

**Example 1**

*A 5-year old Australian national, Sam, lives with his mother in Australia. He has lived there continuously for the last 4 years. Sam's father is a Moroccan national who lives and works in London as a painter. He is married to Sam's mother but they are now separated. He wishes to apply for access as Sam's mother is refusing to let him see Sam.*

The Contracting State where the child is **habitually resident** will have jurisdiction (Art 5(1)). This is Australia until such time as the child's habitual residence changes to another Contracting State (Art 5(2)), subject to Article 7 in relation to Child Abduction (see below).

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**Example 2**

*Sam's mother agrees that Sam can spend one week with his father in London. Two months have passed and Sam's mother has not heard from either Sam or his father. She makes an application for return under the 1980 Hague Child Abduction Convention. 10 months have now passed since the wrongful retention and the proceedings have still not concluded.*

Providing the retention was wrongful according to Australian law, the Contracting State of habitual residence **immediately before** the retention keep their jurisdiction, i.e. Australia. Providing the mother has not acquiesced to the retention (Art 7(1)(a)) and as one year **since the mother had or should have had knowledge** of the retention (Art 7(1)(b)) has not passed, jurisdiction under the 1996 Convention will remain with Australia.

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**Example 3**

*The 1980 Convention proceedings have concluded, 11 months after the wrongful retention. The father successfully makes out a grave risk defence and a non-return Order under Art 13(1)(b) of the 1980 Convention is made. The mother then applies for custody in Australia.*

As there has been no acquiescence and a year has not passed since the mother knew or should have known about the wrongful retention (Art 7(1)), jurisdiction remains with Australia notwithstanding that Sam may now be habitually resident in England. **However**, assuming habitual residence is in England, a transfer of jurisdiction to Australia may be made under Articles 8 or 9 as Sam is an Australian national (Art 8(2)(a) and 9(1)). The original 'home State' must use Article 8 and the 'new State' must use Article 9. In both cases, the requesting State must consider that Australia is **better placed to assess Sam's best interests** and the receiving State must consider that the transfer is in Sam's best interests.

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**Example 4**

*3 years have passed since the non-return Order and Sam and his father are now settled and habitually resident in England. Sam's father now wishes to divorce Sam's mother and initiates divorce proceedings in Morocco (where he is a national). He also wishes to relocate with Sam there, which Sam's mother fiercely opposes.*

Assuming Morocco has jurisdiction to deal with the divorce, they will **not** have jurisdiction to deal with the relocation issue under Art 10. This is because **neither parent is habitually resident in Morocco** (see Art 10(1)(a)). England, however, will have jurisdiction under the 1996 Convention as Sam is now habitually resident there and Art 7(1)(b) has been satisfied.

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**Example 5**

*Sam's mother is furious and takes Sam away from his father in England, wrongfully removing him to Australia. Sam's father is concerned that she has not changed and will cause Sam irreparable harm by abusing him.*

Notwithstanding that jurisdiction will remain with England (until Art 7(1)(a) or (b) are satisfied), Australia can take **urgent necessary measures** under Art 11 to protect Sam (but **not** provisional measures under Art 12; see Art 7(3)). These will lapse if and when the English authorities take measures required by the situation. Sam's father could either issue 1980 Hague Child Abduction proceedings or apply for an Order requiring return in England and rely on the recognition and enforcement provisions under the 1996 Convention (see below).

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**Example 6**

*Sam is swiftly returned to his father in England. As Morocco does not have jurisdiction under Art 10 to deal with the relocation issue alongside the divorce, Sam's father issues an application for permanent relocation in the English courts.*

The starting position is that the English authorities, in exercising their jurisdiction under Art 5, **should apply their own law** (Art 15(1)). However, they may decide to consider Moroccan law (Art 15(2)) and to frame any relocation Order with the terminology used in Moroccan law to try and ensure its smooth continuation.

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**Example 7**

*Sam's father's relocation application is successful and they move to Morocco. The divorce proceedings have concluded and, two years later, Sam's father moves in with his new boyfriend, John, in Argentina, taking Sam with him. They all live there for a year before Sam's father and John enter into a same-sex marriage. They then all move to Morocco to live permanently.*

Although Argentina is not a Contracting State, the provisions on applicable law applies to the law of non-Contracting States (Art 20). If Sam was habitually resident in Argentina and it can be shown that, by operation of the law in Argentina, John has parental responsibility (without intervention from a judicial or administrative authority), that parental responsibility will subsist in Morocco even after Sam becomes habitual resident there (Art 16(3)).

Since same-sex activity is illegal in Morocco, the Moroccan authorities may refuse to apply Argentinian law as it is manifestly contrary to public policy (Art 22). In taking this step, the Moroccan authorities must take Sam's best interests into account.

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**Example 8**

*As part of the relocation proceedings that took place in England, Sam's mother was granted direct contact over the Summer holidays in Australia. Sam's father refuses to hand over their child. He adds that Sam is also against the idea and that the courts in England would never have allowed such contact if they had actually listened to Sam's views.*

**Assuming** the father's observation that Sam was not heard is true, recognition of the English measure **may** not be recognised in another Contracting State if the fact that Sam was not heard is **in violation of the latter State's fundamental principles of procedure** and the case was not urgent (Art 23(2)(b)). Assuming that the Order is recognisable, Sam's mother can seek enforcement pursuant to Articles 26 and 28.

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**Example 9**

*Sam is now 17. Unfortunately, John has since joined a dangerous cult. He tries to get Sam to join. Sam's father informs the Moroccan police but before they can do anything, John snatches Sam and disappears. Sam's father suspects John has taken Sam to Uruguay.*

The Central Authority in Uruguay has a **duty to assist in locating Sam** as he is in need of protection and may be present there (Art 31(c)). Since no measures under the Convention have been taken in Morocco, they do not fall under a duty to inform the authorities in Uruguay under Art 36. As Sam is 17, the 1980 Child Abduction Convention will **not** apply but the 1996 Convention will apply (Art 2).

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