

1980 Hague Child Abduction Convention – a Judicial Perspective

Provides:

A practical, effective framework to achieve practical, effective justice for children and families when a child has been wrongfully removed or retained.

A framework which operates to facilitate expeditious justice.

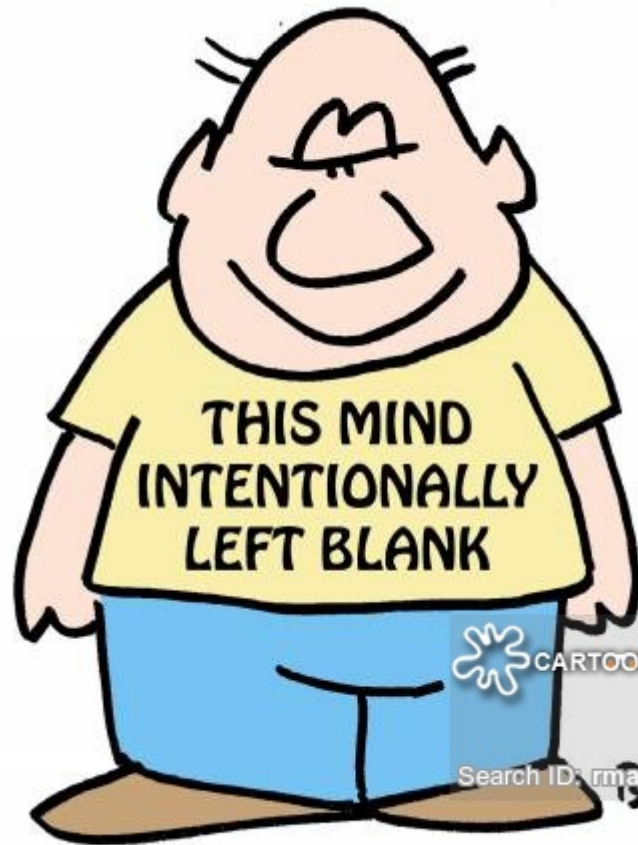
1978


2 Events:

3rd May 1978: 1st unsolicited bulk commercial e-mail ("spam") is sent by a Digital Equipment Corporation marketing representative to every ARPANET address on the US west coast.

I started practising family law.

International Family Law Instruments?



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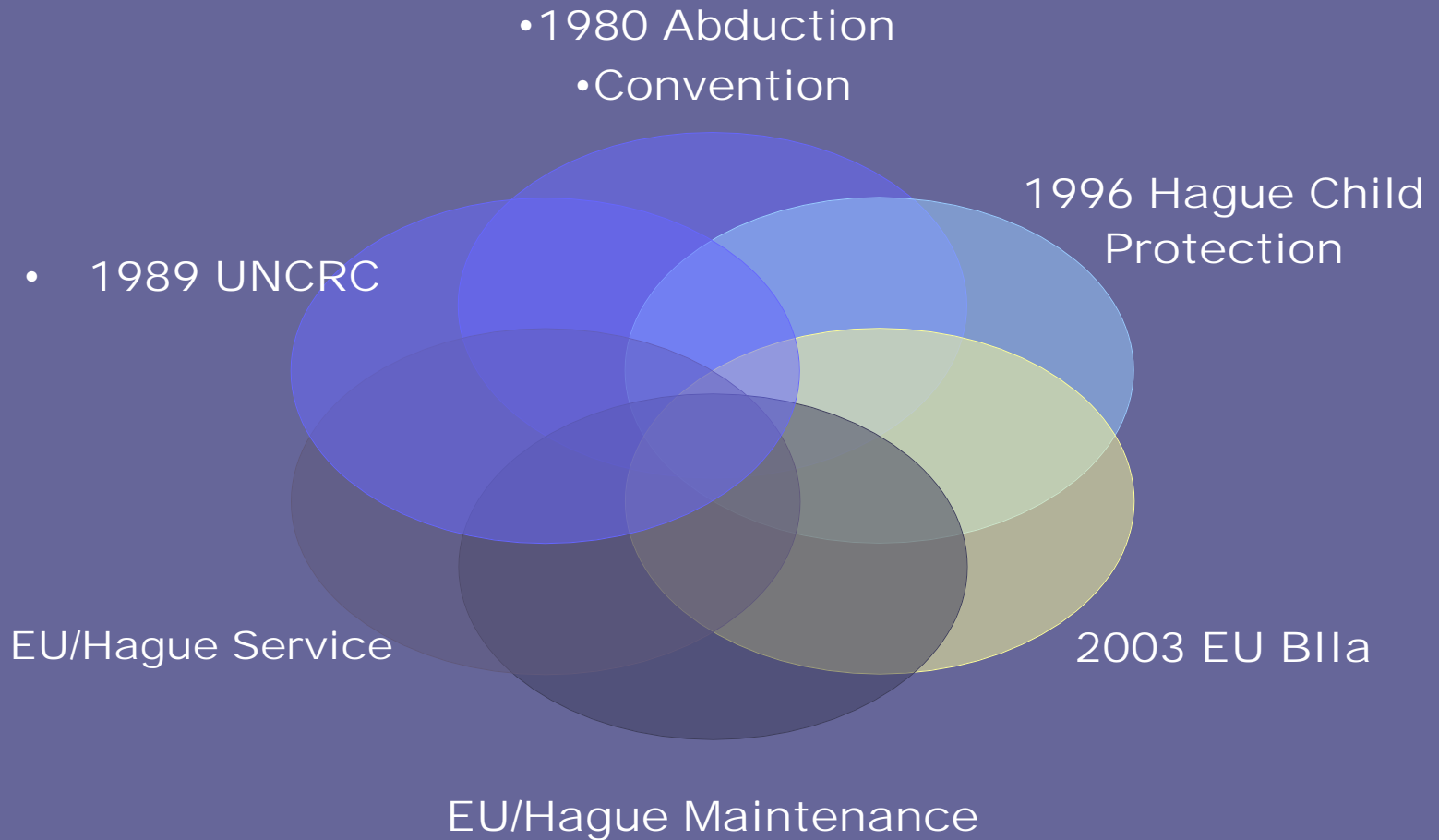
Recent Example

- Mother and 8 others arrested in Lebanon.
- Mother seeking to recover two children (6 and 4) who, she alleged, had been retained by the father in Lebanon after a holiday from their home in Australia.
- What principles apply?
- UNCRC 1989: Art 3: “In all actions concerning children ... the best interests of the child shall be a primary consideration”.
- But differences in domestic law can lead to different outcomes.
- In England: the welfare of the child is the court’s “paramount consideration”. Not easy to apply to abductions before the implementation of the 1980 Convention. No clear framework of factors.

Internationalisation of Family Law

- Professor Nigel Lowe, Professor of Law at Cardiff Law School has said:
- “The time has long since passed when the study [and practice] of family law can sensibly be confined to purely domestic issues and jurisprudence. In part this is because there are many more cases with an international element ... One result of the growing phenomenon of cross-border families has been increasing international attempts both to create basic rights regulating the family and to provide international solutions to common problems.”

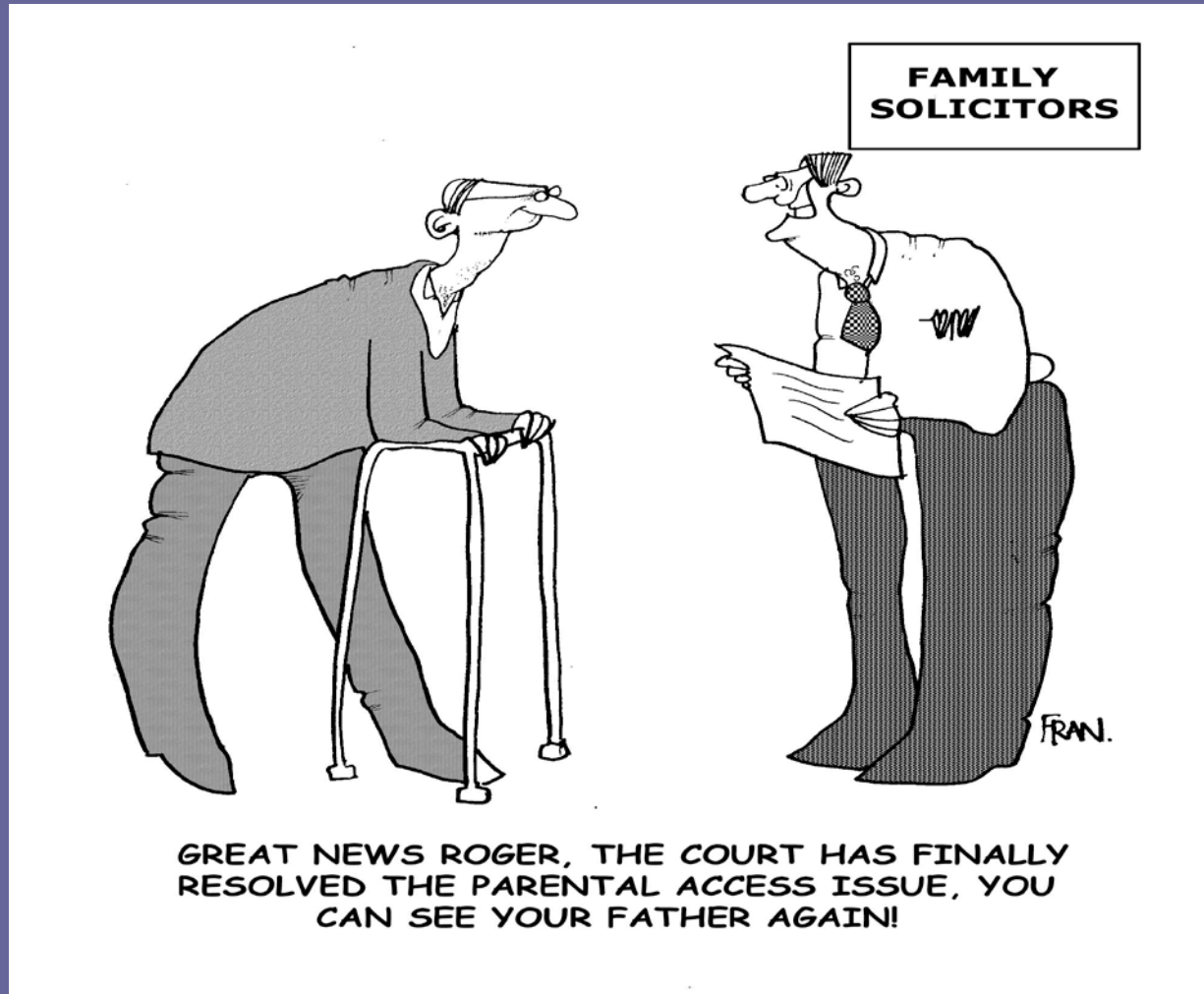
INTERNATIONAL INSTRUMENTS



Objectives of the Convention

- Article 1:
- “(a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are respected in other Contracting States.”
- To protect children internationally from the harmful effects of abduction; and
- To establish procedures to ensure their prompt return to the State of their habitual residence.
- Home state best placed to make welfare decisions.
- To discourage abduction.

Expeditious Justice: Delay in decision making - contrary to welfare of children



Framework (1)

- 1 There must be a removal to or retention from the child's home state – habitual residence.
- 2 The removal/retention must be wrongful – in breach of rights of custody attributed under the law of the home state (and which being exercised).
- 3 Two questions: (i) what rights does the left behind parent have under *domestic* law and (ii) are they “rights of custody” within the Convention.
- 4 Rights of custody include rights relating to the care of a child and, in particular, the right to determine the child's place of residence.

Framework (2)

- 5 Where the child has been wrongfully removed/retained, the court “shall” order the child to be returned “forthwith”: Art 12.
- 6 Art 13: The court *may* refuse to return where:
 - (i) The left behind parent consented to or subsequently acquiesced in the removal or retention. An issue of fact;
 - (ii) There is a *grave* risk that the child’s return would expose him/her to physical or psychological harm or otherwise place the child in an intolerable situation. High threshold, assessed broadly;
 - (iii) The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his/her views.

Framework (3)

- 7 If one of the grounds is established, the court then has to decide whether to order return.

This is a discretionary exercise - the court will undertake an overarching assessment.

This includes giving weight to the Convention policy - swift return of children; comity between Contracting States; respect for each other's judicial processes; to deter abduction.

And, the child's welfare interests.

As well as the circumstances giving rise to the discretion.



GL

ARCTIC OCEAN

Godthab
Reykjavik

Arctic Circle

Juneau
Edmonton
Calgary
Vancouver
Seattle
Portland
Boston
San Francisco
Las Vegas
Los Angeles
Sacramento
Denver
Chicago
Minneapolis
Dallas
San Antonio
Houston
Phoenix
Portland
Seattle
Denver
Chicago
Minneapolis
Dallas
San Antonio
Houston
Phoenix

ATLANTIC

Tropic of Cancer

OCEAN

OCEAN

INDIAN

OCEAN

Tropic of Capricorn

Tropic of Capricorn

Tropic of Capricorn

Havana
Miami
Guadalajara
Mexico City
Caracas
Bogota
Georgetown
Paramaribo
Quito
Belem
Lima
La Paz
Rio de Janeiro
Sao Paulo
Asuncion
Porto Alegre
Santiago
Buenos Aires
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Nouakchott
Barrako
Niamey
N'Djamena
Abuja
Yaounde
Libreville
Brazzaville
Kinshasa
Luanda
Windhoek
Gaborone
Johannesburg
Cape Town
Port Elizabeth
Helsinki
St. Petersburg
Moscow
Yekaterinburg
Minsk
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Pyongyang
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Tokyo
Osaka
Sapporo
Hiroshima
Shanghai
Nanjing
Chongqing
Guiyang
Kunming
Yankee
Hanoi
Vientiane
Phnom Penh
Ho Chi Minh City
Manila
Kuala Lumpur
Jakarta
Surabaya
Antananarivo
Mogadishu
Dar es Salaam
Nairobi
Dodoma
Addis Ababa
San'a
Jeddah
Riyadh
Muscat
Ahmadabad
Bombay
Bangalore
Hyderabad
Chennai
Madurai
Colombo
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Riyadh
Muscat
Ahmadabad
Bombay
Bangalore
Hyderabad
Chennai
Madurai
Colombo

Tropic of Cancer

Tropic of Capricorn

Port M

Perth
Adelaide
Melbourne
Sydney
Canberra

Views from England and Wales

The Convention has been referred to as one of the most successful international family law instruments.

The clarity of its message (abduction is harmful to children) and the simplicity of its central remedy (a prompt return) have undoubtedly contributed to this success.

“One of the beauties of the Hague Abduction Convention is the simplicity of its objectives.”: Professor Nigel Lowe.

Baroness Hale: “*The Hague Convention ... is an admirably clear and simple instrument.*”: **2008** Re M (Abduction: Zimbabwe).

Volume of Cases in E & W

Hague Abduction Applications

	Hague Access In	Hague Access out	Hague Return In	Hague Return Out
2010	29	33	234	153
2011	33	41	251	202
2012	27	38	228	221
2013	53	31	237	224
2014	43	36	274	170

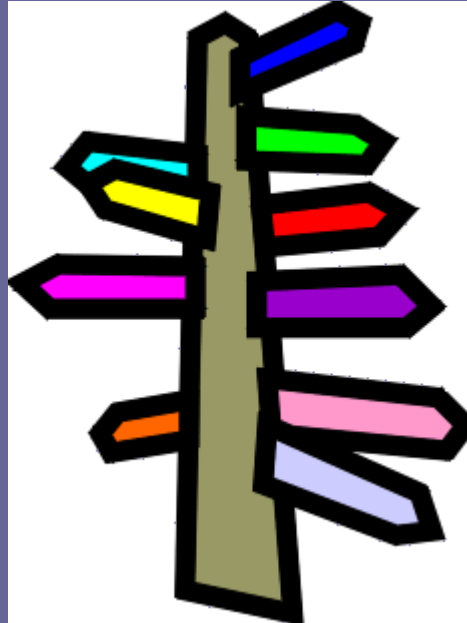
Practical Implementation

The practical application of the Convention in England and Wales has, in my view, benefited greatly from the manner of its implementation.

Some relevant factors:

- Cases assigned only to the High Court (20 judges all based in London);
- Automatic provision of public funding to the applicant;
- A sufficiently funded and staffed Central Authority.

Non-Hague Framework



Hague Framework

