standard is a vague and amorphous standard because it permits moral, cultural, and social values to have an impact on the outcome.³⁶ Cultural biases and disregard for how the child ended up in the country dominated the uphill legal battles left-behind parents were forced to undertake.³⁷

The Hague Convention was created with the presumption that the majority of abducting parents were not the primary caretakers, but this presumption has increasingly been shown to be inaccurate.³⁸ According to the 2008 questionnaire, primary caretakers were the abductors seventy-two percent of the time.³⁹ At the time

³¹ OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, THE CRIME OF FAMILY ABDUCTION: A CHILD’S AND PARENT’S PERSPECTIVE, US DEPT. OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 3 (2010).

³² Bannon, *supra* note 1, at 133.

³³ Browne, *supra* note 13, at 1198. See also Mary Lund, *A Therapist’s View of Parental Alienation Syndrome*, 33 FAM. & CONCILIATION CTS REV. 308 (1995) (Parental Alienation Syndrome manifests as hostilities directed from the child to the other parent and is often the result of manipulation by the taking parent).

³⁴ Browne, *supra* note 13, at 1197–98.

³⁵ William M. Hilton, *Parents Patriae or the Jurisdictional Brick Wall*, 21 WHITTIER L. REV. 231, 233 (1999).

³⁶ Smita Aiyar, Comment, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT’L L. REV. 277, 284 (2007).

³⁷ Browne, *supra* note 13, at 1197–98. See also Hilton, *supra* note 35, at 233.

³⁸ Lubin, *supra* note 7, at 417; PAUL BEAUMONT & PETER McELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 10 (1999). See also William Duncan, *A View from the Permanent Bureau*, 33 N.Y.U. J. INT’L L. & POL. 103, 112–13 (2000).

³⁹ Lowe & Stephens, *supra* note 14, at 44.

of adoption, noncustodial fathers were presumed to be the abductors but the majority of abductors today are noncustodial mothers.⁴⁰ In cases falling under the Hague Convention, mothers account for sixty-nine percent of abductors,⁴¹ fathers constitute twenty-eight percent of abductors, and the remaining three percent are grandparents, other relatives, institutions, and both parents.⁴²

B. *The Hague Convention on Civil Aspects of International Child Abduction as a Global Solution*

The purpose of the Hague Convention is not to adjudicate custody disputes between parents, but to return to the *status quo ante*.⁴³ It expressly proscribes the courts of the abducted to country from making a determination on the merits of a custody dispute except in those situations where the Convention does not apply or one of the exceptions⁴⁴ applies.⁴⁵ According to the Hague Convention, the “best court to handle the custody case is in the country of the child’s ‘habitual residence.’”⁴⁶ The Hague Convention provides a civil remedy for left-behind parents to seek the prompt return of their wrongfully removed children but as such, it does not provide for the extradition of the abducting parent.⁴⁷

⁴⁰ Browne, *supra* note 13, at 1194–95.

⁴¹ Clemens, *supra* note 20, at 153 (mothers constituted abductors sixty-three percent of the time as of 2003) (citing June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century’s End*, 15 ARIZ. J. INT’L AND COMP. L. 791, 792 (1998). See also BEAUMONT & McELEVAY, *supra* note 38, at 9–10.

⁴² Lowe & Stephens, *supra* note 14, at 43. See also Clemens, *supra* note 20, at 153 (noting that in abduction cases falling outside the Hague Convention, fathers are the abductors sixty-eight percent of the time).

⁴³ HON. JAMES D. GARBOLINO, FEDERAL JUDICIAL CENTER, INTERNATIONAL LITIGATION GUIDE, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 6–7 (2012).

⁴⁴ See *infra* notes 68–81 and accompanying text for a discussion of exceptions and defenses.

⁴⁵ Christine T. Di Guglielmo, Comment, *Provisionally Permanent? Keeping Temporary Custody Orders Temporary Under the Hague Convention on International Child Abduction*, 151 U. PA. L. REV. 619, 624 (2002).

⁴⁶ Hadrian N. Hatfield & Melissa A. Kucinski, *Growth Spurt Hits International Law Related to Children*, 45-FEB MD. B.J. 40, 42 (2012). See also Cathy S. Helzick, *Returning United States Children Abducted to Foreign Countries: The Need to Implement the Hague Convention on the Civil Aspects of International Child Abduction*, 5 B.U. INT’L L.J. 119, 143 (1987) (the decision to return a child under the Hague Convention does not constitute a determination on the merits).

⁴⁷ Jacqueline D. Golub, *The International Parental Kidnapping Crime Act of 1993: The United States’ Attempt to Get Our Children Back—How is it Working?*, 24 BROOK. J. INT’L L. 797, 800 (1999) (Contracting States are free to criminalize IPCA and persecute abducting parents).

In order for a left-behind parent to invoke the Hague Convention, there are three criteria that must be satisfied: removal or retention of the child must be wrongful,⁴⁸ the country from which the child was taken must be a Contracting State as well as his/her habitual residence,⁴⁹ and the child must be under sixteen years of age.⁵⁰ Removal and retention are wrongful when they are in violation of the other parent's custody rights and those custody rights were actually exercised, jointly or alone.⁵¹ Habitual residence is defined as the "state where the child habitually resides."⁵² If a child's habitual residence does change outside the context of a wrongful removal or retention, authorities in the new habitual residence obtain jurisdiction.⁵³ Provided the above criteria are satisfied, a left-behind parent can choose to initiate the process and file an application in the country of habitual residence or in the abducted to country.⁵⁴

The Hague Convention discourages forum shopping because custody disputes are to be heard in the appropriate court with jurisdiction.⁵⁵ In theory this means that parents dissatisfied with a custody order issued in Country A cannot flee to Country B in search of a more favorable result.⁵⁶ In practice, the failure of Contracting

⁴⁸ Hague Convention, *supra* note 7, at art. 3 (wrongful removal is defined as a breach of the custody rights of the other parent under the law of the habitual residence and the custody rights were actually exercised or would have been but for the removal or retention of the child).

⁴⁹ *Id.* at art. 3-4 (the Hague Convention must be in force between the country of habitual residence and the country to which the child was removed).

⁵⁰ *Id.* at art. 4.

⁵¹ *Id.* at art. 3.

⁵² *Id.* at art. 31. See also O'Brien, *supra* note 5, at 203 (the Court of Appeals for the Sixth Circuit held that habitual residence could not be altered by a wrongful taking of the child by a parent and to permit such a change would render the Hague Convention meaningless). See also Adair Dyer, *The Tangled International Divorce Web: Recognition and Enforcement Abroad*, 9-SPG FAM. ADVOC. 5, 12 (1987) (The Hague Convention on the Recognition of Divorces and Legal Separations also uses the term "habitual residence" and defines it as "the factual center of a person's life" and does not look to the "specific intent of that person to live indefinitely in a particular country.").

⁵³ Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691 (2011) (determinations of habitual residence are straightforward issues of fact under the Hague Conventions).

⁵⁴ Katharine L. Tyler, *International Custody Battles: The Not So Curious Case of David Goldman*, 12 J.L. & FAM. STUD. 533, 534 (2010).

⁵⁵ Julia Alanen, *Remedies and Resources to Combat International Family Abduction*, 21 AM. J. FAM. LAW 11, 15-16 (2007). See also Lubin, *supra* note 7, at 420 (the "child's best interest" standard incentivized forum shopping as a parent could abduct his/her child and take him/her to a different forum where the result would be more favorable).

⁵⁶ See Helzick, *supra* note 46, at 143 ("This provision prevents the abducted parent from legitimizing her physical custody of the child in the courts of the foreign country to which she

States to honor the Hague Convention undermines the entire regime because it is “a purely cooperative enterprise, with no authoritative international body charged with resolving disputes or disciplining treaty members.”⁵⁷ “The benefit of the summary return mechanism of the Hague Convention is its predictability,”⁵⁸ and without the cooperation and compliance of Contracting States that predictability is lost. Contracting States are faced with the challenge of remaining loyal to the fundamental international interests and goals of the Hague Convention that often conflict with national interests.⁵⁹ There is global acceptance of the notion that Contracting States “have an international responsibility to cooperate with one another to combat [IPCA].”⁶⁰

There are two manners in which countries become parties to the Hague Convention: ratification and accession. When a country ratifies the Hague Convention, it automatically enters into full force and effect between that state and all other Contracting States.⁶¹ When a country accedes to the Hague Convention, it only takes full force and effect only between the new state and the Contracting States that accept the new state’s accession.⁶² The difference between ratification and accession yields critical implications for IPCA. A left-behind parent may be left without any remedy—even if the country of habitual residence and the taken-to country are both Contracting States, if for example, the country of habitual residence did not recognize the accession of the taken-to country to the Hague Convention.⁶³ Furthermore, any grants or denials of return or access are to comply with the Convention when issues of IPCA arise, but there is no guarantee that the child will be re-

removed her child, and thereby prevents the advantage she sought by moving to a new jurisdiction.”).

⁵⁷ Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 49 (2010).

⁵⁸ Lubin, *supra* note 7, at 444.

⁵⁹ Arcaro, *supra* note 12, at 111.

⁶⁰ Duncan, *Globalisation of the Hague Children’s Conventions*, *supra* note 11, at 609.

⁶¹ Bannon, *supra* note 1, at 145. *See also* HAGUE CONFERENCE ON PRIVATE LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INT’L CHILD ABDUCTION, PART II – IMPLEMENTING MEASURES 13–14 (2003) (All States that have signed and ratified or that have acceded to the Convention are considered Contracting States to the Convention. Parties to the Convention do not receive different treatment according to the manner in which they became Parties. Once the Convention is in force between two States the obligations are the same whether the States concerned ratified or acceded to the Convention.) [hereinafter PART II – IMPLEMENTING MEASURES].

⁶² PART II – IMPLEMENTING MEASURES, *supra* note 61, at 13–14.

⁶³ *See id.*

turned.⁶⁴ The Hague Convention requires each Contracting State to designate or create a Central Authority to carry out the administrative duties⁶⁵ of the Convention, including “assisting left-behind parents with access to Convention remedies, communicating with other Central Authorities, communicating with national judges on specific cases, and attempting to amicably resolve cases where possible.”⁶⁶ It is not the role of the Central Authority to make determinations of custody, habitual residence, settlement of the child, or risk of harm.⁶⁷

C. *Defenses to the Hague Convention*

If the left-behind parent proves that the removal was wrongful and satisfies the criteria, the taking parent is permitted to raise several defenses to prevent the return of the child to the habitual residence: (1) failure to initiate proceedings within one year; (2) the Settled Child Exception; (3) consent or acquiescence of the left-behind parent; (4) child’s objections; or (5) the protection of human rights and fundamental freedoms.⁶⁸

Under Article 12, a parent may raise the defense that the proceedings were initiated more than one year after the abduction occurred.⁶⁹ When Contracting States do not comply with the requirements of the Hague Convention by permitting delays in proceedings or are uncooperative with efforts to locate abducted children,⁷⁰ that Contracting State not only fails to ensure the prompt return of the child but also enables the taking parent to raise this defense. Failure to initiate proceedings within one year

⁶⁴ Clemens, *supra* note 20, at 159.

⁶⁵ HAGUE CONFERENCE ON PRIVATE LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INT’L CHILD ABDUCTION, PART I – IMPLEMENTING CENTRAL AUTHORITY PRACTICE 44–48 (2003) (tasks of central authorities include the receipt of applications, registration and acknowledgement of receipt, ensure the application meets the requirements of art. 3–4, request additional information as needed, expeditiously process requests, confirm the child is actually locating in the country, and ensure that judges are familiar with the Hague Convention) [hereinafter PART I – IMPLEMENTING CENTRAL AUTHORITY].

⁶⁶ Arcaro, *supra* note 12, at 117.

⁶⁷ PART I – IMPLEMENTING CENTRAL AUTHORITY, *supra* note 65, at 45.

⁶⁸ Hague Convention, *supra* note 7, at art. 12–13, 20.

⁶⁹ *Id.* at art. 12.

⁷⁰ Harper, *supra* note 6, at 263 (locating a child is critical for meeting the one year requirement because proceedings cannot commence without knowing if that child is even within the particular Contracting State).

permits the judge to exercise discretion in ascertaining whether or not the child has settled into his/her new environment.⁷¹

The Settled Child Exception permits the judge to decline issuing an order of return based on the principle that because the child has adapted to the new environment because they have been there for a year or longer, uprooting them again is not the child's best interests.⁷² Settlement is a factual assessment that considers how involved the child is in his or her new environment, how he or she has adapted to that new environment, and if he or she is more connected to the taken-to state than the country of their habitual residence.⁷³ When a judge determines that the Settled Child Exceptions applies because the child has settled into the new environment it will most likely "result in a change in jurisdiction over issues relating to the child, with the State to which he or she was abducted becoming his or her new habitual residence."⁷⁴

The taking parent may also claim that the left-behind parent consented to or later acquiesced to the child's removal.⁷⁵ Consent and acquiescence negate the crucial element "that the removal or retention be 'wrong,'" thereby no longer mandating that the court in the taken-to country order the child's return.⁷⁶ Article 13 provides that a court may deny a return application if "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."⁷⁷ The burden falls on the parent opposing the return to show by a preponderance of the evidence that the child has attained the requisite age and degree of maturity.⁷⁸ Article 13 also contains an exception to return where "there is a grave risk that his or her return

⁷¹ Hague Convention, *supra* note 7, at art. 12. See also Harper, *supra* note 6, at 264.

⁷² Brian S. Kenworthy, *The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Child's Rights Aspects of the Hague Convention on International Child Abduction*, 12 IND. INT'L & COMP. L. REV. 329, 336 (2002) ("The less prompt the return, the less likely the Hague Convention's goals are being preserved.").

⁷³ Ruth Lamont, *Re M and Beyond: Managing Return When a Child Has Settled Following Abduction*, 31 J. SOC. WELFARE & FAM. L. 73, 77 (2009) (assessment of whether a child has settled is similar to the assessment of whether a child's habitual residence has changed).

⁷⁴ *Id.* at 77.

⁷⁵ Kenworthy, *supra* note 72, at 335.

⁷⁶ *Id.* (noting that courts generally interpret claims of consent and acquiescence very narrowly in order to "refrain from undermining the purpose of the Hague Convention").

⁷⁷ Hague Convention, *supra* note 7, at art. 13.

⁷⁸ Linda D. Elrod, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663 (2011).

would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”⁷⁹

The final defense to a return under the Hague Convention, found in Article 20, provides that a court may deny issuing an order of return when doing so “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”⁸⁰ The terms “human rights” and “fundamental freedoms” have no precise definition or guidelines on application.⁸¹

D. *The Failures of the Hague Convention on Civil Aspects of International Child Abduction*

The Hague Convention lacks any sanction power and relies upon the various signatory states to act in accordance with the Convention.⁸² Contracting States can make a conscious decision not to comply or their non-compliance may be the result of factors such as judicial inefficiency.⁸³ “[W]hen faced with sustained non-compliance there is little Contracting States can do; certainly there is no mechanism within the text of the Convention. There can of course be informal contact between the State concerned, or indeed the matter may be raised at a diplomatic or even ministerial level,” or a Review Special Commission at the Hague can be contacted.⁸⁴ Despite the array of intensive support packages provided by the Hague Permanent Bureau, non-governmental organizations (“NGOs”), and other countries, Latin American Contracting States continue to struggle to satisfy their obligations and duties under the Hague Convention.⁸⁵

“All abduction proceedings held pursuant to the Hague Convention on Child Abduction are marked by a great amount of tension: the abducting parent is afraid of losing his or her child at the end of the proceedings, while the abandoned parent is afraid that

⁷⁹ Hague Convention, *supra* note 7, at art. 13(b). *See also* Harper, *supra* note 7, at 262 (arguing that the Article 13(b) exception can be utilized by ethnocentric judges as a tool of prejudice against the left-behind parent).

⁸⁰ Hague Convention, *supra* note 7, at art. 20.

⁸¹ Kenworthy, *supra* note 72, at 336–37.

⁸² O’Brien, *supra* note 4, at 218.

⁸³ Tyler, *supra* note 54, at 534.

⁸⁴ *Id.*

⁸⁵ Arcaro, *supra* note 12, at 121.

he or she will see the child seldom or not at all.”⁸⁶ The discretionary exceptions are problematic because they can be abused by courts to favor the taking parent, who is often a national of the taken-to country.⁸⁷ In some instances, a left-behind parent will re-abduct the child because he or she lacks recourse under the Hague Convention or the demonstrated non-compliance has left him or her with no alternative.⁸⁸

III. BRAZIL: PATTERNS OF NON-COMPLIANCE WITH THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Brazil was the country with the sixth highest incidence of reported abductions of children from the United States in 2009 and 2010.⁸⁹ Ninety-six percent of IPCA cases with return applications in Brazil were “going home” abductions in which the abductor was a Brazilian national.⁹⁰ In 2008, it took an average of 225 days from receipt of a Hague application from a left-behind parent for the Brazilian Central Authority to submit Hague applications to the appropriate court.⁹¹

In 2009, there were forty-nine American children in thirty-four IPCA cases in Brazil.⁹² Fifteen of those children were returned within the year.⁹³ In 2010, there were thirty-one American children

⁸⁶ Wolfgang Vomberg, *Hague Convention on Child Abduction (HCA), the Hague Defences - How are they being applied? Perspectives from the European and German Jurisdictions*, INT'L ACAD. OF MATRIMONIAL LAW, Sept. 2, 2010, 5.2.

⁸⁷ See Harper, *supra* note 6, at 277; O'Brien, *supra* note 4, at 197.

⁸⁸ Dagmar Coester-Waltjen, *The Rise of Domestic and International Tensions—The European Perspective*, 33 N.Y.U. J. INT'L L. & POL. 59, 71 (2000) (re-abduction usually occurs after a return order has been denied or appears likely to be denied).

⁸⁹ *Improving Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Hearing Before the Subcomm. on Africa, Global Health, and Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 49–50 (2011).

⁹⁰ Lowe & Stephens, *supra* note 14, at 44 (twenty-seven return applications were filed in 2008).

⁹¹ *Id.* at 70. See also Kirk Semple, *Court Battle Over a Child Strains Ties in 2 Nations*, N.Y. TIMES (Feb. 25, 2009), available at <http://www.nytimes.com/2009/02/25/nyregion/25custody.html?pagewanted=Print> (“‘If this were a dispute about recovering an artifact or a document in U.S. history, then it would be unfortunate but acceptable to allow years to go by while it’s adjudicated in local courts,’ said Bernard W. Aronson, a former assistant secretary of state for inter-American affairs who has been advising Mr. Goldman. ‘But you’re dealing with a child who’s been deprived of contact with his father for four and a half years. Time is the enemy.’”).

⁹² *Improving Implementation of the Hague Convention*, *supra* note 89, at 50.

⁹³ *Id.*

in twenty-four IPCA cases.⁹⁴ Of those thirty-one children, eight were returned to the United States by year's end.⁹⁵

A. *The Brazilian Central Authority and Implementation of the Hague Convention*

Brazil acceded to the Hague Convention on April 14, 2000,⁹⁶ established the Brazilian Central Authority ("BCA") in October of 2001, and identified the ways in which the country would comply with the requirements of the Hague Convention⁹⁷ in order for it to take effect within Brazil on January 7, 2002.⁹⁸ By order of Decree No. 3,951 of October 3, 2001, the BCA was established to carry out various Hague Convention Functions, including the collection and reporting of data to the Hague Permanent Bureau in the Netherlands, as well as working with the Brazilian police when a claim for return is made⁹⁹ under Article II.¹⁰⁰ Additionally, the BCA was charged with establishing procedures to ensure the prompt return of abducted children, coordinating with the other Central Authorities of Contracting States, and working with various law enforcement agencies to locate abducted children.¹⁰¹

After a request is made under the Hague Convention for the return of a child and the location of a child has been confirmed by INTERPOL,¹⁰² the BCA sends a notice of "conciliation" to all parents notifying them of the opportunity to participate in mediation,

⁹⁴ *Id.* at 49.

⁹⁵ *Id.*

⁹⁶ Decreto No. 3.413, de 14 de Abril de 2000, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.4.2000 (Braz.).

⁹⁷ Decreto No. 3.951, de 3 de Outubro de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.10.2001 (Braz.). BCA members include the President of the National Council for the Rights of Children and Adolescents, representatives from the Ministry of Foreign Affairs, the Federal Public Defender, the National Anti-Drug Secretariat, the National Secretariat of Justice, the Department of Children and Adolescents, and the Federal Police Department. BCA members may also consist of representatives from the Attorney General's office, the Brazilian Bar Association, the National Council of Bishops of Brazil, and the Brazilian Society of Pediatrics.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Hague Convention, *supra* note 7, at art. 2.

¹⁰¹ *Id.*

¹⁰² HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY MATTERS—RESPONSES TO THE QUESTIONNAIRE (Mar. 2008)[hereinafter FEASIBILITY STUDY]; MISSING PERSONS, INTERPOL, <http://www.interpol.int/Missing-Persons> (last visited Nov. 6, 2013) (INTERPOL operates an online database of missing individuals, many of whom are children).

which can take place either in person, by phone or Internet through the BCA before court proceedings are initiated.¹⁰³

B. *Brazil's Legacy of Non-Compliance with the Hague Convention*

The most infamous Brazilian IPCA case is that of David Goldman and his son, Sean, the first child returned to the United States after wrongfully removed and taken to Brazil.¹⁰⁴ Mr. Goldman's ex-wife took their son to Brazil and upon arrival, filed for divorce there.¹⁰⁵ Sean was ultimately returned nearly five years later, but not before Senator Lautenberg delayed a bill that offered Brazil nearly three billion dollars in trade preferences until the child was returned.¹⁰⁶ David Goldman spent over three-quarters of a million dollars in the first four and a half years on legal costs and travel expenses after his son was abducted to Brazil.¹⁰⁷

"Brazilian courts have on several occasions treated Convention decisions as custody determinations; some judges continue to show a bias in favor of mothers and Brazilian citizens; and the judicial process is exceedingly lengthy and made even longer through the appellate process."¹⁰⁸ Brazilian courts tend to cite Article 12 of

¹⁰³ Zawid, *supra* note 2, at 14.

¹⁰⁴ Amanda Michelle Waide, *To Comply or Not to Comply? Brazil's Relationship with the Hague Convention on the Civil Aspects of International Child Abduction*, 39 GA. J. INT'L & COMP. L. 271, 289 (2010).

¹⁰⁵ *International Child Abduction: Broken Laws and Bereaved Lives: Hearing before the Subcomm. on Africa, Global Health, and Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 7–8 (2011) (David Goldman's wife re-married in Brazil and passed away during childbirth but Sean's step-father continued fighting David's return application).

¹⁰⁶ *Id.* at 7. *See also* Waide, *supra* note 104, at 289 (noting that the extraordinary measures used to bring Sean Goldman home included unanimous resolutions in both houses of Congress, hold on a trade bill by the Senate, two trips to Brazil by a Congressman from New Jersey (David's home state), and the personal advocacy of both President Obama and then Secretary of State Hillary Clinton).

¹⁰⁷ Timothy Weinstein, *The Financial Cost of Child Abduction*, BRING SEAN HOME FOUNDATION (Dec 2013), <http://www.bringseanhome.org/resources/the-left-behind-parent/the-financial-cost-of-child-abduction/> (left-behind parents pursuing return applications from Brazil encounter legal bills and travel expenses ranging from \$30,000 to \$150,000 to the over \$750,000 spent by Mr. Goldman, and often these parents do not have their children returned).

¹⁰⁸ *Improving Implementation of the Hague Convention*, *supra* note 89, at 122. *See also* Waide, *supra* note 104, at 279 ("Brazilian courts have a tendency to treat Convention cases as custody decisions . . . This type of decision goes to the merits of a custody dispute, and therefore ignored the clear terms of Article 16."); *Brazil's Legal System*, DEP'T OF STATE, available at <http://photos.state.gov/libraries/164149/pdfs/BrazilianLegalSystemNational.pdf> (last visited Jan 15, 2014) (while Brazilian law grants mothers and fathers equal custody rights, the *de facto* prac-

the Hague Convention on the grounds that more than one year has elapsed since the removal and as a result, the Settled Child Exception applies.¹⁰⁹ Some believe that the lengthy delays in commencing actions as well as in the litigation and appeals process are a part of a strategic decision by both the abductor and the biased judge so that the Article 12 defenses may be raised.¹¹⁰ “In practice, the longer a child is in [Brazil], the more likely it is that a Brazilian court will be reluctant to send the child back to the country of habitual residence.”¹¹¹ When Brazilian courts hear return applications, they often look at criteria relevant for custody determinations but irrelevant for the purposes of determining whether a removal was wrongful and a return order should be issued.¹¹²

Brazilian courts regularly misapply the Article 13 defense¹¹³ by permitting children as young as five years old to make statements as to where he/she would like to live.¹¹⁴ According to the 2009 DOS Compliance Report, compliance with the Hague Convention is hampered by Brazilian law enforcement’s low prioritization of Hague Convention cases because it is not a criminal offense under Brazilian law to wrongfully retain a child.¹¹⁵

tice favors mothers and parents of Brazilian nationality over foreigners); Timothy Weinstein & Andre Felipe Oliveira, *The Brazilian Judicial System and the Hague Convention*, BRING SEAN HOME FOUNDATION (July 2011) <http://www.bringseanhome.org/resources/the-left-behind-parent/the-brazilian-judicial-system-and-the-hague-convention-2/> (Brazilian legal system consists of three appellate courts and permits multiple appeals and re-hearings); Rodrigo da Cunha Pereira, *The Parental Relationship in Brazilian Law: A Study of Custody*, 39 FAM. L.Q. 563, 566 (2005) (The Best Interest of the Child and Adolescent Principle is the standard utilized by Brazilian judges when making determinations of custody, visitation, adoption, suspension or termination of parental rights, and other cases involving children. The fundamental idea of this principle is that children need parents or someone acting *in loco parentis* for proper rearing.).

¹⁰⁹ Tyler, *supra* note 54, at 537.

¹¹⁰ Timothy Weinstein, *The Hague Convention: “Brazilian Style”*, BRING SEAN HOME FOUNDATION (Dec. 2013) <http://www.bringseanhome.org/resources/the-left-behind-parent/hague-convention-“brazilian-style”/> at p. 3. *See also* Waide, *supra* note 105, at 292 (“[I]n many instances, Brazil makes no decision at all. This maneuvering leaves the abducted children in Brazil indefinitely.”).

¹¹¹ Waide, *supra* note 104, at 292.

¹¹² Tyler, *supra* note 53, at 538.

¹¹³ Article 13 defense of child maturity discussed *supra* at p. 8.

¹¹⁴ Weinstein, *The Hague Convention: “Brazilian Style”*, *supra* note 110. *See also* Waide, *supra* note 104, at 280.

¹¹⁵ DOS COMPLIANCE REPORT 2009, *supra* note 19, at 16. *See also* Waide, *supra* note 104, at 280.

IV. MEDIATION AND THE HAGUE CONVENTION

A. *Mediation within the Framework of the Hague Convention*

The Guide to Good Practice under the Hague Convention of October 25th, 1980 on the Civil Aspects of International Child Abduction for Mediation defines mediation as a “voluntary, structured process whereby a ‘mediator’ facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.”¹¹⁶ The Permanent Bureau of the Hague recognizes that “the best interests of the child are likely to best be served if an amicable solution can be reached,”¹¹⁷ and steps to achieve a voluntary resolution should begin as early as possible, varying state-by-state as to whether such steps begin before or during court proceedings.¹¹⁸ The mediation infrastructure can be created in advance of any Hague proceedings in order to ensure that the professional mediators and/or experts from the psycho-social professions are prepared to assist at an early stage, are familiar with the Hague Convention, and can prevent any undue delay in locating mediators.¹¹⁹ Such an infrastructure could involve the “establishment of a pool of interested mediators who agree to make themselves available for mediation in Hague return proceedings at short notice, and who receive some training on the legal framework . . . [T]he Central Authorities and/or the courts should have ready access to this pool of mediators if the need arises.”¹²⁰

The Working Party on Mediation in the Context of the Malta Process issued a list of principles to guide Contracting States in the creation of mediation structures in November of 2010.¹²¹ A designated central point of contact should act as a contact for both indi-

¹¹⁶ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INT’L CHILD ABDUCTION, MEDIATION 7 (2012) [hereinafter MEDIATION PRACTICE GUIDE].

¹¹⁷ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PART IV – ENFORCEMENT 25 (2010) [hereinafter ENFORCEMENT GUIDE].

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 26.

¹²⁰ *Id.*

¹²¹ WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS, PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS (2010) [hereinafter WORKING PARTY ON MEDIATION].

viduals and the mediators,¹²² and provide information about the family mediation services available in that particular country,¹²³ information to help locate the abducting parent or relative and the child, guidance on where one can obtain legal advice, information on how to make the mediated agreement binding in both countries,¹²⁴ information on enforcement of return and access orders within the country, information on the support available to ensure the long-term viability of the agreement. Finally, the central point of contact should promote cooperation between experts and collect and report on data.¹²⁵ Mediations should also be structured to ensure that parents' participation does not dilute the legal process or prevent parents from seeking a court order and that participation does not constitute acquiescence.¹²⁶

The Working Party also found the following characteristics to be necessary in the selection of mediators: (1) professional approach; (2) suitable and specialized training; (3) experience with cross-cultural IPCA and family disputes; (4) knowledge and familiarity with the relevant international and legal instruments; (5) access to a relevant network of domestic and international contacts; (6) knowledge of the legal systems of both countries and how to make mediated agreements binding and enforceable in both jurisdictions; (7) access to administrative and professional support; (8) affiliation with or referred from a legally recognized mediation service within the Contracting State; and (9) possession of language skills and competency.¹²⁷

Finally, the mediation processes should have the following elements inherent in their design and function: (1) screening to ensure that mediation is suitable for the case at hand; (2) informed con-

¹²² *Id.* at 2.

¹²³ *Id.* (includes a list of a family mediators and their contact info, training, background; a list of organizational providers; cost information; information on the models of mediation available and/or used within the given country; and information on what topics can be addressed in mediation).

¹²⁴ *Id.* See also ENFORCEMENT GUIDE, *supra* note 66, at 117 (encourages parties to submit any and all agreements to guarantee enforceability as a settlement or consent order).

¹²⁵ *Id.*

¹²⁶ MEDIATION PRACTICE GUIDE, *supra* note 116, at 9. See also SARAH VIGERS, HAGUE CONFERENCE ON PRIVATE INT'L LAW, NOTE ON THE DEV. OF MEDIATION, CONCILIATION AND SIMILAR MEANS TO FACILITATE AGREED SOLUTIONS IN TRANSFRONTIER FAMILY DISPUTES CONCERNING CHILDREN ESPECIALLY IN THE CONTEXT OF THE HAGUE CONVENTION OF 1980 9 (2006).

¹²⁷ WORKING PARTY ON MEDIATION, *supra* note 121, at 3 (recognized that in those Contracting States where international mediation services are at the early stages of development that many of the characteristics are aspirational and not yet realistic).

sent of the parties and voluntary participation by the parties; (3) assistance to parents in reaching an agreement that considers the child's interests and welfare rather than focusing solely on those of the parents; (4) neutrality and fairness; (5) confidentiality; (6) use of language(s) with which the parties are comfortable; (7) inter-cultural competence; and (8) the necessary access to legal advice to enable the parties to make informed decisions.¹²⁸

B. *The Expansion of Mediation in Contracting States*

Mediation, both as an alternative to and counterpart of family law litigation, is gaining popularity because it is a "particularly useful form of dispute resolution where the parties intend to have an ongoing relationship"¹²⁹ and "[r]esearch overwhelmingly indicates that when parties resolve their disputes through a mediation process, as opposed to a forced judicial decree, they are far more likely to comply with the terms of their settlement."¹³⁰ Mediation is an accepted tool to resolve IPCA issues¹³¹ and has been the subject of numerous pilots and taskforces.¹³²

The study on the Reunite pilot program¹³³ in England and Wales revealed that ninety-five percent of parent participants would recommend mediation to others and eighty-six percent of parent participants were either satisfied or highly satisfied with the outcome.¹³⁴ Even if the parents do not wish to have a relationship

¹²⁸ See *id.* at 3–4.

¹²⁹ VIGERS, *supra* note 126, at 5. See also HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, PART III – PREVENTIVE MEASURES 16 (2005) (recognizes the importance and value of voluntary agreements and mediation in encouraging and helping parents reach amicable decisions) [hereinafter PREVENTIVE MEASURES GUIDE].

¹³⁰ Arcaro, *supra* note 12, at 127.

¹³¹ Hatfield & Kucinski, *supra* note 46, at 44.

¹³² *Id.* (American Bar Association Section of International Law Task Force); VIGERS, *supra* note 126, at 11 (Argentine Central Authority, Mission d'aide à la médiation internationale pour les familles (MAMIF), Reunite Pilot Project, England & Wales Court of Appeal Alternative Dispute Resolution Scheme, German Federal Ministry of Justice, Franco-German Parliamentary Mediation Commission, Franco-German Project of Bi-national Professional Mediation, International Social Service (ISS)).

¹³³ Melissa A. Kucinski, *The Pitfalls and Possibilities of Using Technology in Mediation Cross-Border Child Custody Cases*, 2010 J. DISP. RESOL. 297, 303 (2006 pilot program successfully mediated and resolved twenty-eight IPCA cases).

¹³⁴ Mediation in International Parental Child Abduction, The Reunite Mediation Pilot Scheme by Reunite International Child Abduction Centre, Oct. 2006, 52.

and want the complete dissolution of their marriage or family, by virtue of their continued parenting of at least one child, the parents will continue to interact with one another. The Reunite pilot¹³⁵ found that even when the parties could not agree to a Memorandum of Understanding, the parties felt that mediation aided in reducing conflict and helped to improve communication, and sometimes so much so that the parties were able to work together after the conclusion of the mediation process to reach an agreement.¹³⁶ Mediation not only provides possibilities for resolution and/or return in favor of one party or the other, but can also address myriad familial issues such as access to the child(ren) and education.¹³⁷ The adoption of mediation in cross-border family disputes has been slower than in purely domestic family disputes because of different languages, cultures, and geographic distance.¹³⁸

It is important that the parties not perceive mediation as a dilution of the legal process or their legal rights under the Hague Convention or in the relevant legal system.¹³⁹ Parties are more hesitant to participate in mediation if they do not understand or are unfamiliar with the process and as a result, parties that could have truly benefited from mediation never have the opportunity to explore it.¹⁴⁰ “Mediation is a structured but flexible process, which can easily be adapted to the needs of the individual case. It allows for the simultaneous discussion of legal and extra-legal considerations as well as for the informal involvement of (third) persons who might not have legal standing in the case.”¹⁴¹

There are many forms of mediation, each with its own benefits and shortcomings. In direct mediation “both parties directly and simultaneously participate in the mediation sessions”¹⁴² and may meet face-to-face with the mediators or through video/teleconferencing technologies if located in distant places.¹⁴³ Indirect mediation, by comparison, functions without the involved parties meeting face-to-face, instead meeting individually with the media-

¹³⁵ See *infra* note 132 and accompanying text.

¹³⁶ See Mediation in International Parental Child Abduction, *supra* note 134, at 54.

¹³⁷ Vomberg, *supra* note 86, at 2–3.

¹³⁸ *Id.*

¹³⁹ *Id.* at 9.

¹⁴⁰ Cunha, *supra* note 3, at 166. See also GARBOLINO, *supra* note 43, at 8 (left-behind parents will be wary of participation if it constitutes acquiescence under the Hague Convention).

¹⁴¹ MEDIATION PRACTICE GUIDE, *supra* note 116, at 22.

¹⁴² Vigers, *supra* note 129, at 14.

¹⁴³ *Id.*

tor or mediators.¹⁴⁴ Indirect mediation can occur at the same time but in different rooms or countries or it can occur at different times in the same country or different countries.¹⁴⁵

In single-state mediation regimes, mediation “operate[s] within the requested State as part of that State’s process for dealing with a Hague Convention application and use[s] mediators from that State.”¹⁴⁶ Bi-national mediation functions with mediators from both affected States working together to mediate a case but can either occur in one place with all parties present or simultaneously in the two states through the use of video/teleconferencing equipment.¹⁴⁷

The Reunite program in England and Wales is an example of a single state mediation regime. The program is structured to ensure that it is in legal conformity with the Hague Convention and with the domestic legal structure¹⁴⁸ and to operate parallel¹⁴⁹ to Hague proceedings so as not to delay the six-week resolution goal.¹⁵⁰ Mediations generally take place over a two-day period with three three-hour sessions.¹⁵¹ Participants are made aware that taking part in mediation does not strip them of their rights to pursue a Hague application for return through the judicial process.¹⁵² This information can be provided during a screening interview prior to mediation and can also be useful in addressing any concerns or questions the parties may have about the process.¹⁵³ Co-mediators must each have a strong expertise in the Hague Convention in order to ensure that the process operates at the necessary pace and to address the complex nature of IPCA.¹⁵⁴ If a resolution is reached, the parties enter into a Memorandum of Understanding, which is

¹⁴⁴ MEDIATION PRACTICE GUIDE, *supra* note 116, at 9. *See also* Vigers, *supra* note 129, at 15.

¹⁴⁵ MEDIATION PRACTICE GUIDE, *supra* note 116, at 9.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Mediation in International Parental Child Abduction, *supra* note 134, at 7.

¹⁴⁹ *Id.* (mediation only embarked upon once an initial court hearing has occurred).

¹⁵⁰ *Id.* (English law sets a six week goal for resolution once a Hague proceeding is commenced). *See also* Kucinski, *Pitfalls*, *supra* note 133, at 312 (the only significant delay occurred because one parent participant had difficulty obtaining the proper visa to enter the United Kingdom).

¹⁵¹ Mediation in International Parental Child Abduction at 52, 55. *See also* Kucinski, *Pitfalls*, *supra* note 133, at 303.

¹⁵² Mediation in International Parental Child Abduction, *supra* note 134, at 8. *See also* Vomberg, *supra* note 86, at 2–3 (In MiKK e.V., *see infra* note 161 and accompanying text, the left-behind parent “must not receive the impression that he or she is being talked out of the right to return proceedings.”).

¹⁵³ Mediation in International Parental Child Abduction, *supra* note 134, at 52.

¹⁵⁴ *Id.* at 9.

submitted to the relevant court as a consent order in order to have legal force in England and Wales as well as the other country.¹⁵⁵ The Reunite pilot was able to provide direct, face-to-face mediation for individuals living outside the United Kingdom due to funding from a private foundation that helped offset travel and accommodation costs during mediation.¹⁵⁶

Germany began developing its first bi-national mediation model, the German Federal Association for Family Mediation (“BAFM”),¹⁵⁷ in 1999 and implemented the program in 2003¹⁵⁸ with a focus on educating parents about the availability of mediation as a mode of conflict resolution.¹⁵⁹ In 2008, BAFM and the Bundesverband Mediation (“BM”) founded the Mediation in Internationalen Kindschaftskonflikten (“MiKK e.V.”), a specialized organization dealing specifically with IPCA cases.¹⁶⁰ Mediation is now the standard procedure for IPCA cases in Germany.¹⁶¹ Each case is co-mediated by two mediators¹⁶² and selection conforms to the following criteria: (1) one male and one female mediator;¹⁶³ (2) one mediator from a legal background and the other from a psycho-social background;¹⁶⁴ (3) the mediators will mirror the nationalities of the parents;¹⁶⁵ (4) the mediators should have “advanced binational mediation training;”¹⁶⁶ and (5) the parties should

¹⁵⁵ *Id.* (also ensure that the Memorandum of Understanding is not seen as acquiescence).

¹⁵⁶ Jeremy D. Morley, *The Hague Abduction Convention*, PRACTICAL AND PROCEDURAL ISSUES, INT’L FAM. L. PRAC. §9:49, 1 (2013) (funds provided for the cost of airfare, five days of hotel stay, and basic living expenses).

¹⁵⁷ Vomberg, *supra* note 86, at 5.1; Kucinski, *Pitfalls*, *supra* note 133, at 301 (a bi-national mediation project with France).

¹⁵⁸ Melissa A. Kucinski, *Creating a Successful Structure to Mediate International Parental Child Abduction*, 26 AM. J. FAM. L. 82 (2012).

¹⁵⁹ *Id.* at 82 (the German mediator program is entirely voluntary and occurs in tandem with the legal proceedings). See also Kucinski, *Pitfalls*, *supra* note 134, at 301 (the mediation program suspended operations in March 2006).

¹⁶⁰ Vomberg, *supra* note 86, at 5.1.

¹⁶¹ Christoph C. Paul & Jamie Walker, *An International Mediation: From Child Abduction to Property Distribution*, 23 AM. J. FAM. L. 167 (2009) (discusses a case in which mediation prevented IPCA altogether).

¹⁶² Kucinski, *Creating a Successful Structure*, *supra* note 158, at 82. See also Vomberg, *supra* note 86, at 5.2.

¹⁶³ Kucinski, *Creating a Successful Structure*, *supra* note 158, at 82. Cf. Mediation in International Parental Child Abduction, *supra* note 135, at 52 (study showed that parents not so concerned about the gender of the mediators but more concerned about their expertise, professionalism, and neutrality).

¹⁶⁴ Kucinski, *Creating a Successful Structure*, *supra* note 158, at 82.

¹⁶⁵ *Id.*

¹⁶⁶ FEASIBILITY STUDY, *supra* note 102.

have at least one common language.¹⁶⁷ Mediators must undergo a minimum of 160 hours of training in family mediation, advanced training in child IPCA, and attend follow-up seminars.¹⁶⁸ Mediation starts only after the Hague proceedings are initiated in order to pressure the parties to reach a timely resolution within the timeframe permitted under the Hague Convention.¹⁶⁹ Mediators must also be able to “prepare the mediation process concisely and upon very short notice.”¹⁷⁰ Similarly to the Reunite program, any agreement or resolution must be acceptable to and accepted by the court hearing the Hague proceedings and the home court of the left-behind parent¹⁷¹ as well as specific as to the details of return or future arrangements.¹⁷²

There is some debate regarding the efficacy and propriety of using mediation in cases involving domestic violence. Often in such cases, the abducting parent is the victim, female, and the primary caregiver.¹⁷³ “Under the remedy of return framework, the abused parent flees with the child to escape the wrath of the abusive parent, only to have the Convention deliver the child back into the arms [of] the violent abuser.”¹⁷⁴ The Reunite program found that “[a]llegations of domestic violence do not preclude entering the mediation process and do not affect the ability to reach a Memorandum of Understanding[.]”¹⁷⁵ but cautions that risk assessment be conducted and appropriate measures adopted to help the participant parents feel safe.¹⁷⁶ The use of technology to mediate has been proposed as a solution to the inherent problems of mediating in domestic violence situations.¹⁷⁷ The abused parent may feel empowered articulating his or her concerns, fears, and views when physically at a safe distance from the purported abuser.¹⁷⁸

¹⁶⁷ *Id.*

¹⁶⁸ Kucinski, *Pitfalls*, *supra* note 133, at 301.

¹⁶⁹ Vomberg, *supra* note 86, at 2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3.

¹⁷² Vomberg, *supra* note 86, at 3.

¹⁷³ Dana Beth Finkey, *The Hague Convention on the Civil Aspects of International Childhood Abduction: Where Are We, and Where Do We Go From Here?*, 30 HASTINGS INT'L & COMP. L. REV. 505, 509 (2007).

¹⁷⁴ *Id.*

¹⁷⁵ Mediation in International Parental Child Abduction, *supra* note 134, at 53.

¹⁷⁶ *Id.*

¹⁷⁷ Kucinski, *Pitfalls*, *supra* note 133, at 318.

¹⁷⁸ *Id.*

C. *BCA Mediation Within the Brazilian Legal System*

Mediation is generally used in Brazil by the “Juizados Especiais Cíveis”¹⁷⁹ (“Special Civil Courts”) to “promote quick and low cost solutions in small disputes related to traffic accidents; property damage; credit default; and other issues,” and in domestic custody disputes agreements reached are often approved by the court in order to guarantee that the child’s rights are protected and the terms of the agreement are enforced.¹⁸⁰ BCA mediation operates outside the Special Civil Court model, is typically conducted with legal representatives present from both parties,¹⁸¹ and is promoted as an alternative prior to initiating court proceedings.¹⁸² Once court proceedings begin, judges hold a formal conciliation hearing to help the parties reach a voluntary agreement.¹⁸³ While mediation is an option, there are no non-governmental organizations or non-profit organizations in Brazil that provide mediation services, support, or aid in abduction cases.¹⁸⁴

V. A NEW MEDIATION MODEL

Despite the availability of mediation in Brazil, the country remains on the State Department’s list of non-compliant countries.¹⁸⁵ The current system of mediation is inadequate to assist in the timely resolution of claims brought pursuant to the Hague Convention because the current mode of mediation lacks the requisite mechanisms to encourage parties to mediate and reach resolutions that return children to their habitual residence for a custody determination, and the formal safeguards to prevent undue delays and insulate participants from the biases present in the Brazilian legal system.

¹⁷⁹ FEASIBILITY STUDY, *supra* note 102.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *International Parental Child Abduction Brazil*, U.S. DEP’T OF STATE, http://www.travel.state.gov/abduction/country/country_5886.html, accessed 10/8/13 (last updated Apr. 1, 2013).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See DOS COMPLIANCE REPORT 2013, *supra* note 16; DOS COMPLIANCE REPORT 2012, *supra* note 19; DOS COMPLIANCE REPORT 2011, *supra* note 19; DOS COMPLIANCE REPORT 2010, *supra* note 19; DOS COMPLIANCE REPORT 2009, *supra* note 19; DOS COMPLIANCE REPORT 2008, *supra* note 19; DOS COMPLIANCE REPORT 2006, *supra* note 19.

A. *A New Brazilian Mediation Framework*

Any mediation model created in Brazil ought to conform to the guidelines put forth by the Hague Conference in the Guide to Good Practice.¹⁸⁶ Mediation should be voluntary as a general rule, but when the parties are prime candidates and likely to find resolution, mediation can be mandated,¹⁸⁷ although the parties would not be required to reach an agreement. Not all aggrieved parties will be suitable for mediation, so screening procedures should be in place to address whether the relationship was abusive,¹⁸⁸ whether there is any middle ground to uncover, and the time sensitive nature of the particular case.¹⁸⁹ “In international cases one parent has already broken the rules in a major way and has taken the child from the other parent’s home turf to a new environment of which the left-behind parent is usually suspicious.”¹⁹⁰ Mediations should also occur in tandem with official Hague proceedings similar to the Reunite program. Requiring left-behind parents to pursue mediation before initiating proceedings might result in the application of the one-year time bar and the Settled Child Exception.¹⁹¹ Simultaneous mediations should also occur over the course of several sequential days.¹⁹²

Mediator selection and qualifications are important considerations because he/she largely shape the specific details of mediation and assist the parties in reaching a resolution.¹⁹³ A bi-national approach to mediation will help protect both parents by promoting trust¹⁹⁴ in all participants and will act as a countermeasure to the pervasiveness of Brazilian biases inherent in the current system.¹⁹⁵ The Hague Conference encourages the use of two mediators who

¹⁸⁶ MEDIATION PRACTICE GUIDE, *supra* note 116.

¹⁸⁷ Kucinski, *Pitfalls*, *supra* note 133, at 305.

¹⁸⁸ *See id.* at 319.

¹⁸⁹ *See* Hague Convention at art. 12 (time sensitivity concerns if the one year mark is approaching).

¹⁹⁰ Morley, *supra* note 156, at 1.

¹⁹¹ Hague Convention at art. 12.

¹⁹² *See* Mediation in International Parental Child Abduction, *supra* note 134; Vomberg, *supra* note 86, at 2 (such structure would also help reduce costs of travel for participants assuming that the Brazilian government or a private funder does not provides reimbursements for left-behind parents).

¹⁹³ *See* Kucinski, *Pitfalls*, *supra* note 133, at 307.

¹⁹⁴ Melissa A. Kucinski, *Culture in International Parental Kidnapping Mediations*, 9 PEPP. DISP. RESOL. L.J. 555, 575 (2009) (trust can be difficult to establish and is highly dependent on the cultural norms of the participants).

¹⁹⁵ *See id.* at 556.

represent the respective nationalities of both parents.¹⁹⁶ This two-mediator model would also provide participants with someone who speaks the same language(s) but more importantly, understands their cultural biases and can aid in translating those concerns for the other parent and vice versa.¹⁹⁷ The mediators should also have a common language.¹⁹⁸ Brazil is a culturally diverse country and in those situations where a suitable mediator cannot be located within the country, the BCA and the respective Central Authority can work together to locate a suitable mediator from the other Contracting State.¹⁹⁹ All mediators should be trained and educated in the relevant family law of the countries of the parents in order to ensure that any agreement can be enforceable in both Brazil and the other Contracting State.²⁰⁰ Much like mediators in the German bi-national program,²⁰¹ mediators here should have backgrounds in the law and psychology in order to neutralize the hostilities and marital problems that led to the abduction.²⁰²

B. *Mediation Safeguards*

Safeguards are necessary to ensure that the proposed mediation model will work with the Brazilian legal system and improve Brazil's compliance with the Hague Convention. The BCA should aid in the provision of mediation services to parents as well as educate judges, law enforcement, and parents on the availability of such resources, the format of mediation, and what the implications of participation on Hague proceedings.²⁰³ Brazilian judges must be educated to understand that the simultaneous mediation does not constitute acquiescence by the left-behind parent.²⁰⁴ Any agreement reached should be memorialized as a consent order, memo-

¹⁹⁶ *Id.* at 579.

¹⁹⁷ Kucinski, *Pitfalls*, *supra* note 133, at 300.

¹⁹⁸ See FEASIBILITY STUDY, *supra* note 102.

¹⁹⁹ Such cooperation bolsters the cooperation and mutual respect necessary for the success of the Convention.

²⁰⁰ Mediation in International Parental Child Abduction, *supra* note 134.

²⁰¹ See Kucinski, *Culture*, *supra* note 194, at 579 ("The German system banks on the fact that if both mediators originate from both cultural and legal systems, then both parents will be more likely to comply with any result coming from the mediation."); Kucinski, *Creating a Successful Structure*, *supra* note 158, at 82.

²⁰² See Kucinski, *Culture*, *supra* note 194, at 572.

²⁰³ Such an administrative role would be consistent with the Hague Convention and Hague Conference. See PART I – IMPLEMENTING CENTRAL AUTHORITY, *supra* note 65, at 44–48.

²⁰⁴ Morley, *supra* note 156, at 1.

randa of understanding, mirror order, or whatever form necessary for it to have effect in both Brazil and the other Contracting State.²⁰⁵ Undertakings, which are “a promise, or commitment, or assurance given by a person to a court to do, or not to do, certain things[.]” may be utilized to help parties come to a compromise.²⁰⁶ Undertakings can include promises not to seek criminal charges in the habitual residence, child care arrangements, and child support arrangements but can be temporary in nature until a final resolution is issued by a court of competent jurisdiction in the country of habitual residence.²⁰⁷ When mediation fails to result in the child’s return to his/her country of habitual residence, in order to prevent noncompliance with the Hague Abduction Convention, the Brazilian courts must be prepared to prevent any further delay caused by judicial inefficiency, burdened dockets, or delay tactics used by the abducting parent.²⁰⁸

VI. CONCLUSION

IPCA mediation has been growing because of its effectiveness in resolving disputes between parents, who by sharing a child will undoubtedly have life-long involvement with each another even after the dissolution of a marriage or relationship, and because mediation, when used efficiently, helps to reduce the workloads placed on already burdened courts.²⁰⁹ Brazil’s adoption of a mediation process operating concurrently with Hague proceedings in court would help resolve cases without placing an undue delay on the parties and would reaffirm Brazil’s commitment to upholding its obligations as a Contracting State. Brazil is the home to the 2014 World Cup and the 2016 Summer Olympics as well as one of the G20 economies. A country with such a large role on the world stage should honor its commitments and take measures to promote the prompt return of children abducted to and wrongfully retained within its borders. The success of the Hague Convention turns on the willingness of Contracting States to act, bound by their obligations, in compliance and return abducted children to their habitual residence so a proper custody proceeding can take place.

²⁰⁵ See PART I – IMPLEMENTING CENTRAL AUTHORITY, *supra* note 65, at 9. See also Kucinski, *Pitfalls*, *supra* note 133, at 311–12.

²⁰⁶ PART I – IMPLEMENTING CENTRAL AUTHORITY, *supra* note 65, at 9.

²⁰⁷ *Id.* at 56.

²⁰⁸ Morley, *supra* note 156, at 1.

²⁰⁹ VIGERS, *supra* note 129, at 5.

