

1996 Hague Convention

IAML Family Law Cross Border Conference
 28th February – 1st March 2016
 Moscow, Russia

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


- Overview
- Jurisdiction
- Applicable Law
- Recognition & Enforcement
- Co-operation

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Overview



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Overview 

Aims

The **1996 Hague Convention** aims to improve the protection of children in cross-border cases and came into effect in the United Kingdom on 1 November 2012.

The Convention addresses a wide range of issues involving children and aims to create a more unified approach in international cases. It does not purport to harmonise substantive law.

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Overview 

Scope (Article 1)

The Convention deals with:

- Jurisdiction
- Applicable Law (General)
- Applicable Law (Parental Responsibility)
- Recognition & Enforcement
- Co-operation

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Overview 

Scope

Article 3 gives a non-exclusive list of measures of protection within the Convention's scope. The following are included:

- Measures attributing / terminating parental responsibility
- Residence / Contact / Leave to remove
- Guardianship
- Child's representation / Wardship
- Placement in foster care / care by *kafala*
- Local Authority supervision
- Administration of child's property

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Overview 

Scope – Exceptions

Article 4

The Convention does not apply to –

- a) the establishment or contesting of a parent-child relationship;
- b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- c) the name and forenames of the child;
- d) emancipation;
- e) maintenance obligations;
- f) trusts or succession;
- g) social security;
- h) public measures of a general nature in matters of education or health;
- i) measures taken as a result of penal offences committed by children;
- j) decisions on the right of asylum and on immigration.


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Overview 

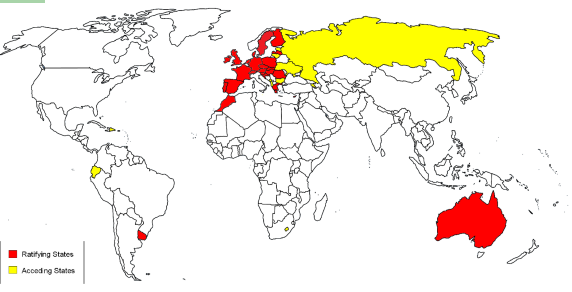
Contracting States (as at 17/03/14)

Ratifying States	Acceding States
Australia	Albania
Austria	Bulgaria
Canada	Ecuador
Cyprus	Estonia
Czech Republic	Lithuania
Denmark	Malta
Finland	Montenegro
France	Russian Federation
Germany	Ukraine
Greece	Armenia
Hungary	Dominican Republic
Ireland	Lesotho
Latvia	
Luxembourg	
Monaco	
Morocco	
Netherlands	
Poland	
Portugal	
Romania	
Slovakia	
Slovenia	
Spain	
Sweden	
Switzerland	
United Kingdom	
Uruguay	

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Overview 

Ratifying and Acceding States




■ Ratifying States
■ Acceding States

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Jurisdiction



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Jurisdiction 

GENERAL JURISDICTION (Arts 5 – 10)

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graph TD
    A[General Jurisdiction] --> B[Article 5  
General Rule]
    A --> C[Article 6  
Refugees etc.]
    A --> D[Article 7  
Child Abduction]
    A --> E[Article 8 - 9  
Transfer of jurisdiction]
    A --> F[Article 10  
Divorce etc.]
    
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Jurisdiction 

GENERAL JURISDICTION (Arts 5 – 10)

Article 5
The Starting Point



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Jurisdiction 

The Starting Point Article 5

Article 5

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
- (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

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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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Jurisdiction 

**GENERAL JURISDICTION
(Arts 5 – 10)**

Article 6
Refugees etc.



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Jurisdiction 

**Refugees etc.
Article 6**

Where a child is present in a Contracting State due to being:

- A refugee; or
- Displaced due to disturbances in their country

Or the child's habitual residence cannot be established...

The Contracting State where the child is present will have jurisdiction.

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GENERAL JURISDICTION (Arts 5 – 10)

Jurisdiction



Article 7 Child Abduction



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Child Abduction Article 7

Jurisdiction



General rule:

Where a child is wrongfully removed or retained, the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction.

Removal or retention will be considered wrongful according to law of Contracting State immediately before the removal / retention.

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Child Abduction Article 7

Jurisdiction



However, where a child has acquired a habitual residence in the new State, jurisdiction will shift if:

- Everyone who has rights of custody has acquiesced in the removal / retention

OR

- The child has resided in the new State for at least a year after the person / other body having rights of custody knew or should have known of the child's whereabouts;
- No request for return is still pending; and
- Child is settled.

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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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Child Abduction Brussels II bis

Jurisdiction 

There is **no equivalent provision** in the 1996 Convention of Article 11(6) to (8) in Brussels II bis (allowing an Order requiring the return of the child in the country the child was abducted from to take precedence over a judgement of non-return pursuant to Article 13 of the 1980 Hague Child Abduction Convention made in the State the child was abducted to).


Furthermore, Article 11(6) to (8) in Brussels II bis imposes an obligation on a court that has refused to order the return of a child under Article 13 of the 1980 Child Abduction Convention to transmit relevant documents to the State where the child was abducted from. **No such obligation** appears in the 1996 Convention, although the competent authorities may make a request for information under Article 34 of the 1996 Convention where a measure of protection is being contemplated.

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GENERAL JURISDICTION (Arts 5 – 10)

Jurisdiction 

Articles 8 and 9
Transfer of Jurisdiction



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Transfer of Jurisdiction Articles 8 and 9

Jurisdiction



It is possible to transfer jurisdiction to a Contracting State where the child is not habitually resident but with which a child has a connection:

- Child is a national or has property located there;
- That State is seized of an application for divorce / legal separation / nullity; or
- Child has a substantial connection with that State.

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Transfer of Jurisdiction Articles 8 and 9

Jurisdiction



The provisions in **Article 8** (*requests for transfer made by State where child is habitually resident*) and **Article 9** (*vice versa*) are similar, but differ slightly.

In both situations:

- The requesting State must consider that the other State is better placed to assess the child's best interests; and
- The transfer should be in the child's best interests.

However, where a request is made by a State where the child is **not** habitually resident (Article 9), the authorities in the other State must expressly accept the request.

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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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GENERAL JURISDICTION (Arts 5 – 10)

Jurisdiction



Article 10 Divorce etc.



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Divorce etc. Article 10

Jurisdiction



A Contracting State dealing with the parents' divorce / legal separation / nullity may have jurisdiction to deal with matters in relation to the child under the Convention...

... despite the fact that the child is habitually resident in another Contracting State

providing that the provisions in Article 10 are met (e.g. one parent is habitually resident in the State dealing with the divorce and both parents agree to that State having jurisdiction).


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Example 4

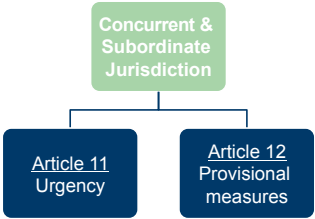
3 years have passed since the non-return Order and Sam and his father are now settled and habitually resident in England. Sam's father now wishes to divorce Sam's mother and initiates divorce proceedings in Morocco (where he is a national). He also wishes to relocate with Sam there, which Sam's mother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


Concurrent and Subordinate Jurisdiction (Articles 11 – 12)



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graph TD
    A[Concurrent & Subordinate Jurisdiction] --> B[Article 11 Urgency]
    A --> C[Article 12 Provisional measures]
    
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Jurisdiction 

Concurrent and Subordinate Jurisdiction

Article 11
Urgency



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Jurisdiction 

Urgent Measures Article 11

Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

Jurisdiction exercised under Article 11 is:

- Concurrent; and
- Subordinate

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Concurrent and Subordinate Jurisdiction

Jurisdiction



Article 12 Provisional Measures



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Provisional Measures Article 12

Jurisdiction



Article 12

(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

Jurisdiction exercised under Article 12 is:

- Concurrent; and
- Subordinate


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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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Jurisdiction 

And finally...

Article 13: Lis pendens


Must abstain from exercising jurisdiction where same / similar measures in another Contracting State having jurisdiction under Articles 5 – 10 are still under consideration unless other State has declined jurisdiction.

Article 14: Continuation of measures


A measure taken when exercising jurisdiction under Articles 5 – 10 will remain in force after jurisdiction is lost until a new Contracting State has modified, replaced or terminated that measure.

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Applicable Law



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Applicable Law 

The General Position

Article 15

(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

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Applicable Law 

Foreign Law

(2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection.

Note:

- This will only apply 'exceptionally'
- Application / consideration of foreign law should be in the child's best interests

Also note Article 15(3) regarding change of habitual residence.


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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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Applicable Law 

Parental Responsibility

Article 16

- (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the **law of the State** of the habitual residence of the child.
- (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the **law of the State** of the child's habitual residence at the time when the agreement or unilateral act takes effect.
- (3) Parental responsibility which exists under the **law of the State** of the child's habitual residence subsists after a change of that habitual residence to another State.
- (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the **law of the State** of the new habitual residence.

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Applicable Law 

Parental Responsibility

Terms:

- "law of the State" includes the law of non-Contracting States.
- "without the intervention of a judicial or administrative authority" excludes cases where the intervention is purely passive, e.g. involvement is limited to registering a declaration without exercising control over the matter's substance.

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Applicable Law 


Other provisions

Article 19: Protection of third parties acting on false belief that someone holds parental responsibility.

Article 21: Exclusion of choice of law rules where foreign law applied, though see Article 21(2) in relation to the application / consideration of the law of a non-Contracting State.

Article 22: May refuse to apply designated law if *manifestly contrary to public policy*.

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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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Recognition & Enforcement



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Recognition The General Rule (Article 23(1))



The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

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Recognition Non-Recognition



Article 23

(2) Recognition may however be refused –

- a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
- b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;
- c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

Continued...

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Recognition Non-Recognition

Recognition &
Enforcement



...Continued

- d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
- e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
- f) if the procedure provided in Article 33 has not been complied with.

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Advanced Recognition

Recognition &
Enforcement



Article 24...

... allows any interested person to ask for a declaration confirming whether or not a measure will be recognised in another Contracting State.

May be useful in **relocation cases** where a parent seeks assurance that an Order granting them contact with their child will be recognised in another Contracting State.

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Enforcement (Arts 26 and 28)

Recognition &
Enforcement



Enforcement proceedings may be initiated by any interested party where there is no voluntary compliance by requesting that a measure of protection be **declared enforceable** (or registered for enforcement).

State must employ a simple and rapid procedure for such a declaration of enforceability / registration.

Can only be refused using the same grounds for non-recognition.


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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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Recognition & Enforcement 

Enforcement (cont.)

Article 27


No review of merits (other than what is necessary to apply the rules on recognition & enforcement).

Article 28


Measures will be enforced as if made by the authorities in that State and to the extent provided by that State's laws.

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Co-operation



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Co-operation 


Central Authorities

For the United Kingdom, the Central Authority's functions under the Convention are discharged by:

England	The Lord Chancellor
Wales	The Welsh Ministers
Northern Ireland	The Department of Justice
Scotland	The Scottish Ministers

In England, the Lord Chancellor delegates his day to day duties to the International Child Abduction and Contact Unit.

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Co-operation 


Central Authorities

Article 30

(1) Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention.

(2) They shall, in connection with the application of the Convention, take appropriate steps to provide information as to the laws of, and services available in, their States relating to the protection of children.

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Co-operation 

Specific duties

Article 31

Central Authorities (directly or through public authorities or other bodies) shall:

1. Facilitate communication and offer assistance regarding (i) transfer of jurisdiction and (ii) co-operation provisions in the Convention.
2. Facilitate agreed solutions via mediation, conciliation etc.
3. Assist in locating child on a request by competent authority of another Contracting State where child is in need of protection.

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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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Obligatory co-operation and communication (1)

Co-operation 


Article 33:
Cross-border placement of children

- Contracting State (with jurisdiction under Articles 5 to 10) **must** consult with the Contracting State where placement of a child is being contemplated.
- They **must** provide a report on the child and the reasons for the proposed placement / provision of care.

State where placement is proposed **must** give consent, otherwise placement may be refused recognition under Article 23(2)(f).

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Obligatory co-operation and communication (2)

Co-operation 


Article 36:
Contracting State in which measures have been taken or are under consideration **shall** inform the State (including a non-Contracting State) where:

- Child is exposed to a *serious danger*; and
- Child has changed residence or is present in the latter State

about the danger involved and the measures taken or under consideration unless Article 37 applies (e.g. child would be put in danger).

Examples of *serious danger*: Child exposed to drugs
Child requiring constant medical treatment

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Co-operation 

Other provisions

Convention provides for other instances where co-operation is envisaged (but is not made mandatory):

- **Article 32** (Requesting a report on the child's situation and that measures of protection are taken)
- **Article 34** (Requesting information when contemplating taking a measure of protection)
- **Article 35(1)** (Requesting assistance in implementing measures abroad)
- **Article 35** (Requesting information, evidence or a finding in access cases)
- **Article 40** (Requesting certificate specifying details of parental responsibility powers)

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Co-operation 

FPR and Regulations (England)

Part 31 (with PD31A) of the Family Procedure Rules 2010 should be referred to in respect of proceedings for the recognition, non-recognition and registration of measures to which the 1996 Convention applies.

The Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 took effect on the day the Convention entered into force.

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