

**Seventh Meeting of the Special Commission  
on the practical operation of the 1980 Child Abduction Convention  
and of the 1996 Child Protection Convention – October 2017**

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<b>Title</b>	Discussion paper on the operation of Article 15 of the 1980 Child Abduction Convention	
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<b>Agenda item</b>	TBC	
<b>Mandate(s)</b>	Conclusion and Recommendation No 63 of Part I (1-10 June 2011) of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Convention and the 1996 Convention	
<b>Objective</b>	To provide information on the operation of Article 15 of the 1980 Child Abduction Convention as a basis for discussion as to possible steps for the improvement of the application of this Article	
<b>Action to be taken</b>	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
<b>Annexes</b>	N/A	
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## A. Introduction<sup>1</sup>

### 1. Recommendation of the Sixth Special Commission on Article 15

1. Article 15 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter the “1980 Convention”) provides an optional mechanism for a requested court or other competent authority seized of return proceedings to ascertain the law of a foreign State applied under the 1980 Convention to a specific case, by recourse to a foreign authority. The Article reads as follows:

“The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.”

2. The Explanatory Report to the 1980 Convention notes that Article 15 “answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child through being uncertain of how the law of the child’s habitual residence will apply in a particular case”.<sup>2</sup>

3. *Guide to Good Practice, Part II – Implementing Measures* on the 1980 Convention explains the mechanism in the following way:

“Article 15 provides for the possibility of requesting from the authorities of the child’s habitual residence a declaration on the wrongful nature of the removal. The purpose of Article 15 is to help the requested judicial or administrative authorities reach a decision in those cases where there is uncertainty whether the removal or retention of a child was wrongful under the law of the State of the child’s habitual residence.”<sup>3</sup>

4. The Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention of June 2011 (Part I) discussed the operation of Article 15, with the benefit of Contracting States’ responses to a Questionnaire circulated in advance of the meeting.<sup>4</sup> The Special Commission noted some difficulties in the operation of the Article 15 mechanism, and recommended that further attention be given to the improvement of its application:

“The Special Commission records the problems, including delays, that were identified in the operation of Article 15. It recommends that the Permanent Bureau give further consideration to the steps which may be taken to ensure a more effective application of the Article.”<sup>5</sup>

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<sup>1</sup> The Permanent Bureau would like to thank Ms Ha-Kyung Jung (Judge, Chuncheon District Court, Gangwon-Do, Republic of Korea, on secondment to the Permanent Bureau, March 2013 to March 2014) and Ms Penelope Lipsack (Barrister and Solicitor, Legal Services Branch, Ministry of Justice, British Columbia, Canada) for their valuable research assistance in the preparation of this document.

<sup>2</sup> See E. Pérez-Vera, “Explanatory Report on the 1980 Hague Child Abduction Convention”, in *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, SDU, 1982, para. 120 (hereinafter, “Explanatory Report”).

<sup>3</sup> See 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 II – Implementing Measures*, Bristol, Family Law (Jordan Publishing Ltd.), 2011, para. 6.5.1, p. 34.

<sup>4</sup> “Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*”, Prel. Doc. No 1 of November 2010 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction and the 1996 Hague Child Protection Convention (hereinafter “the Questionnaire”) (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section” then “Special Commission meetings” and “Sixth Special Commission meeting”).

<sup>5</sup> “Conclusions and Recommendations of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (Part I – June 2011)”, C&R No 63 (hereinafter, “C&R of the 2011 SC”), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction” then “Special Commission meetings” and “Sixth Special Commission meeting”.

5. This note firstly provides background information in relation to this Article and discussion thereof in various sources (Section B), and secondly suggests possible steps which might be considered to improve the application of Article 15 (Section C).

## B. Background

### 1. Discussion at the Sixth Special Commission

6. The Questionnaire circulated before the Sixth Meeting of the Special Commission posed three questions to Contracting States to the 1980 Convention with respect to obtaining Article 15 decisions or determinations (sometimes also described as “declarations”),<sup>6</sup> seeking information as to any operational problems encountered, experiences of delay, and also whether direct judicial communications had been used in furtherance of Article 15 requests.<sup>7</sup> Some States responding to the Questionnaire reported that they had not encountered any problems or that Article 15 was rarely used.<sup>8</sup>

7. However, a range of States identified a number of issues with the operation of Article 15 in the Questionnaire responses or during discussions at the Sixth Meeting of the Special Commission, including:

- delays in receipt of the decision or determination such that it was no longer useful in the proceeding or the proceeding was substantially delayed, including where Article 15 decisions or determinations require adversarial proceedings (with, *e.g.*, service of process abroad and notice requirements);
- jurisdictional challenges in proceedings pursuant to issuing Article 15 decisions or determinations, for example, linked to ambiguity as to whether the authority issuing the Article 15 decision or determination can or should make a provisional finding of the habitual residence of the child prior to issuing such a decision or determination;<sup>9</sup>
- difficulty in identifying the specific authorities in charge of Article 15 decisions or determinations;<sup>10</sup>
- unnecessary requests for Article 15 decisions or determinations, for example in cases where information provided or already known was sufficient;<sup>11</sup>

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<sup>6</sup> The terminology of Art. 15 with respect to “decisions” or “determinations” will be used interchangeably in this document. According to *Black’s Law Dictionary*, a “decision” would always be considered a “judicial determination after consideration of the facts and the law” while a “determination” would encompass “final decision[s] by a court or administrative agency” (B. A. Garner, *Black’s Law Dictionary*, 7<sup>th</sup> Ed., St. Paul, West Group, 1999, at pp. 414 and 460). In negotiations of the 1980 Convention, there is some evidence that this wording under Art. 15 was included to encompass both judicial decisions and types of “*attestations judiciaires*” / “court certificates” known in some jurisdictions (see Comments of the Governments on Prel. Doc. No 6 of May 1980, Hague Conference on Private International Law, *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, SDU, 1982, at p. 222 *et seq.*). The terminology of an Art. 15 “declaration” is also employed with some frequency in case law and commentary in a number of jurisdictions.

<sup>7</sup> The Questionnaire (*op. cit.* note 4) included the following questions: Question 8.1 “Have you encountered any difficulties with the use of Article 15? If so, please specify the difficulties encountered and what steps, if any, have been taken to overcome such difficulties”; Question 8.2 “Has the use of Article 15 caused undue delay in return proceedings in your State? Are there particular States Parties with whom you have had difficulties in this regard? Please provide case examples where possible”; and Question 8.3 “Are you aware of any cases in your State where direct judicial communications have been used in relation to Article 15? If so, please provide details of how, if at all, direct judicial communications assisted in the particular case”.

<sup>8</sup> Some States reported that in their experience the Art. 15 mechanism was generally operating well and / or that there were not, in general, undue delays caused by its use (*e.g.*, Australia, Brazil, Canada, Finland and Israel). A number of States reported that the Art. 15 mechanism was rarely used and thus it was difficult to comment on any operational issues (*e.g.*, Belgium, Bulgaria, Denmark, Luxembourg, Monaco and Norway).

<sup>9</sup> The United States of America, in its response to the Questionnaire, noted that some courts in the United States of America may find they have no jurisdiction until the court in the requested State (*i.e.*, the court hearing the return proceeding) determines that the child’s country of habitual residence is in fact the United States.

<sup>10</sup> The Country Profile for the 1980 Convention, in Question 10.2(b) asks States to specify, in very general terms, the authorities in charge of issuing the Art. 15 decisions or determinations. Country Profiles are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction” then “Country Profiles”.

<sup>11</sup> See *e.g.*, the response of the Netherlands to the Questionnaire. It was suggested that the authorities in the requested State (and / or interested individuals) should refrain from such unnecessary requests.

- receipt of inconclusive decisions or determinations;<sup>12</sup>
- lack of experience of judges in dealing with Article 15 requests;
- costs of obtaining an Article 15 decision or determination;
- use of certificates or affidavits issued by the Central Authorities which may be rejected by foreign courts as they do not emanate from the judiciary;
- use of affidavits from private attorneys which may be unreliable;<sup>13</sup> and,
- unavailability of Article 15 decisions or determinations in some States, due to the absence of a legal basis or established procedures, and / or due to lack of authorities' knowledge of this Article.

8. In addition, during a consultation process with the members of the International Hague Network of Judges (the "IHNJ") and academics on the desirability and feasibility of a protocol to the 1980 Convention, undertaken in connection with the Sixth Meeting of the Special Commission, Article 15 was identified as an area in need of improvement.<sup>14</sup> One response pointed out that Article 15 could delay rather than clarify matters in the return proceedings and another response suggested that there was a need to improve uniformity in the operation of the provision.<sup>15</sup>

## 2. Responses to Country Profiles<sup>16</sup>

9. Of the 62 States that have submitted their Country Profiles for the 1980 Convention to date, 46 States note that Article 15 decisions or determinations are available in their jurisdiction(s),<sup>17</sup> while 13 States reported that they were not available.<sup>18</sup> In the States which responded positively, it is principally judicial authorities that were noted as responsible for issuing the decisions or determinations (34 States<sup>19</sup>), but in some States, Central Authorities are tasked with issuing the decisions or determinations (four States<sup>20</sup>). In a number of States (eight States<sup>21</sup>), both judicial authorities and / or Central Authorities are tasked with issuing Article 15 decisions or determinations.

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<sup>12</sup> Australia and the Netherlands, for example, in their responses to the Questionnaire, cited cases with foreign courts where an unclear Art. 15 decision / determination was received.

<sup>13</sup> While private lawyers may not be viewed as "authorities" that can issue the decision or determination under Art. 15, they may be categorised as a "qualified person" under Art. 8(3)(f) of the 1980 Convention to provide an affidavit concerning the relevant law of a given State. The evidentiary value attached to such affidavits may differ according to the internal laws (or practices) of each State.

<sup>14</sup> "Consultations on the desirability and feasibility of a Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – a Preliminary Report", Prel. Doc. No 7 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction and the 1996 Hague Child Protection Convention (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under "Child Abduction Section" then "Special Commission meetings" and "Sixth Special Commission meeting").

<sup>15</sup> *Ibid.*, p. 36.

<sup>16</sup> Four questions are relevant to Art. 15 in the Country Profile (*supra*, note 10): 10.2(a) "In your State is it possible for a decision or other determination to be made, in accordance with Article 15 of the Convention, that the removal or retention of a child was wrongful within the meaning of Article 3?"; 10.2(b) "Which authorities in your State can issue Article 15 decisions / determinations?"; 10.2(c) "Who can apply for an Article 15 decision / determination?"; and 10.2(d) "Are Article 15 decisions / determinations of other States accepted by the judicial or administrative authorities in your State?".

<sup>17</sup> Argentina, Australia, Austria, Belgium, Brazil, Burkina Faso, Canada, Chile, China – SAR of Hong Kong, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Georgia, Germany, Guinea, Honduras, Ireland, Israel, Italy, Latvia, Malta, Mauritius, Mexico, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America.

<sup>18</sup> Armenia, Bulgaria, Dominican Republic, El Salvador, Estonia, Greece, Hungary, Japan, Lithuania, Peru, Republic of Korea, Uruguay and Venezuela. Three States did not respond to this question.

<sup>19</sup> Argentina, Australia, Austria, Belgium, Canada, China – SAR of Hong Kong, Costa Rica, Cyprus, Czech Republic, Ecuador, Finland, France, Georgia, Germany, Guinea, Ireland, Israel, Italy, Latvia, Malta, Mauritius, Montenegro, New Zealand, Portugal, Romania, Russian Federation, Slovakia, South Africa, Spain, Sweden, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America.

<sup>20</sup> Burkina Faso, Mexico, Netherlands, and Panama.

<sup>21</sup> Brazil, Chile, Denmark, Honduras, Norway, Paraguay, Slovenia, and Switzerland.

10. In most States responding, applicants could make the Article 15 request,<sup>22</sup> with several States reporting that only the Central Authorities could apply for the Article 15 decision or determination.<sup>23</sup> In many States, both Central Authorities and applicants<sup>24</sup> could apply for the Article 15 decision or determination, and / or a court<sup>25</sup> or both Central Authorities and a court<sup>26</sup> could apply. In one jurisdiction it was specified that “any person who has an interest” could make the request under Article 15.<sup>27</sup>

### 3. Explanatory Report

11. The Explanatory Report to the 1980 Convention touches briefly upon two principal points in relation to Article 15.<sup>28</sup> The first is that an Article 15 request is purely voluntary and not mandatory, such that “the return of the child cannot be made conditional upon such decision or other determination being provided” (noting that it may be impossible to obtain such a decision or determination in the State of the child’s habitual residence).<sup>29</sup> As a corollary point, it is noted that the Central Authority should facilitate the applicant’s obtaining of an Article 15 decision or determination, mentioned in connection with Article 8(3)(f) of the Convention, where an application “may be accompanied or supplemented by – [...] a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child’s habitual residence, or from a qualified person, concerning the relevant law of that State”.<sup>30</sup>

12. Secondly, the Explanatory Report notes that “the decision or certificate” should contain an analysis bearing on whether the removal or retention was wrongful under the terms of the 1980 Convention, addressing the two elements articulated in Article 3: that the removal or retention constituted a breach of custody rights and that the applicant was *prima facie* exercising these rights “legitimately and in actual fact, in terms of the law of the child’s habitual residence”.<sup>31</sup>

### 4. The drafting history of Article 15 in the *Proceedings*

13. In the Preliminary draft of the 1980 Convention,<sup>32</sup> Article 15 was originally included as Article 14, which read as follows:

“The Central, judicial or administrative authorities of a Contracting State may request the authorities of the State of the habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that the child’s removal or retention was wrongful within the meaning of Article 3 of the Convention.”<sup>33</sup>

14. The Report prepared by Elisa Pérez-Vera on the Preliminary draft Convention<sup>34</sup> noted that this provision was proposed to address difficulties that the authorities of the requested State may face in deciding on a return application, having limited understanding of foreign law.<sup>35</sup> In those cases, the authorities in the requested State could ask the authorities of the State of the child’s habitual residence to take practical steps to obtain a decision or determination on the

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<sup>22</sup> In 26 States: Argentina, Austria, Canada (various jurisdictions), China – Hong Kong SAR, Cyprus, Czech Republic, Denmark, Ecuador, Finland, Georgia, Ireland, Israel, Italy, Latvia, Malta, Mexico, New Zealand, Norway, Russian Federation, Slovakia, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland (England and Wales only), and the United States of America.

<sup>23</sup> In three States: Costa Rica, Guinea, and Romania.

<sup>24</sup> In 15 States: Australia, Brazil, Burkina Faso, Canada (various jurisdictions), Chile, France, Germany, Honduras, Mauritius, Panama, Paraguay, Portugal, Slovenia, South Africa, and Spain.

<sup>25</sup> Belgium.

<sup>26</sup> Netherlands.

<sup>27</sup> United Kingdom of Great Britain and Northern Ireland (Northern Ireland).

<sup>28</sup> Explanatory Report (*op. cit.* note 2), para. 120.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> See “Preliminary draft Convention on the civil aspects of international child abduction, adopted by the Special Commission on November 16<sup>th</sup>, 1979”, Prel. Doc. No 6 of May 1980, Hague Conference on Private International Law, *Proceedings of the Fourteenth Session (1980)*, Tome III, *Child abduction*, The Hague, SDU, 1982, p. 166 (hereinafter, “*Proceedings*”).

<sup>33</sup> *Ibid.*, p. 168.

<sup>34</sup> “Report of the Special Commission by Elisa Pérez-Vera”, in *Proceedings (op. cit.* note 32).

<sup>35</sup> *Ibid.*, para. 104, p. 205.

wrongful removal of the child.<sup>36</sup> The recipient authority of the request, though not specified under the draft Article, was presumed to be the Central Authority of the State of the child's habitual residence.<sup>37</sup>

15. Several delegates commented on the draft Article 14.<sup>38</sup> Australia suggested that the scope of the draft Article be expanded to include the provision of a copy of any previous custody order rendered in the State of the child's habitual residence.<sup>39</sup> Finland suggested that it be made mandatory for applicants who have custody rights by operation of law to obtain a decision or certificate that would establish the breach of custody rights, in order to guarantee a more effective operation of the Convention.<sup>40</sup> The Finnish delegation further commented that the courts in the requested State should not be allowed to make a decision on return until they received a document on custody rights from the requesting State.<sup>41</sup> Canada commented that the provision was "aimed principally at dealing with the difficulty created by cases of breach of custody rights *ex lege*", but it could also be used when there was a judicial decision concerning custody in the State of the child's habitual residence before the removal.<sup>42</sup>

16. In the course of the discussion, there was a proposal by the *Rapporteur* that a return order should be executed forthwith "upon receipt of the decision, the agreement, or the certificate or sworn declaration as to the applicable law produced in accordance with Article 8".<sup>43</sup> However, the delegate from Australia commented that such a requirement would "impose an unjustifiable burden in cases where neither party wished documents to be produced",<sup>44</sup> and suggested that a judicial authority be simply given the power to request a certificate under the draft Article 14.<sup>45</sup>

17. There was another proposal by Belgium suggesting that authorities in the State of the child's habitual residence take all practical steps to obtain a decision on the wrongfulness of the removal.<sup>46</sup> A delegate from the United Kingdom commented that, while such requests concerning situations of fact and law were reasonable, it would be excessive to make it a requirement for a return decision.<sup>47</sup>

18. The Dutch delegation, supported by the Canadian delegation, pointed out that the duty to ask for a decision from the State of the child's habitual residence should be placed on the applicant, and not on the authorities in that State.<sup>48</sup> This suggestion was reflected in a proposal in Working Document No 47,<sup>49</sup> which is the first part of current Article 15. The Dutch proposal was supplemented by a proposal from the United Kingdom,<sup>50</sup> which sets out the duty of the Central Authority to assist applicants in obtaining a decision; a proposal that became the latter part of the current Article 15. The Dutch delegation explained that its proposal would: (1) amend draft Article 14 by providing that the authorities would address their requests to the "applicant" and not to the authorities; and, (2) make it clear that the production of such documents were not a condition for the return order.<sup>51</sup> The Dutch proposal went to the Drafting Committee and the United Kingdom proposal was approved unanimously in the proceedings.<sup>52</sup> Hence the current form of Article 15 was adopted.

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 105, p. 206.

<sup>38</sup> See "Comments of the Governments on Preliminary Document No 6", Prel. Doc. No 7 of September 1980, in *Proceedings* (*op. cit.* note 32), p. 215.

<sup>39</sup> *Ibid.*, p. 218.

<sup>40</sup> *Ibid.*, p. 246.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, p. 235.

<sup>43</sup> See Work. Doc. No 37, in *Proceedings* (*op. cit.* note 32), p. 289.

<sup>44</sup> See P.-v. No 7, in *Proceedings* (*op. cit.* note 32), p. 294.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Work. Doc. No 4, in *Proceedings* (*op. cit.* note 32), p. 262.

<sup>47</sup> See P.-v. No 10, in *Proceedings* (*op. cit.* note 32), p. 314.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Work. Doc. No 47, in *Proceedings* (*op. cit.* note 32), p. 312.

<sup>50</sup> See Work. Doc. No 54, in *Proceedings* (*op. cit.* note 32), p. 319.

<sup>51</sup> See P.-v. No 11, in *Proceedings* (*op. cit.* note 32), p. 325.

<sup>52</sup> *Ibid.*, p. 326.



19. In addition, the Australian and the Finnish delegations proposed Working Document No 50 suggesting that the authority may request the production of a document referred to in current Article 8(3)(e) or (f) and “may make production of such document a condition of making an order for return of the child”.<sup>53</sup> The Australian delegate mentioned that the proposal was about making the production of such documents “directory” but not mandatory, as had been suggested by Working Document No 37.<sup>54</sup> A delegate for the United States of America suggested that despite its merits, the proposal be omitted.<sup>55</sup> The Japanese delegate also found it difficult to support the proposal.<sup>56</sup> When put to a vote, the proposal was rejected by 12 votes against and six in favour.<sup>57</sup>

## 5. INCADAT case commentaries

20. While some Contracting States do not often employ the Article 15 mechanism, others use it with some regularity, and there are more than 50 cases in the International Child Abduction Database (“INCADAT”) involving Article 15 of the 1980 Convention.<sup>58</sup>

21. The INCADAT commentaries on Article 15 provided on the database include analysis under the following sub-headings: 1) “The Role and Interpretation of Article 15”; 2) “Scope of the Article 15 Decision or Determination Mechanism”; 3) “Status of an Article 15 Decision or Determination”; 4) “Practical Implications of Seeking an Article 15 Decision or Determination”; and, 5) “Alternatives to Seeking an Article 15 Decision or Determination”.<sup>59</sup>

22. The INCADAT commentary on the scope of the Article 15 mechanism notes that several common law jurisdictions have engaged in some measure of debate as to whether the court in the child’s State of habitual residence should make a finding as to the wrongful nature of the removal or whether its decisions should be limited to the applicant’s possession of custody rights under its own law.<sup>60</sup> With respect to the status accorded to an Article 15 decision or determination, requested courts hearing the return proceeding have offered differing opinions as to how conclusive the Article 15 decision or determination might be.<sup>61</sup> In the “Practical Implications” commentary, it is mentioned that recourse to the Article 15 mechanism “will inevitably lead to delay in the conduct of a return petition”.<sup>62</sup> Finally, for “Alternatives to Seeking an Article 15 Decision or Determination”, measures such as greater recourse to the European Judicial Network, seeking a single joint expert, or asking for an opinion of the liaison judge to assist in ascertaining the law of his or her own country have been suggested, according to the circumstances of the individual case.<sup>63</sup>

<sup>53</sup> See Work. Doc. No 50, in *Proceedings* (op. cit. note 32), p. 319.

<sup>54</sup> See P.-v. No 11 (op. cit. note 51), p. 326.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> INCADAT is available online in English, French and Spanish, at: < [www.incadat.com](http://www.incadat.com) >. It should be noted that while INCADAT aspires to be as up-to-date and as jurisdictionally diverse as possible, it is subject to resource constraints and relies upon voluntary submissions of leading case law from various jurisdictions. Moreover, some jurisdictions, for example those with a high volume of cases and / or which have more extensive case law reporting practices, may be over-represented. A range of cases from INCADAT referencing Art. 15 are cited in this paper; all jurisdictions are invited to submit additional case law and legislation on Art. 15 to the Permanent Bureau to add to the material available for analysis.

<sup>59</sup> Available at < [www.incadat.com](http://www.incadat.com) > under “Case Law Analysis” then “Article 12 Return Mechanism” then “Rights of Custody” and “Article 15 Decisions or Determinations”. Analysis prepared by Professor Peter McEleavy (University of Dundee, Scotland) with the assistance of Ms Aude Fiorini (University of Dundee, Scotland).

<sup>60</sup> See *Hunter v. Murrow* [2005] EWCA Civ 976, [2005] 2 F.L.R. 1119, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *Re D. (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [INCADAT cite: HC/E/UKe 880]; *Fairfax v. Ireton* [2009] NZFLR 433 (NZ CA), [INCADAT cite: HC/E/NZ 1018].

<sup>61</sup> See *In the Marriage of R. v. R.*, 22 May 1991, transcript, Full Court of the Family Court of Australia (Perth), [INCADAT cite: HC/E/AU 257]; *Hunter v. Murrow* [2005] EWCA Civ 976, [2005] 2 F.L.R. 1119, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *Re D. (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [INCADAT cite: HC/E/UKe 880]; *5A\_479/2007/frs*, Tribunal fédéral, 11<sup>e</sup> cour civile, 17 octobre 2007, [INCADAT cite: HC/E/CH 953].

<sup>62</sup> See *Re D. (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [INCADAT cite: HC/E/UKe 880].

<sup>63</sup> See *Re F. (A Child) (Abduction: Refusal to Order Summary Return)* [2009] EWCA Civ 416, [2009] 2 F.L.R. 1023, [INCADAT cite: HC/E/UKe 1020].



### C. Possible steps to improve the operation of Article 15

23. In the light of the above background information, the various practices that have developed in diverse Contracting States, and suggestions in other existing resource materials,<sup>64</sup> there may be a number of steps to consider, either in isolation or in combination, to facilitate a more effective application of Article 15.

#### 1. Invitation to Contracting States to make available or improve existing procedures for Article 15 decisions or determinations

24. The use of Article 15 was left optional under the 1980 Convention and Contracting States are free to choose whether to introduce the possibility of an Article 15 decision or determination. However, a substantial majority of Contracting States which have completed their Country Profile have reported that they can issue Article 15 decisions or determinations.<sup>65</sup>

25. The Special Commission may wish to consider whether it would like to invite all Contracting States to make a clear and expeditious procedure available for Article 15 decisions or determinations, in a manner appropriate to their legal systems; and, where already in place, also invite improvement of current procedures for issuing the decisions or determinations (see Section 3, below).

#### 2. Increased availability of information on Article 15 and its operation

##### a. Enhancement of Country Profile information

26. One straightforward step to improve operation of the provision could be to enhance information currently available in relation to Article 15 for each Contracting State, through a modest amendment to the Country Profile, and / or through the availability of additional information for each State in a centralised location on the Child Abduction Section of the Hague Conference website.<sup>66</sup>

27. Currently, four questions on the Country Profile display very general information on Article 15; *i.e.*, as to whether Article 15 decisions or determinations are available, the general types of issuing authorities, who may apply for an Article 15 decision or determination and if Article 15 decisions or determinations are accepted by judicial or administrative authorities in a given State when making the return decision.<sup>67</sup>

28. Further enhanced and more detailed, practical information could be provided by Contracting States, including, for example, which specific authorities (judicial or otherwise) are tasked with providing an Article 15 decision or determination (as well as their contact details),<sup>68</sup> concrete information as to how to make a request, procedures which are applied in issuing a decision or determination, the normal timeframe for issuance, and whether decisions or determinations issued by a Central Authority or other non-judicial actors may be accepted by competent authorities in a given State charged with the return decision.

##### b. Information Document on Article 15

29. A barrier commonly identified in the operation of Article 15 is a lack of experience of some judges and other authorities in issuing a decision or determination, or simply a lack of awareness that such decisions or determinations might be issued at all.<sup>69</sup> Therefore, a short, user-friendly Information Document on the operation of Article 15 for diffusion amongst relevant actors in Contracting States may assist in this respect.

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<sup>64</sup> See for example, *Guide to Good Practice – Implementing Measures* (*op. cit.* note 3), and 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 I - Central Authority Practice*, Bristol, Family Law (Jordan Publishing Ltd.), 2003.

<sup>65</sup> *Supra*, note 17.

<sup>66</sup> See the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section".

<sup>67</sup> See *supra*, note 16, for the text of the questions in full.

<sup>68</sup> The difficulties in identifying the authority to make the decision or determination has been noted in case law, *e.g.*, see *HSB v. AAK*, 17 February 2013, *RFamA* 9441/12 [INCADAT cite: HC/E/IL 1300]. See also Questionnaire responses (*supra*, para. 7).

<sup>69</sup> See Questionnaire responses (*ibid.*).

30. Such a document could include, for example, the rationale and the intended purpose of the Article 15 decision or determination (according to authoritative sources, such as the Explanatory Report), under what (limited) circumstances the requested competent authority might consider requesting an Article 15 decision or determination from the State of habitual residence of the child, what an Article 15 request and decision or determination should typically include (and the importance of it being conclusive), the role of Central Authorities, and representative practices (highlighting those directed at expedition) which may be employed in the request for and the issuing of a decision or determination.

### 3. Clarifying internal procedures and practices

#### a. Implementing legislation

31. From a study of case law dealing with Article 15 and other sources, it is evident that it may be desirable to have implementing legislation for the 1980 Convention that provides, if necessary, a legal basis for and clarifies procedures for obtaining an Article 15 decision or determination. The *Guide to Good Practice, Part II – Implementing Measures*, for example, notes that:

“In some domestic legal systems it is not possible to make “declaratory judgments”<sup>70</sup> [under Article 15] unless explicitly provided for in implementing legislation. Certain countries have therefore provided specifically in their implementing legislation that their courts may make such declaratory orders.”<sup>71</sup>

32. New Contracting States may wish to ensure that adequate provisions enabling Article 15 decisions or determinations are included in any implementing legislation for the 1980 Convention, and current Contracting States might review their implementing legislation or regulations in this respect, if feasible. Spain, for example, has recently legislated to provide clarity as to Article 15 requests directed to national judicial authorities, specifying who may make such a request and which courts are competent, among other things.<sup>72</sup>

#### b. Internal procedures

33. Where implementing legislation is not in place or is difficult to amend, there may be a range of supplementary means within a given jurisdiction to clarify procedures employed to issue an Article 15 decision or determination in the State of a child’s habitual residence: for example, through procedural protocols, court rules, recommendations of judicial councils, court regulatory decisions / practice directions, or through enhanced and more explicit co-operation policies between courts and Central Authorities.

34. With respect to Central Authorities generally in Contracting States (see Section 4(d), below), as they have a positive duty under Article 15 to “so far as practicable assist applicants to obtain such a decision or determination”, there may be a need for each Central Authority to systematise, review and / or make clearer their practices or internal protocols in this respect, where necessary.

#### c. Consistency and expedition in internal procedures and practices

35. When developing, updating or clarifying internal practices, Contracting States will likely wish to be particularly mindful of the requirement of expedition in return proceedings, and also to learn from various best practices at the international level. It would be possible to identify, in the above-suggested Information Document (drawn up, for example, with the assistance of a Working Group), some of the key elements that States may consider and incorporate into

<sup>70</sup> That is, for example, under law of the United States of America, “[a] binding judgment from a court defining the legal relationship between parties and their rights in the matter before the court. A declaratory judgment does not provide for any enforcement, however. In other words, it states the court’s authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything” (Wex, Legal Information Institute (LII), Cornell Law School, < [https://www.law.cornell.edu/wex/declaratory\\_judgment](https://www.law.cornell.edu/wex/declaratory_judgment) >).

<sup>71</sup> See *Guide to Good Practice – Implementing Measures* (*op. cit.* note 3), at para. 6.5.1., p. 34. For example, in Finland.

<sup>72</sup> See Artículo 778 sexies, of *LEY 1/2000, de 7 de enero, de Enjuiciamiento Civil*, SP/LEG/2012 (modified by L 15/2015 of 2 July, with entry into force as of 23-7-2015).

their Article 15 procedures (for example, in relation to a number of the issues identified in Section 4, below). Identifying such elements may prove useful generally and also particularly for States that have already been requesting or issuing Article 15 decisions or determinations but which have experienced the problems identified above, especially problems of delay. For example, a timeframe for the Article 15 procedure could be set out in internal practices or procedures, to ensure it can be a functional element within expedited return proceedings, which should in principle take no longer than six weeks.

#### 4. Improvement of the practical application of Article 15

##### a. *The use of the IHNJ and direct judicial communications*

36. At the Sixth Meeting of the Special Commission in 2011, the use of direct judicial communications to obtain, facilitate or replace an Article 15 request was suggested by an expert from Germany, who expressed the view that using direct judicial communications was preferable as it was “faster and allowed further clarification if necessary.”<sup>73</sup> This was an observation echoed in the Questionnaire responses by a range of Contracting States.<sup>74</sup>

37. The IHNJ has witnessed constant growth since its inception in 1998, and as of July 2017, 81 States have designated one or more Network Judges to the IHNJ, for a total of 124 judges currently in the network in all regions of the world.<sup>75</sup> Moreover, an important guidance document has been developed for the operation and the use of the IHNJ, including for direct judicial communications: *Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases* (hereinafter, the “Principles”).<sup>76</sup> The Principles were endorsed by the Sixth Meeting of the Special Commission – an endorsement noted by the 2012 Council of General Affairs and Policy of the Hague Conference, which also invited the wide dissemination of the Principles.<sup>77</sup>

38. The Principles, setting forth guidance for the use of direct judicial communications in specific cases, offer examples of subject matters that may be the object of direct judicial communications (in particular in the context of the 1980 Convention, and also the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*), which may include, but are not limited to:

- a) scheduling the case in the foreign jurisdiction to make interim orders or to ensure expedited hearings;
- b) establishing whether protective measures are available for the child or other parent upon return;
- c) ascertaining whether the foreign court can accept and enforce undertakings;
- d) ascertaining whether the foreign court can issue mirror orders;
- e) confirming whether orders were made by the foreign court;

<sup>73</sup> “Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)”, Prel. Doc. No 14 of November 2011 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, at para. 223 (hereinafter, “Report of the 2011 SC”) (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Special Commission meetings” and “Sixth Special Commission meeting”).

<sup>74</sup> See the Questionnaire (*op. cit.* note 4). Serbia noted, for example, that employing direct judicial communications in the context of Art. 15 would be considered a best practice, while a number of other States reported the successful use of direct judicial communications in the context of Art. 15, to effectively resolve issues (e.g., Canada (British Columbia), Germany, Switzerland).

<sup>75</sup> A list of members of the IHNJ is available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction” then “The International Hague Network of Judges”.

<sup>76</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Judicial Communications”.

<sup>77</sup> C&R No 68 of the 2011 SC, and “Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (17-20 April 2012)”, C&R No 27 (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Governance” then “Council on General Affairs and Policy”).

- f) verifying whether findings about domestic violence were made by the foreign court; and,
- g) verifying whether a transfer of jurisdiction is appropriate.<sup>78</sup>

39. There are indeed known cases where direct judicial communications have been used in relation to Article 15 requests.<sup>79</sup> In one case, an English High Court judge contacted the Network Judge in Germany about the meaning of a custody order rendered by the German court prior to the mother's removal of the children to England. After receiving a response from the German Network Judge that the mother needed the consent of the father or the court before the relocation, the English court then requested an Article 15 decision / determination from the German court.<sup>80</sup> In another case, an English court explored the possibility of obtaining an Article 15 decision or determination from a Spanish court but decided not to make the request after contacting and receiving information from the Spanish Network Judge that an Article 15 request in Spain could take more than six months, and it could only be considered in the context of a custody hearing taking place in Spain with a comprehensive welfare investigation.<sup>81</sup> It is important to note that this communication took place and the response was received *before* the recent Spanish legislation was introduced to facilitate Article 15 requests.<sup>82</sup> There are also known cases in which direct judicial communications have been used to ascertain or clarify the foreign law of another State, thereby obviating the need to subsequently also request an Article 15 decision or determination.<sup>83</sup>

40. The ability of judges in various jurisdictions to seek information on foreign law in general through judicial communications may vary from State to State, according to national procedure and practice, for example, those applicable to judicial involvement in the ascertainment of foreign law. As highlighted in the Principles, "[e]very judge engaging in direct judicial communications must respect the law of his or her own jurisdiction."<sup>84</sup> However, Article 14 and 15 of the 1980 Convention may be of assistance in this respect, to enable judges to use direct judicial communications for this purpose in the context of the 1980 Convention.

41. As can be seen by the above examples, direct judicial communications might be meaningfully employed, depending on restrictions under national law to, *inter alia*: receive information about procedures and practices of issuing an Article 15 decision or determination in the foreign State (including expected timeframes) to assist in assessing whether to make such a request; receive general information on the relevant custody law in the foreign State or to clarify certain points of ambiguity about the foreign law (which may be taken notice of directly under Art. 14); request information on the interpretation of the foreign law in light of the analysis normally sought in the scope of an Article 15 request; and / or, request that a formal Article 15 decision or determination be issued.<sup>85</sup>

42. From the perspective of the practical operation of the 1980 Convention, using direct judicial communications with respect to Article 15 or the information normally sought under Article 15 (*e.g.*, including to avoid the need for a formal Art. 15 determination or decision) may offer a saving of time and costs in the context of return proceedings.

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<sup>78</sup> The Principles (path indicated in note 76), p. 12.

<sup>79</sup> See also, *supra*, note 74. Canada (British Columbia) described a joint hearing with a court in the United States of America, with parties and counsel present, which clarified the relevant custody rights.

<sup>80</sup> See the *Judge's Newsletter on International Child Protection*, Vol. XIX, Winter 2013, p. 19 (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction" then "*The Judges' Newsletter on International Child Protection*").

<sup>81</sup> *Re K* (Rights of Custody: Spain) [2009] EWHC 1066, [2010] 1FLR 57. See J. Moylan, "The Strengths and Weakness of the Hague Abduction Convention: a 'Child-Centric' view from an English Judge", *International Family Law*, (March 2010), p. 84.

<sup>82</sup> *Supra*, note 72.

<sup>83</sup> See, *supra*, note 74: Germany and Switzerland reported such examples in their Questionnaire responses. See also, *e.g.*, Spanish legislation, *Law on International Legal Cooperation in Civil Matters (Ley de cooperación jurídica internacional en material civil (BOE-A-2015-8564))* of 30 July 2015 (available at: < [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2015-8564](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8564) >), where Arts 4, 35 and 36 enable the use of direct judicial communications to seek information on foreign law, and a recent Argentinian case, *G., L. s/ por su hijo G.P., T. por restitución s/familia p/ rec. ext. de inconstit. – casación*, Supreme Court of Argentina, 27 December 2016 (CSJ 453/2016).

<sup>84</sup> Principle 6.1 of the Principles (path indicated in note 76), at p. 13.

<sup>85</sup> The possibility for a Hague Network Judge to issue a decision or determination under the terms of Art. 15 would, of course, depend on his or her competence in this respect under domestic law.

43. Finally, at the Sixth Meeting of the Special Commission, there was also discussion of the further use of Information Technology to support judicial networking and communication. In this context it was noted that members of the IHNJ would benefit from “a secure platform through the Internet to exchange messages, to build a virtual library to archive and file documents, for example templates for communication such as requests for Article 15 declarations, and to conduct secure video-conferencing.”<sup>86</sup> While the secure communication platform for members of the IHNJ may not be feasible at this time due to resource constraints, the idea of a template or Model Request Form for Article 15 decisions or determinations, in paper and electronic form, may be a worthwhile idea to consider within the scope of improving the operation of Article 15.

*b. Greater care in usage of the Article 15 mechanism and the use of alternatives*

*i. Analysis as to when an Article 15 decision or determination is required*

44. As additional cost and delay may, in general, be considered as inherent in a request for an Article 15 decision or determination,<sup>87</sup> some courts have underlined that requests under Article 15 should be carefully limited to situations where they are strictly required, and where there is genuinely no other option to ascertain the relevant foreign law.<sup>88</sup> In particular, requests that will give rise to adversarial proceedings (including the possibility of appealing the decision or determination) in the State of the child’s habitual residence may be especially time-consuming and costly for litigants. For example, in *Deak v. Deak*, it is noted that it took over two years to receive the final Article 15 decision / determination from the State of the child’s habitual residence.<sup>89</sup>

45. Judicial commentary in case law at times evidences criticism of what are seen in some cases as unnecessary or inappropriate requests for Article 15 decisions or determinations, where it is considered that adequate information is already available to the competent authority hearing the return proceeding, or that there are swifter, alternative processes available which should be employed.<sup>90</sup>

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<sup>86</sup> Report of the 2011 SC (*op. cit.* note 73), at para. 213.

<sup>87</sup> The factor of delay depends, of course, on the procedures in place in a given jurisdiction (see, *supra*, paras 31-35). On the topic of delay see Questionnaire responses (*supra*, para. 7) and discussion in case law, e.g., *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *Re B. (Child Abduction: Habitual Residence)* [1994] 2 FLR 915, [1995] Fam Law 60, [INCADAT cite: HC/E/UKe 42]; *Taylor v. Ford* 1993 SLT 654, 03 September 1992, [INCADAT cite: HC/E/UKs 191]; *In the Marriage of Resina* [1991] FamCA 33, [INCADAT cite: HC/E/AU 257]; *Dellabarca v. Christie* [1999] NZFLR 97, [INCADAT cite: HC/E/NZ 295]; *Re A. (Abduction: Declaration of Wrongful Removal)* [2002] NI 114, [INCADAT cite: HC/E/UKn 593]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *A.A.A. v. A.S.H. (Registrar General for England and Wales and the Secretary for Justice)* [2009] EWHC 636 (Fam.), [INCADAT cite: HC/E/UKe 1019]; *Re F. (A Child)* [2009] EWCA Civ 416, [INCADAT cite: HC/E/UKe 1020]; *Family, appeal request 1930/14, Plonit v. Plonit*, 05 June 2014, [INCADAT cite: HC/E/IL 1317]; *H.I. v. M.G.* [1999] 2 ILRM 1, [2000] 1 IR 110 [INCADAT cite: HC/E/IE 284]; *K. M and N. M v. His Honour Judge J. Nevins and His Honour Judge D. Main, The Attorney General of Ontario, and E. Beckett*, 12 June 1996, [INCADAT cite: HC/E/CA 370].

<sup>88</sup> *Taylor v. Ford* 1993 SLT 654, 03 September 1992, [INCADAT cite: HC/E/UKs 191] notes that a request to the foreign jurisdiction, given the potential for delay, should only be made if there was “real doubt” as to the import or application of the foreign law in the given case.

<sup>89</sup> *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866].

<sup>90</sup> See, e.g., discussion in *Re F. (A Child)* [2009] EWCA Civ 416, [INCADAT cite: HC/E/UKe 1020]; *Viragh v. Foldes*, 415 Mass 96, 612 N.E.2d 241 (Mass. 1993), 29 April 1993, [INCADAT cite: HC/E/USs 81]; *Perrin v. Perrin* 1994 SC 45, [INCADAT cite: HC/E/UKs 108]; *Taylor v. Ford* 1993 SLT 654, [INCADAT cite: HC/E/UKs 191]; *Re C. (Child Abduction) (Unmarried Father: Rights of Custody)* [2002] EWHC 2219 (Fam), [INCADAT cite: HC/E/UKe 506]; *Re A. (Abduction: Declaration of Wrongful Removal)* [2002] NI 114, [INCADAT cite: HC/E/UKn 593]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Fairfax v. Ireton* [2009] 1 NZLR 540, [INCADAT cite: HC/E/NZ 1017]; *A. v. B. (Abduction: Declaration)* [2008] EWHC 2524 (Fam.), [2009] 1 FLR 1253, [INCADAT cite: HC/E/UKe 1056]; *Mercredi v. Chaffe* [2011] EWCA Civ. 272, [INCADAT cite: HC/E/UKe 1064]; *Family, appeal request 1930/14, Plonit v. Ploni*, 05 June 2014, [INCADAT cite: HC/E/IL 1317].



46. Some judges have emphasised the inherently discretionary nature of such a request; a discretion which the competent authority should exercise with care, and that such a request should be exceptional,<sup>91</sup> given the likely delay, and that there may be an array of less onerous methods to ascertain the foreign law (see Section (b)(ii), below). Some judges have also stressed that information as to the foreign custody law available to competent authorities tasked with deciding upon return should be deemed to be *sufficient*, but should not be held to a standard of perfection.<sup>92</sup>

*ii. Use of alternatives before requesting an Article 15 decision or determination (e.g., Arts 8 and 14)*

47. Information submitted by the parties to the return proceedings with respect to the custody rights at issue should normally be adequate for a competent authority to assess relevant issues under the Convention. If the application under Article 8 is also “accompanied or supplemented by” the documents specified in Article 8(3)(e)<sup>93</sup> and (f), this should enhance and support a determination of relevant custody issues by the authority in the State to which the child has been removed or retained.

48. In addition, competent authorities should not overlook Article 14 of the 1980 Convention, which allows them to take judicial notice of law and decisions of the State of habitual residence of the child, without “recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.” The purpose of Article 14 is to simplify proof of that law or the recognition of foreign decisions, thereby enabling the competent authorities to act expeditiously in proceedings for the return of children. In some Contracting States implementing legislation for the 1980 Convention provides that courts may take judicial notice of foreign law or of foreign judicial or administrative decisions directly, in accordance with the terms of Article 14.<sup>94</sup> Legislation may also allow for decisions and determinations of authorities of other Contracting States to be admissible as evidence.<sup>95</sup>

49. However, difficulties may still arise, for example, in particular when the custody rights exist by operation of law rather than through judicial decision, and / or are contested, including through the parties’ contending experts who offer divergent opinions on the foreign law. Further barriers to a swift determination may include custody issues which form part of unsettled, ambiguous or divided opinion in the State of the child’s habitual residence. And more generally, language and other barriers that are often inherent in accessing reliable accounts of foreign law may still be at play.<sup>96</sup>

50. In such circumstances, the competent authority may have recourse to additional methods before resorting to a request under Article 15 for a decision or determination in the State of the child’s habitual residence. As mentioned, if permitted under internal law and procedures, a competent authority may use the IHNJ and direct judicial communications to swiftly resolve ambiguous issues through judicial exchange. Other options may include the engagement of an independent court-appointed expert on the foreign law, or contact with the Central Authority in the State of the child’s habitual residence (e.g., through the Central Authority in the requested State) to request additional general information on the foreign law in the light of the Central Authority’s duty to provide information under Article 7(e).

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<sup>91</sup> However, it has also been noted that in certain circumstances a decision or determination under Art. 15 might be particularly valuable, for example, to ascertain the law of new Contracting States. *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880], at para. 46.

<sup>92</sup> See *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880] (citing *C v. C (Abduction: Rights of Custody)* [1989] 1 WLR 654, 658A), at para. 5.

<sup>93</sup> Art. 8(3)(e) provides for the possible inclusion of “an authenticated copy of any relevant decision or agreement”.

<sup>94</sup> For example in Canada (Ontario), China (Hong Kong Special Administrative Region), Mauritius, Ireland and Sri Lanka. Described in the *Guide to Good Practice — Implementing Measures (op. cit. note 3)*, at para. 6.5.1, p. 34.

<sup>95</sup> For example in Australia, Ireland, United Kingdom, described in *ibid.*

<sup>96</sup> See, for example, the general barriers to accessing foreign law and possible solutions in the form of a new international instrument discussed in “Accessing the content of foreign law and the need for the development of a global instrument in this area — a possible way ahead,” prepared by the Permanent Bureau, Prel. Doc. No 11 A of March 2009 for the attention of the Council of March / April 2009 on General Affairs and Policy of the Conference, and “Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007”, prepared by the Permanent Bureau, Prel. Doc. No 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference (available at < [www.hcch.net](http://www.hcch.net) > under “Governance” then “Council on General Affairs and Policy”).

51. This array of options might be helpfully described in the above-suggested Information Document to better inform competent authorities and other actors of mechanisms available to ascertain foreign law short of a request under Article 15.

*c. Quality of the decisions or determinations given*

52. As noted in the Explanatory Report,<sup>97</sup> and indeed in Article 15 itself with its reference to Article 3, the decision or determination should contain several specific components, with reference both to the applicable custody law of the child's habitual residence and the criteria set out in the Convention as to the alleged wrongful removal of a child (see also below, regarding content / components of an Art. 15 determination, under Section (e)(iv)). Complaints about Article 15 decisions or determinations have included that the information received may be inconclusive,<sup>98</sup> or that generally judges may lack experience in dealing with Article 15 requests or the Convention generally.<sup>99</sup> An Information Document and / or a Model Request Form for Article 15 decisions or determinations may assist with these problems.

*d. Role of the Central Authorities*

53. The Convention does not specify which "authorities" in the child's State of habitual residence should issue Article 15 decisions or determinations. With respect to the role of Central Authorities, the second sentence of Article 15 only mentions that the Central Authority shall "so far as practicable assist applicants to obtain" an Article 15 decision or determination. In practice, as can be seen from the Country Profiles, Central Authorities in some States are considered as issuing authorities for the Article 15 decisions or determinations.<sup>100</sup> This understanding that a Central Authority may be an Article 15 issuing authority is also reflected in the *Guide to Good Practice, Part I — Central Authority Practice*.<sup>101</sup>

54. For example, in the Netherlands, the Central Authority is the designated authority to provide an Article 15 determination, drafting an affidavit on the relevant family law and answering specific questions about the pending case.<sup>102</sup> The Swiss Central Authority, Federal Office of Justice, may provide a "declaration" according to which the removal may be considered wrongful if it has taken place in violation of the Swiss Civil Code. The Swiss Central Authority may equally accept other Central Authorities' Article 15 "declarations" and may then transmit them to the court.<sup>103</sup>

55. In addition, Article 8(3)(f) of the Convention stipulates that when a return application is filed through a Central Authority, the application "may be accompanied or supplemented by – [...] a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the habitual residence of a child or from a qualified person, concerning the relevant law of that State."<sup>104</sup> As described above, this provision was proposed to be mandatory in the preliminary draft of the 1980 Convention, but during the negotiation process was made optional.

<sup>97</sup> *Supra*, para. 12.

<sup>98</sup> See, e.g., *Re F. (Minors) (Abduction: Habitual Residence)* [1992] 2 FCR 595, [INCADAT cite: HC/E/UKe 204], and *supra*, note 12.

<sup>99</sup> See, e.g., discussion in *Re B.-M. (Wardship: Jurisdiction)* [1993] 1 FLR 979, [INCADAT cite: HC/E/UKe 41]; *H.I. v. M.G.* [1999] 2 ILRM 1; [2000] 1 IR 110, [INCADAT cite: HC/E/IE 284]; *Anderson v. Paterson* [2002] NZFLR 641, [INCADAT cite: HC/E/NZ 471]; *A.J. v. F.J.* [2005] CSIH 36, 2005 1 S.C. 428, [INCADAT cite: HC/E/UKs 803]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Achakzad v. Zemaryalai*, 2009 CarswellOnt 5615, 06 July 2009, [INCADAT cite: HC/E/CA 1113]; *Re F. (A Child)* [2009] EWCA Civ 416, [INCADAT cite: HC/E/UKe 1020].

<sup>100</sup> *Supra*, notes 20 and 21.

<sup>101</sup> *Supra*, note 64, at p. 38.

<sup>102</sup> Response of the Netherlands to Question 8.2. in the Questionnaire (*op. cit.* note 4).

<sup>103</sup> Described in the *Guide to Good Practice — Implementing Measures* (*op. cit.* note 3), at para. 6.5.1, p. 34.

<sup>104</sup> The Explanatory Report mentions Art. 8(3)(f) in connection with its commentary on Art. 15 (see *supra*, para. 11).



56. In case law, the problem of rejections by foreign courts of Article 15 “decisions or determinations” in the form of affidavits, letters or statements from Central Authorities has been noted.<sup>105</sup> Some foreign courts may only accept or insist upon a decision or determination from judicial authorities. In one case involving the Netherlands, the Dutch IHNJ judge exceptionally issued an Article 15 decision / determination,<sup>106</sup> as the foreign judge in the requested State did not accept the affidavit drawn up by the Central Authority.

57. The Country Profile (Question 10.2(d) in particular), as suggested above, could be amended to include more precision as to whether a competent authority in the requested State deciding upon return will or will not, as a general rule, accept an Article 15 “decision or determination” that is issued by a Central Authority or another non-judicial authority.

58. However, it may be a matter of discussion by the Seventh Meeting of the Special Commission as to best practices in this respect: *e.g.*, whether the widest acceptance of types of Article 15 decisions or determinations should be encouraged. Also, it may be a matter for discussion the extent to which Article 8(3)(f) should be employed, if such certificates or affidavits can be encouraged to be of a sufficient quality and include the necessary information and analysis, to increase the level of authoritativeness.<sup>107</sup> If Article 8(3)(f) certificates / affidavits of a sufficient quality can be included as a matter of course when an application is filed (in particular where ambiguous / *ex lege* custody rights are at issue), there would naturally be gains in expedition in return proceedings.

*e. Other possible issues for which to seek greater consistency or to develop international best practices*

*i. Who can request?*

59. Article 15 itself specifies that the competent “judicial or administrative” authority may request that the applicant obtain a determination from the authorities of the child’s habitual residence. However, in practice, some jurisdictions accept that applicants or others may independently request an Article 15 decision or determination.<sup>108</sup> For example, under implementing legislation of the United Kingdom, “any person appearing to the court to have an interest in the matter” may request an Article 15 “declaration”.<sup>109</sup> Such flexibility is indeed borne

<sup>105</sup> See, *e.g.*, *Perrin v. Perrin* 1994 SC 45, 29 September 1993, [INCADAT cite: HC/E/UKs 108]; *M. v. K.*, 20/06/2000; Iceland Supreme Court, [INCADAT cite: HC/E/IS 363]; *Re A. (Abduction: Declaration of Wrongful Removal)* [2002] NI 114, [INCADAT cite: HC/E/UKn 593]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880].

<sup>106</sup> Reported in the Questionnaire responses (*op. cit.* note 4).

<sup>107</sup> A potential Information Document and / or Model Request Form (suggested above) could assist all authorities, including Central Authorities, in relation to concerns raised as to the quality of some decisions, determinations or certificates / affidavits provided.

<sup>108</sup> A range of cases touch on the issue of who can request a decision or determination, *e.g.*, see discussion in: *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *Re J. (Minor: Ward of Court)* [1989] Fam 85, [INCADAT cite: HC/E/UKe 32]; *Re B.-M. (Wardship: Jurisdiction)* [1993] 1 FLR 979, [INCADAT cite: HC/E/UKe 41]; *Re B. (Child Abduction: Habitual Residence)* [1994] 2 FLR 915, [1995] Fam Law 60, [INCADAT cite: HC/E/UKe 42]; *Pirrie v. Sawacki* 1997 SLT 1160, 30 October 1996, [INCADAT cite: HC/E/UKs 188]; *Re F. (Minors) (Abduction: Habitual Residence)* [1992] 2 FCR 595, [INCADAT cite: HC/E/UKe 204]; *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S.2d 429 (Fam. Ct. 1991), [INCADAT cite: HC/E/USs 208]; *In the Marriage of Resina* [1991] FamCA 33, [INCADAT cite: HC/E/AU 257]; *Re J. (Abduction: Declaration of Wrongful Removal)* [1999] 2 FLR 653, [INCADAT cite: HC/E/UKe 265]; *Dellabarca v. Christie* [1999] NZFLR 97, [INCADAT cite: HC/E/NZ 295]; *Secretary Attorney-General's Department v. S.*, 08 November 1999, [INCADAT cite: HC/E/AU 311]; *K. M and N. M c.* His Honour Judge J. Nevins and His Honour Judge D. Main, The Attorney General of Ontario, and E. Beckett, 12 June 1996, [INCADAT cite: HC/E/CA 370]; *Anderson v. Paterson* [2002] NZFLR 641, [INCADAT cite: HC/E/NZ 471]; *B. v. UK* [2000] 1 FLR 1, [INCADAT cite: HC/E/ 480]; *Re G. (Abduction) (Rights of Custody)* [2002] 2 FLR 703, [INCADAT cite: HC/E/UKe 505]; *Re C. (Child Abduction) (Unmarried Father: Rights of Custody)* [2002] EWHC 2219 (Fam), [INCADAT cite: HC/E/UKe 506]; *Re A. (Abduction: Declaration of Wrongful Removal)* [2002] NI 114, [INCADAT cite: HC/E/UKn 593]; *Benditkis v. Benditkis* [2007] O.J. No. 4815; 162 A.C.W.S. (3d) 45; 46 R.F.L. (6th) 438, HC/E/CA 730]; *A.J. v. F.J.* [2005] CSH 36, 2005 1 S.C. 428, [INCADAT cite: HC/E/UKs 803]; Family Appeal 001109/06, *G.H. v. G.Y.*, 24 December 2006, [INCADAT cite: HC/E/IL 984]; *A. v. B. (Abduction: Declaration)* [2008] EWHC 2524 (Fam.), [2009] 1 FLR 1253, [INCADAT cite: HC/E/UKe 1056]; *Mercredi v. Chaffe* [2011] EWCA Civ. 272, [INCADAT cite: HC/E/UKe 1064]; *Achakzad v. Zemaryalai*, 2009 CarswellOnt 5615, [INCADAT cite: HC/E/CA 1113]; Family, appeal request 1930/14, *Plonit v. Ploni*, 05 June 2014, [INCADAT cite: HC/E/IL 1317].

<sup>109</sup> Section 8, *Child Abduction and Custody Act 1985*, United Kingdom of Great Britain and Northern Ireland: “The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the

out by information provided by Contracting States in the Country Profile.<sup>110</sup> There has been some commentary in case law that may seem to recommend flexibility to some extent, in allowing a broader array of persons or bodies to request decisions or determinations to further goals of expedition, as interested persons may directly request a decision or determination at any stage in the proceedings or even before an application is lodged.<sup>111</sup> However, such an approach may be weighed against concerns as to the burden placed on an issuing authority by answering increasing requests.<sup>112</sup>

ii. *Who can issue?*

60. As reported in the Country Profiles, judicial authorities and Central Authorities are most commonly tasked with issuing an Article 15 decision or determination.<sup>113</sup> What best or advised consistent practices in this respect may be a topic for discussion, as mentioned above (see in particular Section (d), above, on the role of Central Authorities). However, one difficulty noted in practice with some regularity is the issuance of decisions / determinations or certificates / affidavits (under Art. 15 or Art. 8(3)(f), respectively) through the use of affidavits from private lawyers which may be incorrect or lack sufficient authority.<sup>114</sup>

61. A related issue is perhaps to seek some clarification as to any legal, practical and terminological differences between an Article 15 "decision" or "determination" issued by various authorities and an Article 8(3)(f) "certificate" or "affidavit" issued by a Central Authority, whether these differences be linked exclusively to the issuing body, its degree of authoritativeness, or otherwise.<sup>115</sup>

iii. *Ex parte or adversarial proceedings?*

62. Where an Article 15 decision or determination is made by judicial authorities, some jurisdictions provide for full adversarial proceedings in such cases (including the opportunity for appeal), while others have affirmed that Article 15 decisions or determinations should properly be made through *ex parte* or otherwise expedited procedures. The *Guide to Good Practice, Part II – Implementing Measures* notes that:

"Some common law countries will permit an *ex parte* application for an Article 15 declaration to be made. It may well defeat the purpose of the Convention if a court could only make such a declaration after a defended hearing."<sup>116</sup>

63. The Article 15 mechanism, as with other provisions of the Convention, should likely be utilised in a manner that does not impede the expeditious operation of the Convention. Israel noted in its response to the Questionnaire that such proceedings by nature should be *ex parte* given the urgency of the issues at stake.<sup>117</sup> Ideally, competent authorities should be able to decide swiftly upon receipt of an Article 15 request, using procedural techniques which favour

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removal of any child from, or his retention outside, the UK was wrongful within the meaning of Article 3 of the Convention." (See *Re G. (Abduction) (Rights of Custody)* [2002] 2 FLR 703, [INCADAT cite: HC/E/UKe 505]). Spanish legislation also allows for any interested person ("*cualquier persona interesada*") to apply for an Art. 15 decision / determination (*supra*, note 72).

<sup>110</sup> See, *supra*, para. 10.

<sup>111</sup> See, e.g., discussion in *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S.2d 429 (Fam. Ct. 1991), [INCADAT cite: HC/E/USs 208]; *In the Marriage of Resina* [1991] FamCA 33, [INCADAT cite: HC/E/AU 257]; *Re G. (Abduction) (Rights of Custody)* [2002] 2 FLR 703, [INCADAT cite: HC/E/UKe 505]; and, *Re C. (Child Abduction) (Unmarried Father: Rights of Custody)* [2002] EWHC 2219 (Fam), [INCADAT cite: HC/E/UKe 506].

<sup>112</sup> See, e.g., the response of the Netherlands to the Questionnaire, citing an increasing number of Art. 15 requests being received (*op. cit.* note 4).

<sup>113</sup> *Supra*, para. 9.

<sup>114</sup> See, e.g., discussion in *Bordera v. Bordera* 1995 SLT 1176, 18 August 1994, [INCADAT cite: HC/E/UKs 183]; *Taylor v. Ford* 1993 SLT 654, 03 September 1992, [INCADAT cite: HC/E/UKs 191]; *H.I. v. M.G.* [1999] 2 ILRM 1; [2000] 1 IR 110, [INCADAT cite: HC/E/IE 284]; *K. M and N. M c.* His Honour Judge J. Nevins and His Honour Judge D. Main, The Attorney General of Ontario, and E. Beckett, 12 June 1996, [INCADAT cite: HC/E/CA 370]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Re F. (A Child)* [2009] EWCA Civ 416, [INCADAT cite: HC/E/UKe 1020].

<sup>115</sup> For a brief discussion as to the use of the terminology of "decision" and "determination", see *supra*, note 6.

<sup>116</sup> *Supra*, note 3, para. 6.5.1, p. 34.

<sup>117</sup> *Supra*, note 4.

expedition, with parties subsequently having the opportunity to challenge the Article 15 decision or determination, if appropriate, in the requested State hearing the return proceedings, thereby relieving potential due process concerns.

*iv. Content and components of the Article 15 decision or determination*

64. Some courts have sought to clarify the substantive content and legal analysis that should properly be included in an Article 15 decision or determination. As noted in the Explanatory Report, and indeed in the relevant Articles (*i.e.*, the components of Art. 3, as stipulated by Art. 15), the Article 15 decision or determination should include an analysis of whether, in terms of the domestic law of the State of the child's habitual residence, the applicant possessed rights that would be considered "rights of custody" under the Convention (see Art. 5), actually exercised, that were breached by a wrongful removal or retention of the child, as defined by Article 3.

65. In particular, as noted in the INCADAT commentary,<sup>118</sup> there has been judicial discussion in case law in some jurisdictions as to whether an Article 15 decision or determination should ideally focus primarily on an analysis and description of rights of custody under the foreign, domestic law at issue, versus the application of the autonomous terms of the Convention (*e.g.*, understandings of "rights of custody" under the Convention) to that domestic law.<sup>119</sup> Some judges have argued that it should be the former, as autonomous Conventional terms such as "rights of custody" are susceptible to (and should be subject to) an international understanding.<sup>120</sup> However, other (higher) courts have noted that it is in any case valuable to receive an analysis from the foreign court as to the application of Convention terms to its domestic law, as it is "much better placed [...] to understand the true meaning and effect of its own laws in Convention terms".<sup>121</sup>

*v. Jurisdiction / habitual residence issues*

66. As noted, an issue raised in responses to the Questionnaire for the Sixth Meeting of the Special Commission was the potential challenge to the jurisdiction of a foreign court to make the decision or determination, and in particular to make habitual residence determinations (which would seem a prerequisite to issuing an Art. 15 decision or determination in the sense of assessing a wrongful removal or retention under Art. 3) or to delay in taking jurisdiction to make an Article 15 decision or determination until the requested court hearing the return case makes a finding on the issue of the child's habitual residence.<sup>122</sup> In a number of jurisdictions, the issue of the determination of habitual residence has been largely settled in case law, with courts clarifying, for example, that it is within the purview of their Article 15 function to make

<sup>118</sup> *Supra*, para. 22.

<sup>119</sup> See, *e.g.*, discussion in *Re W. (Child Abduction: Unmarried Father)* [1999] Fam 1, [INCADAT cite: HC/E/UKe 6]; *Re B. (Child Abduction: Unmarried Father)* [1999] Fam 1, [1998] 2 FLR 146, [1998] Fam Law 452, [INCADAT cite: HC/E/UKe 7]; *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *Bordera v. Bordera* 1995 SLT 1176, [INCADAT cite: HC/E/UKs 183]; *Pirrie v. Sawacki* 1997 SLT 1160, [INCADAT cite: HC/E/UKs 188]; *In the Marriage of Resina* [1991] FamCA 33, [INCADAT cite: HC/E/AU 257]; *H.I. v. M.G.* [1999] 2 ILRM 1; [2000] 1 IR 110, [INCADAT cite: HC/E/IE 284]; *Dellabarca v. Christie* [1999] NZFLR 97, [INCADAT cite: HC/E/NZ 295]; *K. M and N. M c.* His Honour Judge J. Nevins and His Honour Judge D. Main, The Attorney General of Ontario, and E. Beckett, 12 June 1996, [INCADAT cite: HC/E/CA 370]; *Re G. (Abduction) (Rights of Custody)* [2002] 2 FLR 703, [INCADAT cite: HC/E/UKe 505]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Fairfax v. Ireton* [2009] 1 NZLR 540, [INCADAT cite: HC/E/NZ 1017]; *A.A.A. v. A.S.H.* (Registrar General for England and Wales and the Secretary for Justice) [2009] EWHC 636 (Fam.), [INCADAT cite: HC/E/UKe 1019]; *Re F. (A Child)* [2009] EWCA Civ 416, [INCADAT cite: HC/E/UKe 1020].

<sup>120</sup> See, *e.g.*, discussion in *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809], and *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866].

<sup>121</sup> *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880], at paras 44 and 71.

<sup>122</sup> See, *e.g.*, a range of cases which deal with such issues of the proper court tasked with determination of habitual residence / rights of custody or other elements: *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *Re J. (Minor: Ward of Court)* [1989] Fam 85, [INCADAT cite: HC/E/UKe 32]; *Re B. (Child Abduction: Habitual Residence)* [1994] 2 FLR 915, [1995] Fam Law 60, [INCADAT cite: HC/E/UKe 42]; *Re S. (A Minor) (Abduction)* [1991] 2 FLR 1, [INCADAT cite: HC/E/UKe 163]; *Re G. (Abduction) (Rights of Custody)* [2002] 2 FLR 703, [INCADAT cite: HC/E/UKe 505]; *Benditkis v. Benditkis* [2007] O.J. No. 4815; 162 A.C.W.S. (3d) 45; 46 R.F.L. (6th) 438, [INCADAT cite: HC/E/CA 730]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; Family, appeal request 1930/14, *Plonit v. Ploni*, [INCADAT cite: HC/E/IL 1317].

a provisional finding or “assumption” on the habitual residence of the child, even if the requested court hearing the return proceeding has not yet pronounced on the matter, or has not yet been seized.<sup>123</sup>

67. Where ambiguity remains in certain Contracting States as to the ability of courts to take jurisdiction or to make provisional findings on habitual residence in the context of Article 15 decisions or determinations, this may be remedied through implementing legislation, or other internal measures to clarify for courts the basis for their jurisdiction under Article 15.<sup>124</sup> An Information Document, citing the common practices and techniques in a number of jurisdictions (*i.e.*, making a provisional finding as to habitual residence) may also assist, and / or a Working Group might make suggestions as to a possible international best practice in this respect.

*vi. Weight given to an Article 15 decision or determination*

68. In the Explanatory Report, academic literature,<sup>125</sup> and in much case law on the application of Article 15, it is generally affirmed that an Article 15 decision or determination received from a foreign authority should be considered advisory and is not binding on the requested court deciding upon the return of the child.<sup>126</sup> However, some discussion has been evident in a number of jurisdictions as to how authoritative an Article 15 decision or determination should be, in particular when the decision or determination emanates from a foreign court (*e.g.*, as opposed to a non-judicial authority), and / or is the result of a full adversarial process which might include appeal to the higher courts of the foreign jurisdiction.<sup>127</sup>

69. In such a latter case, indeed, the House of Lords of the United Kingdom has noted that, “[w]hile ultimately [...] the decision is one for the courts of the requested state, those courts must attach considerable weight to the authoritative decision of the requesting state” on both the issues of the content of the foreign law and its interaction with the autonomous terminology of the Convention.<sup>128</sup> In this case, the court also noted that it would be improper that an Article 15 decision of the Court of Appeal of Bucharest be subject to further challenge by fresh expert opinion commissioned by one of the parties in the return litigation in the requested State.<sup>129</sup>

70. It may be a matter for discussion as to approaches among jurisdictions at the international level as to the weight that might be given to Article 15 decisions or determinations issued in particular by foreign courts, whether they are issued through *ex parte* or adversarial proceedings.

<sup>123</sup> See, *e.g.*, discussion in *Re P. (Abduction: Declaration)* [1995] 1 FLR 831 [INCADAT cite: HC/E/UKe 9]. It is clearly noted that the ultimate decision on the habitual residence of the child rests with the requested court hearing the return proceeding.

<sup>124</sup> See the example of Spain, *supra*, note 72.

<sup>125</sup> See, *e.g.*, N. Lowe, M. Overall and M. Nichols, *The International Movement of Children: Law Practice and Procedure*, Family Law, 2004, para. 15.9, at p. 284 (quoted in *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809], at para. 27), which states: “Accordingly, a declaration made under Art 15 can be no more than persuasive, and cannot bind the parties or the authorities of the requested State, who will accept as much or as little of the judgment as they choose.”

<sup>126</sup> See, *supra*, para. 22, for the INCADAT commentary on this issue.

<sup>127</sup> As to perspectives on the “bindingness” or authority of decisions or determinations, see, *e.g.*, discussion in: *In the Marriage of Resina* [1991] FamCA 33, [INCADAT cite: HC/E/AU 257]; *Hunter v. Murrow* [2005] EWCA Civ 976, [INCADAT cite: HC/E/UKe 809]; *Deak v. Deak* [2006] EWCA Civ 830, [INCADAT cite: HC/E/UKe 866]; *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880]; *Re W. (Child Abduction: Unmarried Father)* [1999] Fam 1, [INCADAT cite: HC/E/UKe 6]; *Re B. (Child Abduction: Unmarried Father)* [1999] Fam 1, [1998] 2 FLR 146, [1998] Fam Law 452, [INCADAT cite: HC/E/UKe 7]; *Re P. (Abduction: Declaration)* [1995] 1 FLR 831, [INCADAT cite: HC/E/UKe 9]; *Re B. (Child Abduction: Habitual Residence)* [1994] 2 FLR 915, [1995] Fam Law 60, [INCADAT cite: HC/E/UKe 42]; *Re S. (A Minor) (Abduction)* [1991] 2 FLR 1, [INCADAT cite: HC/E/UKe 163]; *Bordera v. Bordera* 1995 SLT 1176, 18 August 1994, [INCADAT cite: HC/E/UKs 183]; *Re F. (Minors) (Abduction: Habitual Residence)* [1992] 2 FCR 595, [INCADAT cite: HC/E/UKe 204]; *David S. v. Zamira S.*, 151 Misc. 2d 630, 574 N.Y.S.2d 429 (Fam. Ct. 1991), [INCADAT cite: HC/E/USs 208]; *Dellabarca v. Christie* [1999] NZFLR 97, [INCADAT cite: HC/E/NZ 295]; Family Appeal 001109/06, *G.H. v. G.Y.*, 24 December 2006, [INCADAT cite: HC/E/IL 984].

<sup>128</sup> *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [INCADAT cite: HC/E/UKe 880], at para. 45. In *Re S. (A Minor) (Abduction)* [1991] 2 FLR 1, [INCADAT cite: HC/E/UKe 163], it is noted that while a determination by the foreign court (of the United States of America) did “not bind [the] court”, it should be given “very great weight indeed”.

<sup>129</sup> *Re D. (A Child) (Abduction: Rights of Custody)*, *ibid.*, para. 41.

## D. Conclusion

71. In general, Contracting States to the 1980 Convention might be invited to implement effective Article 15 procedures, or to review and clarify internal procedures where the Article 15 decisions or determinations are already available, including through the setting of meaningful timeframes for their issuance. In parallel, further and more precise information as to Article 15 procedures could be shared with the Permanent Bureau, in connection with a modest enhancement of the Country Profile. The Permanent Bureau might also draft an Information Document on Article 15 (informed, for example, by a short questionnaire circulated to Contracting States to gather further specific information as to procedures) to foster greater awareness and better employment of the Article 15 mechanism, including its judicious use. The drafting of a Model Request Form for Article 15 requests might also be considered. The Information Document and a Model Request Form could both be drafted with the assistance of a small Working Group convened for this purpose.

72. With respect to various issues of operational consistency, it is a matter for the Special Commission to consider whether these require further attention and discussion, for example, by way of the above-mentioned questionnaire, and / or in the context of a Working Group.

### Summary of possible measures to improve the application of Article 15:

- Encouraging the availability of Article 15 decisions or determinations in all Contracting States;
- Encouraging clarification and improvement of internal Article 15 implementation with a view to making the procedures expeditious and effective;
- Enhancing the Country Profile under the 1980 Convention in relation to Article 15;
- Drafting of an Information Document on Article 15, which would also encourage:
  - a) discretion in the use of the Article 15 mechanism and the use of alternatives;
  - b) the systematic use of Article 8(3)(f) and Article 14, and the use of direct judicial communications and the IHNJ, where appropriate;
- Drafting of an Article 15 Model Request Form;
- Improving Central Authority practice in:
  - a) facilitating the obtaining of decisions or determinations from competent authorities;
  - b) encouraging more systematic inclusion of Article 8(3)(f) certificates / affidavits in applications, where deemed necessary;
- Encouraging improved quality of the decisions or determinations (under Art. 15) and certificates or affidavits (under Art. 8(3)(f)) (*e.g.*, through an Information Document and / or Model Request Form);
- Encouraging greater international consistency in a number of identified areas, if feasible (*e.g.*, certain trends / approaches could be described in an Information Document drafted with the assistance of a Working Group; use of a questionnaire to Contracting States to collect additional information).