

Title	Document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges
Document	Prel. Doc. No 5 of June 2023
Author	PB
Agenda Item	Item TBD
Mandate(s)	C&R No 63 of the Seventh Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (10-17 October 2017)
Objective	To promote the use of the Emerging Guidance and General Principles on Judicial Communications
Action to be Taken	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
Annexes	- Annex I: Examples of matters that can be the subject of direct judicial communications - Annex II: General Principles for Judicial Communications (Principles 3-5)
Related Documents	- Prel. Doc. No 5 of July 2017 - Draft document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges - Work. Doc. No 2E (available on the Secure Portal – 2017 SC) - Minutes No 2E (available on the Secure Portal – 2017 SC)

Table of Contents

I.	Executive Summary.....	1
II.	The IHNJ.....	1
III.	Direct Judicial Communications Concerning Specific Cases	2
IV.	Subject Matters for Direct Judicial Communications	2
V.	Establishing Outgoing Direct Judicial Communication in a Specific Case	3
VI.	Principles for Direct Judicial Communications in Specific Cases Including Commonly Accepted Safeguards (Principles 6-9).....	4
	Annex I.....	8
	Annex II.....	13

Document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges

I. Executive Summary

- 1 The purpose of this document is to provide information on cross-border direct judicial communications in specific cases. It is intended for legal practitioners and judges who handle international child protection matters¹ and who may not be familiar with cross-border direct judicial communications. Matters that have been the subject of direct judicial communications include, for example, ascertaining available measures of protection in the State of habitual residence when returning an abducted child, responding to questions concerning parallel proceedings and the taking of jurisdiction, verifying how the issue of transfer of jurisdiction might be determined and, once determined, how it might be implemented, and ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful.²
- 2 This document also provides guidance to practitioners and judges as to how to make use of direct judicial communications and will introduce them to the International Hague Network of Judges (IHNJ), which is responsible for assisting them with such communications. This document also includes the relevant General Principles endorsed by the Hague Conference on Private International Law (HCCH)³ used by judges when making direct judicial communications.

II. The IHNJ

- 3 The IHNJ specialising in family matters was created at the 1998 De Ruwenberg Seminar for Judges on the international protection of children. It was recommended that “the relevant authorities (e.g., court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect, at least initially, of issues relevant to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*” (1980 Child Abduction Convention). It was felt that the development of such a network would facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the 1980 Child Abduction Convention. More than 25 years later, it is now recognised that there is a broad range of international instruments, both regional and multilateral, such as the *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* (1996 Child Protection Convention),⁴ in relation to which direct judicial communications can play a role beyond the 1980 Child Abduction Convention. Since March 2023, the scope of the IHNJ has been extended to the *Convention of 13 January 2000 on the International Protection of Adults*.⁵ The IHNJ currently includes 152 judges from 88 States in

¹ A similar document will be produced in the future for the international protection of adults.

² Examples of direct judicial communications in specific cases can be found in Annex I to this document.

³ See, *infra*, note 11.

⁴ A legal basis for such communications is provided in Arts 8 and 9 of the 1996 Child Protection Convention with regard to transfer of jurisdiction.

⁵ See, Conclusion & Decision (C&D) No 32 of the March 2023 meeting of the Council on General Affairs and Policy of the HCCH available on the HCCH website at www.hcch.net under “Governance” then “Council on General Affairs and Policy” and “2023”.

all continents.⁶ It is important to recall that judges designated to the IHNJ with responsibility for international family matters are sitting judges⁷ with authority and present experience in that area.

- 4 The primary role of a member of the IHNJ is to be a link between their colleagues at the domestic level and other members of the Network at the international level. There are two main communication functions exercised by members of the Network. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the IHNJ or the Permanent Bureau (Secretariat) of the HCCH with their colleagues in the jurisdiction and vice versa.⁸ It may also encompass the sharing of general information with regard to the interpretation and operation of international instruments. The second communication function consists of direct judicial communications between two sitting judges with regard to specific cases. The objective of such communications is to address any lack of information of the competent judge, who, for example, may be seized of a return application under the 1980 Child Abduction Convention and may have questions about the situation and legal implications in the State of the habitual residence of the child.

III. Direct Judicial Communications Concerning Specific Cases

- 5 Current practice shows that direct judicial communications mostly take place in child abduction cases under the 1980 Child Abduction Convention and child protection cases under the 1996 Child Protection Convention. These cases show that these communications can be very useful for resolving some of the practical issues, for example, surrounding the safe return of a child (and accompanying parent, as necessary), including the establishment of urgent and / or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing family or domestic violence (hereinafter referred to as “domestic violence”) or abuse allegations, and they may result in immediate decisions or settlements between the parents before the court in the requested State. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child.
- 6 The role of the Hague Network Judge is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network Judge may be the judge involved in the communication itself, or he or she may facilitate the communication between the judges seised with the specific case. Such communications are different from Letters of Request used in the context of the cross-border taking of evidence. Such taking of evidence should follow the channels prescribed by law. When a judge is not in a position to provide assistance he or she may invite the other judge to contact the relevant authority.

IV. Subject Matters for Direct Judicial Communications

- 7 Matters that have been the subject of direct judicial communications include, for example:⁹
- a) scheduling the case in the foreign jurisdiction:

⁶ A complete list of Members of the IHNJ is available on the website of the HCCH at www.hcch.net under “IHNJ” then “Members of the International Hague Network of Judges”.

⁷ These are judges that are currently carrying out judicial functions.

⁸ Additional information concerning communications of a general nature (*i.e.*, not case specific) can be found in Annex II to this document.

⁹ Illustrations of the listed examples are available under Annex I of this document. Additional information and examples of direct judicial communication can be found in P. Lortie, “Report on Judicial Communications in relation to international child protection”, Prel. Doc. No 8 of October 2006 drawn up for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006), at para. 73 under 7 w). Available on the HCCH website at www.hcch.net under “Child Abduction” then “Special Commission meetings” and “Fifth Special Commission Meeting (November 2006)”.

- i. to make interim orders, e.g., support, measure of protection;
 - ii. to ensure the availability of expedited hearings;
 - b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;^{*10}
 - c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;*
 - d) ascertaining whether the foreign court can issue a mirror order (*i.e.*, same order in both jurisdictions);*
 - e) confirming whether orders were made by the foreign court and clarifying their effect;
 - f) verifying whether findings about domestic violence were made by the foreign court;
 - g) verifying how the issue of transfer of jurisdiction might be determined and, once determined, how it might be implemented;*
 - h) ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful;
 - i) ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (e.g., where necessary, access to free legal representation, etc.);*
 - j) ascertaining whether a parent could be subject to civil / criminal sanctions when returning with a child to the State of habitual residence;*
 - k) responding to questions concerning parallel proceedings and the taking of jurisdiction.
- 8 In accordance with Principle 6.3 set out below, judges shall not discuss or express views on the merits of a case when making such communications. Furthermore, the scope and object of these communications will depend on the extent to which the judge may assist in accordance with the applicable law.

V. Establishing Outgoing Direct Judicial Communication in a Specific Case

- 9 Upon request from one of the parties or on its own motion, and in accordance with the applicable law, a judge seized of an international child protection case may decide to make use of direct judicial communications. Doing so, the following steps should generally be followed with a view to establish a line of communications:
- 1) The judge seized of an international child protection case who wants to make use of direct judicial communications will first verify whether a Judge from their State has been designated to the IHNJ by consulting the list of Members available on the website of the HCCH at www.hcch.net under “IHNJ” then “Members of the International Hague Network of Judges”.
 - 2) The judge seized of an international child protection case will then send a request for direct judicial communications to the member of the IHNJ of their State using the most rapid and appropriate means of communication.
 - 3) The International Hague Network Judge of their State will then forward the request to the International Hague Network Judge of the State where the other party to the dispute is located.

¹⁰ It is important to note that it may also be possible to obtain information through Central Authority communications on matters such as the ones identified with an asterisk.

- 4) The International Hague Network Judge of the other State will locate the Court and the Judge already seized by the other party and will forward to them the request for direct judicial communications.
- 5) If there is no judge seized, the International Hague Network Judge of the other State will determine who should respond to the request or will respond themselves to the request.
- 6) A Judge from the other State will then contact the Judge in the State of origin of the request, subject to the applicable law on data protection and access to information.

10 When making direct judicial communications, one should consider Principles 6 to 9 (reproduced below) as set out in the “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, within the context of the International Hague Network of Judges” (Emerging Guidance and General Principles).¹¹ The Principles for Judicial Communications will provide transparency, certainty and predictability to such communications for both judges involved as well as for the parties and their representatives. Such Principles are meant to ensure that direct judicial communications are carried out in a way which respects the legal requirements in the respective jurisdictions and the fundamental principle of judicial independence in carrying out Network functions. The Principles are drafted in a flexible way to meet the various procedural requirements found in different legal systems and legal traditions.

VI. Principles for Direct Judicial Communications in Specific Cases Including Commonly Accepted Safeguards (Principles 6-9)

6. Communication Safeguards

Overarching Principles

- 6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.
- 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

Commonly accepted procedural safeguards

- 6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:
 - except in special circumstances, parties are to be notified of the nature of the proposed communication;

¹¹ Prel. Doc. No 3 A – Revised - of July 2012 for the attention of the Special Commission of June 2011. This document is available on the HCCH website at www.hcch.net under “Child Abduction” then “Special Commission meetings” and “Sixth Special Commission Meeting (Part I, June 2011; Part II, January 2012)”. The Emerging Guidance and General Principles were endorsed by the Sixth Meeting, Part I, of the Special Commission on the Practical Operation of the 1980 and 1996 Conventions (1-10 June 2011). See Conclusion and Recommendation No 68, available on the HCCH website at www.hcch.net under “Child Abduction” then “Special Commission meetings” and “Sixth Special Commission Meeting (Part I, June 2011; Part II, January 2012)”.

- a record is to be kept of communications and it is to be made available to the parties;¹²
- any conclusions reached should be in writing;
- parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

7. Initiating the communication

Necessity

7.1 In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.

Timing – before or after the decision is taken

7.2 Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.

7.3 The timing of the communication is a matter for the judge initiating the communication.

Making contact with a judge in the other jurisdiction

7.4 The initial communication should ordinarily take place between two Hague Network Judges in order to ascertain the identity of the judge seized in the other jurisdiction.

7.5 When making contact with a judge in another jurisdiction, the initial communication should normally be in writing (see Principle No 8 below) and should in particular identify:

- a) the name and contact details of the initiating judge;
- b) the nature of the case (with due regard to confidentiality concerns);
- c) the issue on which communication is sought;
- d) whether the parties before the judge initiating the communication have consented to this communication taking place;
- e) when the communication may occur (with due regard to time differences);
- f) any specific questions which the judge initiating the communication would like answered;
- g) any other pertinent matters.

7.6 The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel unless otherwise ordered by either of the courts.

8. The form of communication and language difficulties

8.1 Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.

¹² It is to be noted that records can be kept in different forms such as, for example, a transcription, an exchange of correspondence, a note to file.

- 8.2 The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.
- 8.3 Where two judges do not understand a common language, and translation or interpretation services are required, such services could be provided either by the court or the Central Authority in the country from which the communication is initiated.
- 8.4 Hague Network Judges are encouraged to improve their foreign language skills.

Written communications

- 8.5 Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers.
- 8.6 Where the written communication is provided through translation, it is good practice also to provide the message in its original language.
- 8.7 Communications should always include the name, title and contact details of the sender.
- 8.8 Communications should be written in simple terms, taking into account the language skills of the recipient.
- 8.9 As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.
- 8.10 Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.
- 8.11 Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.
- 8.12 All communications should be typewritten.
- 8.13 Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language.

Oral communications

- 8.14 Oral communications are encouraged where judges involved come from jurisdictions which share the same language.
- 8.15 Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.
- 8.16 Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.
- 8.17 Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication.

9. Keeping the Central Authority informed of judicial communications

- 9.1 Where appropriate, the judge engaged in direct judicial communications may consider informing his or her Central Authority that a judicial communication will take place.

ANNEXES

Annex I

Examples of subject matter direct judicial communications¹

- a) **scheduling the case in the foreign jurisdiction:**
 - i) **to make interim orders, e.g., support, measure of protection;**
 - ii) **to ensure the availability of expedited hearings.**

Example:

Justice Singer from the United Kingdom (England and Wales) was considering ordering the return of two children to the United States of America (California) in the context of an application under the 1980 Child Abduction Convention.² Justice Singer engaged in direct judicial communications with the relevant California family law judge, who agreed to make efforts to ensure that child custody proceedings instituted in California would be given priority appropriate to the case if the children were returned. The California judge also agreed to make themselves available at short notice, if needed, in order to make any immediate and necessary interim arrangements for the children prior to their arrival in their jurisdiction. As there was also an outstanding arrest warrant in California for the mother's breach of probation, Justice Singer also liaised with the appropriate Californian criminal judge, arranging for a recall of the warrant until the issues relating to the children were resolved.

- b) **establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered**

Example:

Justice Moylan from the United Kingdom (England and Wales) was considering an application for the return of children to Malta under the 1980 Child Abduction Convention.³ Justice Moylan reported that the taking mother "raised very significant issues about domestic violence both in respect of her and in respect of the children."⁴ Justice Moylan, with agreement of the parties, initiated and carried out direct judicial communications to assist in establishing "what arrangements could be made in the other State to secure the protection of the children in the event that [the judge] ordered their return".⁵ A prompt response was received from the judge in Malta, which: a) identified the relevant agency concerned with child protection in Malta; b) "made clear that child protection measures could be initiated expeditiously when and if required";⁶ and c) made clear that other orders (of protection) could also be made expeditiously. Justice Moylan noted that the communication had provided them with the "necessary degree of what might best

¹ It is important to note that the cases used as examples may depend on laws, judicial procedures and practices that may be unique to the jurisdiction in which the case was adjudicated. Furthermore, the scope and object of these communications will depend on the extent to which the judge may assist in accordance with the applicable law.

² Re M and J (Abduction: International Judicial Collaboration) [2000] 1 FLR 803. See also *Mbuyi v. Ngalula*, 2018 MBQB 176 available at www.canlii.org.

³ This case was reported by Judge Andrew Moylan in *The Judges' Newsletter on International Child Protection*, Vol. XV, Autumn 2009, at p. 17 (available on the HCCH website at www.hcch.net under "Child Abduction" then "The Judges' Newsletter on the International Protection of Children"). Note that this case was subject to the "Brussels II a Regulation" (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) and was therefore also subject to Art. 11(4) of that Regulation, which supplements Art. 13(1)(b) of the 1980 Child Abduction Convention among Member States of the European Union where the Regulation is applicable. See also, under the 1980 Child Abduction Convention, Department of Communities and Justice & Bamfield [2021] FedCFamC1F 263 (8 December 2021), *State Central Authority v. Muteki* (No 2) [2018] FamCA 783, and *State Central Authority & Del Rosario* [2019] FamCA 607 (14 August 2019) all available at www.austlii.edu.au. See also, *ibid.*, *Mbuyi v. Ngalula*.

⁴ *Ibid.*, p. 19.

⁵ *Ibid.*

⁶ *Ibid.*

be described as comfort not only to me but also, perhaps more importantly, to the mother, that a proper protective structure was available so that she felt able to agree to return with the children.”⁷

c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction

Example:

A mother had travelled with her 2½ year old child to the United States of America without the consent of the father, who remained in Greece. The parents were married and had joint rights of custody. A judge in the United States of America (Connecticut) ordered, under the 1980 Child Abduction Convention, the return of the child to Greece, subject to undertakings.⁸ The court received undertakings from each party as well as from counsel for the child. The court in the United States of America affirmed that attempts would be made to arrange a conference call with the judge in Greece to ensure that the undertakings would be honoured there. The court noted that such an arrangement between judges could obviate the need of a bond to insure the fulfilment of any undertaking set by the court in Connecticut.

d) ascertaining whether the foreign court can issue a mirror order (i.e., same order in both jurisdictions)

Example:

The Constitutional Court of South Africa was deciding upon an appeal of an order made under the 1980 Child Abduction Convention for the return of a child to Canada (British Columbia).⁹ The mother, appealing the return order, raised substantiated concerns about domestic violence. The South African court required that the applicant act on a number of undertakings (including refraining from criminal or other legal charges towards the abducting parent, providing financial and other material support, co-operating with child services authorities, etc.) by obtaining an order from the appropriate court in British Columbia mirroring, “insofar that it is possible” the order by the requested court in South Africa. Such a “mirror order” then had to be communicated to the requested court. The South African court, by way of communications made by a Family Advocate, also ensured that enquiries were made to the foreign court, via the Central Authority in British Columbia, regarding a specific time-line as to when a custody determination in the State of habitual residence would be made. The court noted that it was “clearly in the interests of [the child] that certainty as to her custody and guardianship be settled at the earliest possible time.”¹⁰

e) confirming whether orders were made by the foreign court and clarifying their effect

Example:

Judge Kay of the Appeal Division of the Family Law Court of Australia (then member of the IHNJ) was a seized judge in the State of habitual residence of a child who had been returned from New Zealand under the 1980 Child Abduction Convention.¹¹ Judge Kay established direct communications with Judge Mahony (then member of the IHNJ and Principal Judge of the Family Law Court of New Zealand). Judge Kay had cause to rule upon some conditions that had been imposed by a Judge of New Zealand for the

⁷ *Ibid.*

⁸ *Panazatou v. Pantazatos*, No FA 960713571S (Conn. Super. Ct. Sept. 24, 1997). The decision and a summary can be found at www.incadat.com, Ref. HC/E/USs 97 [24/09/1997; Superior Court of Connecticut, Judicial District of Hartford (United States of America); First Instance]. See also *Mbuyi v Ngalula*, *supra*, note 2.

⁹ *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC). The decision and a summary can be found at www.incadat.com, Ref. HC/E/ZA 309 [12/04/2000; Constitutional Court of South Africa; Superior Appellate Court].

¹⁰ Although it is unclear if judicial communications were made directly between judges in this case, it is a clear instance of court-to-court communications, where direct judicial communications could be employed.

¹¹ Reported by Judge Joseph Kay, in “Memoirs of a Liaison Judge,” *The Judges’ Newsletter*, Vol. III / Autumn 2001, *supra*, note 3, at pp. 20-24.

return of a child to Australia. After having made the orders the New Zealand Judge had thought appropriate, Judge Kay wrote to Judge Mahony to draw their attention to some issues of jurisdiction he had identified in their reasons. These were indicative of the New Zealand Judge having possibly infringed upon aspects of the Australian court's jurisdiction.

f) verifying whether findings about domestic violence were made by the foreign court

Example:

A mother removed two children from Ireland to the United States of America (Massachusetts), and her husband, possessing joint rights of custody, filed a return application under the 1980 Child Abduction Convention.¹² A return order for the children to Ireland was issued by the court of first instance, and the mother appealed the decision, arguing an Article 13(1)(b) grave risk of harm exception to return due to domestic violence. The appellate court overruled the first instance return order, indicating that the concern was not only whether the Irish authorities would issue protective orders upon return but rather whether the alleged abuser would violate them, as he had a history of fleeing criminal charges and had violated previous court orders in Ireland and in the United States of America. Protection orders in the context of domestic violence had previously been issued in Ireland, following repeated instances of physical abuse.¹³

g) verifying how the issue of a transfer of jurisdiction might be determined and, once determined, how it might be implemented

Example:

Articles 8 and 9 the 1996 Child Protection Convention contain procedures whereby jurisdiction may be transferred from one Contracting Party to another in circumstances where the judge normally exercises jurisdiction (*i.e.*, in the country of the child's habitual residence). For example, under Article 8 of the 1996 Convention, by way of exception, an authority having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting Party would be better placed in a particular case to assess the best interests of the child, may either: (i) request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or (ii) suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. Article 9 of the 1996 Convention sets out a parallel scheme for the foreign counterpart authorities to also request a transfer of jurisdiction if they think that they are better placed in a particular case to assess the child's best interests. The judicial cooperation system necessary to support these communications is laid out in Articles 31 and following of the 1996 Convention.¹⁴

¹² *Walsh v. Walsh*, 221 F.3d 204; Fed: 1st Cir. (2000). The decision and a summary can be found at www.incadat.com, Ref. HC/E/USf 326 [25/07/2000; United States Court of Appeals for the First Circuit; Appellate Court].

¹³ Although it was not reported that direct judicial communications were used in this case, it is clear that the documented domestic violence and the existence of a protection order in the foreign jurisdiction were important in determining this case. Ascertaining the existence or nature of such an order in a foreign jurisdiction might form the object of direct judicial communications. Art. 13(3) of the 1980 Child Abduction Convention stipulates that "[i]n considering the circumstances referred to in this Article [Art. 13], the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

¹⁴ *AM v KL* [2023] EWFC 15 (concerning a transfer under Art. 8 of the 1996 Convention), and *M & L (Children) Re* [2016] EWHC 2535 (Fam) (concerning a transfer under Art. 9 of the 1996 Convention) both available at www.bailii.org. See also *LM (A Child)* [2013] EWHC 646 (Fam) (United Kingdom, England and Wales) for a case under the Brussels II a Regulation of the European Union concerning a transfer of jurisdiction and the desirability of direct judicial communications (subsequently endorsed in *HJ (A Child)* [2013] EWHC 1867 (Fam) and in *LA v ML & Ors* [2013] EWHC 2063 (Fam)), as Art. 15 of Brussels II a is very similar to Arts 8 and 9 of the HCCH 1996 Convention.

- h) ascertaining the application / interpretation of foreign law in order to assist in establishing whether removal or retention has been wrongful**

Example:

A child of two Polish nationals, previously residing in Poland, had been removed by the mother to the United Kingdom (Wales).¹⁵ A Polish court had ordered that the child live with the mother, while the father was granted contact. The father filed an application under the 1980 Child Abduction Convention for the return of the child to Poland. Proceedings in the United Kingdom were delayed due to confusion around the issue of whether the father possessed custody rights in Poland, in order to meet the Article 3 requirements of the Convention. The United Kingdom (England and Wales) appeal court offered commentary that the case was an occasion where direct judicial communications might be employed to most quickly and effectively assist in resolving this issue, noting that an opinion from the Polish liaison judge “would not be binding, but [...] would perhaps help the parties and the court of trial to see the weight or want of weight, in the challenge to the plaintiff’s ability to cross the Article 3 threshold.”¹⁶

- i) ascertaining that the abducting parent would have due access to justice in the State where the child would be returned (e.g., where necessary, access to free legal representation, etc.)**

Example:

Two children for whom the married parents had joint rights of custody were taken by their mother from the United States of America (California) to Canada (Quebec), the mother’s State of origin.¹⁷ An escalation of legal proceedings followed and the mother initiated custody proceedings in Quebec. A court in California then ordered the mother to return the children to California. The Quebec Court subsequently awarded the mother provisional custody, and the father contested the jurisdiction of the court. The California court awarded interim custody to the father. Finally, the father applied to the Superior Court of Quebec for the return of the children under the 1980 Child Abduction Convention. Further to direct judicial communications, the return to California was ordered. The trial judge in Quebec made contact with the responsible judge in California to ascertain whether the mother would be at a disadvantage upon return for having refused to comply with the California order to return with the children. A judge of the California Supreme Court stated this would not be the case and offered to sign an additional order clarifying that their previous custody order was interim only (the latter was subsequently set out in full in the Canadian judgment).

- j) whether a parent could be subject to civil / criminal sanctions when returning with a child to the State of habitual residence**

Example:

A 1980 Child Abduction Convention return application came before Judge Gillen in Northern Ireland regarding three children who had allegedly been abducted from the United States of America and taken

¹⁵ F (A Child) [2009] EWCA Civ 416; [2009] 2 FLR 1023.

¹⁶ *Ibid*, at para. 12. Justice Thorpe also clarified that “[e]ven the formal determination by a court in the requesting state of the status of the father’s rights according to the domestic law is not determinative, because in the end a question has to be decided according to the autonomous law of the Convention and not the domestic law of the requesting state. But in practice, in the majority of cases, a definitive ruling from the court of the requesting state under Art. 15 will be determinative of the issue.”

¹⁷ *D. v. B.*, 17 May 1996, transcript, affirmed by a majority decision by the Quebec Court of Appeal, 27 September 1996. A summary of the decision can be found at www.incadat.com, Ref. HC/E/CA 369 [17/05/1996; Superior Court of Quebec; Terrebonne, Family Division (Canada); First Instance]. See also State Central Authority & Del Rosario [2019] FamCA 607 (14 August 2019), *supra*, note 3.

to Northern Ireland by their mother.¹⁸ The application was on behalf of the father, residing in the United States of America. The mother raised concerns as to what would happen if she returned to the United States of America with the children. After discussing the case with counsel for each party, Judge Gillen contacted, by telephone, Assistant Superior Judge McElyea in Georgia, United States of America. Judge Gillen received assurances from Judge McElyea that the mother would not be subject to any further civil sanction provided that the children were returned subject to a return order. Judge McElyea also shared her view (whilst not inviting reliance) that it was unlikely that the returning parent would be prosecuted by the Law Enforcement Agency without the initiation of the applicant-father and provided the court with the name and contact details of the local sheriff. Judge McElyea also affirmed that she would try to afford a measure of urgency to the custody hearings upon return of the mother and children. The communications between the judges were conducted in the presence of counsel to the parties and the communications were summarised in written documents also circulated to counsel.

k) responding to questions concerning parallel proceedings and the taking of jurisdiction

Example:

In April 2007 the Canadian Judicial Council approved the concept of judicial networking and collaboration in cases where another jurisdiction is involved. The protocol encourages direct judicial communication with the foreign jurisdiction. The judicial communication is not for the purpose of considering the merits of the case. Rather it is simply to make the other court aware of the dual proceedings. The purpose was best expressed by Martinson J. in *Hoole v. Hoole*, 2008 B.C.S.C. 1248 (British Columbia Supreme Court (Canada)) as follows:

“There is a recognition that judicial communication should not be for the purpose of considering the merits of the case. Instead, it can provide judges with the relevant information needed to make necessary decisions, such as making informed decisions on jurisdiction, including the location of the place of habitual residence. It can also assist judges in obtaining information about the custody laws of the other jurisdiction, which is needed to determine whether a removal or retention was wrongful.”¹⁹

¹⁸ Case reported in “Practical Mechanisms for Facilitating Direct International Judicial Communications in the Context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*: A Preliminary Report,” drawn up by P. Lortie, First Secretary, Prel. Doc. No 6 (and Appendices A and B) of August 2002 for the attention of the Special Commission of September / October 2002 (available on the HCCH website at www.hcch.net under “Child Abduction” then “Special Commission meetings” and “Special Commission of September / October 2002”). See also, *ibid.*, State Central Authority & Del Rosario [2019] FamCA 607 (14 August 2019).

¹⁹ See also S Re (A Child) [2022] EWHC 2053 (Fam) available at www.bailii.org.

Annex II

Judicial communications concerning general matters

It is possible to contact the member of the International Hague Network of Judges for your State to obtain information of a general nature (*i.e.*, not case specific) in relation, for example, to the operation and interpretation of Hague Conventions, as the Hague Network Judge will be the depositary of such information in accordance with Principles 3-5.

Principles for General Judicial Communications (Principles 3-5)

The responsibilities of the Hague Network Judge include the collecting of information and news relevant to the implementation of the Hague Conventions and other international child protection matters, both nationally and internationally. He or she will then ensure that this information is disseminated both internally to other judges within his or her State, and internationally amongst members of the Network.

3. Internally – within the domestic court system

- 3.1 The Hague Network Judge should make his or her colleagues in the jurisdiction aware of legislation and Conventions on child protection in general and inform them as to their application in practice. Initiation of and participation in internal training seminars for judges and legal professionals as well as writing articles for publication is also part of this role.
- 3.2 The Hague Network Judge makes certain that other judges within his or her jurisdiction who hear international child protection cases receive their issue of *The Judges' Newsletter on International Child Protection*, published by the Permanent Bureau of the Hague Conference, and are aware of any other information, such as on the International Child Abduction Database (INCADAT) of the Hague Conference,¹ that might contribute to the development of the expertise of the individual judge.

4. Internally – relationship with Central Authorities

Another function of a Network Judge is to promote effective working relationships between all those involved in international child protection matters so as to ensure the most effective application of the relevant rules and procedures.

- 4.1 It is recognised that the relationship between judges and Central Authorities can take different forms.
- 4.2 Central Authorities may play an important role in giving support to judicial networks and in facilitating direct judicial communications.
- 4.3 Successful working relationships depend on the development of mutual trust and confidence between judges and Central Authorities.
- 4.4 Meetings involving judges and Central Authorities at a national, bilateral, regional or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.
- 4.5 The Hague Network Judge will promote within his / her jurisdiction international child protection collaboration generally.

¹ Accessible at www.incadat.com.

5. Internationally – with foreign judges and the Permanent Bureau

- 5.1 The Hague Network Judge will encourage members of the judiciary in his / her jurisdiction to engage, where appropriate, in direct judicial communications.
- 5.2 The Hague Network Judge may provide, or facilitate the provision of, responses to focussed enquiries from foreign judges concerning legislation and Conventions on international child protection and their operation in his / her jurisdiction.²
- 5.3 The Hague Network Judge is responsible for ensuring that important judgments dealing with direct judicial communications, among other matters, are sent to the editors of the International Child Abduction Database (INCADAT).
- 5.4 The Hague Network Judge may be invited to contribute to the Permanent Bureau's *Judges' Newsletter*.
- 5.5 The Hague Network Judge is encouraged to participate in international judicial seminars on child protection in so far as it is relevant and possible.

² It is important to note that Central Authorities under Art. 7(e) of the 1980 Child Abduction Convention shall, in particular, either directly or through any intermediary, take all appropriate measures “to provide information of a general character as to the law of their State in connection with the application of the Convention”.