

Questionnaire concerning the practical operation of the Convention and views on possible recommendations *

* “We” in the following replies refers to our Central Authority.

(1) The role and functioning of Central Authorities

1. *Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.*

There are so far no particular difficulties in communicating and cooperating with other Central Authorities. Exchange by email has shown to be very effective in prompting quick response.

2. *Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?*

The duties of Central Authorities as set out in Article 7 have not raised any particular problems in practice so far.

- *Particular question:*

3. *What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 c))? Do these measures lead to delay?*

As soon as the abducting parent is located, we will ascertain whether he/she is willing to voluntarily return the child to the requesting state. Apart from informing the abducting parent of the legal provisions that require him/her to return the child, we will also provide counselling and social services to him/her and to the child where appropriate. If the abducting parent indicates willingness to do so, we will take the following steps :-

- We will inform the left-behind parent and ask him/her insofar as practicable to come to Hong Kong to collect the child.
- We will arrange for an urgent hearing before the court which is attended by us (as the Central Authority), the left-behind parent and the abducting parent, if available.
- In the court hearing, we will seek a court order for the return of the child on the basis of consent of the abducting parent. In cases where the left-behind parent cannot attend the court hearing, we will also submit to the court for its approval of the proposed practical arrangements for the return of the child such as the details of the departure flight, the person to accompany the child to the airport, the person to pick up the child in the state of habitual residence etc. to ensure the safe return of the child.

In our experience, the above measures would not lead to delay. Once the abducting parent is located we will issue Hague proceedings, arrange for an early hearing date and prepare affidavits etc in accordance with our domestic rules that govern child abduction proceedings. The progress of the Hague proceedings would not be held in abeyance while ascertaining the abducting parent's wishes. If the abducting parent is willing to co-operate, the voluntary return will be embodied in a consent order. If he/she wishes to contest the Hague proceedings, the case will be decided by the Court.

4. *What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7g))? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?*

When we receive a request for return from a Central Authority, if it appears to us that the left-behind parent may be eligible for legal aid or upon request, we will provide the left-behind parent or his/her Central Authority information about the legal aid services in Hong Kong. When we receive the left-behind parent's legal aid application we will forward the same to our Legal Aid Department for urgent processing. If the left-behind parent is granted legal aid, the Legal Aid Department will, assign a solicitors firm and/or a counsel to advise the left- behind parent and to represent him/her in the Hague proceedings.

Our legal aid services are funded by the government and are available to any person, resident or non-resident, involved in legal proceedings instituted within jurisdiction. Hague proceedings are instituted in the Court of First Instance and as such are covered by legal aid.

Applicants for legal aid are required to pass a merits test and means test. Merits test is usually not a problem in this type of cases but there could be difficulties with the means test. Legal Aid Department has to ensure that the applicant, who may be the left-behind parent or the abducting parent, and who may be resident in Hong Kong or making an application from abroad, is financially eligible for legal aid. It may take some time before the applicant produces all the information relating to his financial resources. The applicant may be over our limits, in which case his/her application for legal aid will be refused. He/she may be required to pay a contribution towards the costs of the proceedings and he/she may not want to pay the contribution, in which case the offer of legal aid will lapse. Legal aid will not be granted solely for the purpose of providing legal advice.

The above arrangement would not result in delay. When we receive a request for return from a Central Authority, we will take initial steps including ascertaining from the immigration authority as to whether the child is indeed within jurisdiction and if so, apply for a stop order from the Court to prevent further removal of the child from jurisdiction pending Hague proceedings. After these initial steps have been taken, we then advise the applicant of the options available to him/her in pursuing the Hague proceedings. If the applicant wishes to instruct private lawyer, we will provide list of firms experienced in handling these matters. If the applicant wishes to apply for legal aid, we will provide information to enable the applicant to apply for legal aid. When legal aid is granted, we will then transfer the case to the solicitors firm assigned by the Legal Aid Department. Where appropriate and subject to availability of resources, the Central Authority may take up a case and represent the applicant upon his/her undertaking to pay our reasonable legal costs. If the Central Authority will take up a case and represent the applicant upon his/her undertaking to pay reasonable legal costs, there is no need for the applicant to apply for legal aid.

According to our limited experience, in countries where the Central Authority does not directly handle Hague proceedings, there is usually some delay since no Hague proceedings would be instituted and no substantive legal advice could be given pending the processing of the legal aid application or the assignment of a pro bono lawyer.

5. *Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?*

We do represent applicant parents in Hague proceedings from time to time. So far it has not given rise to particular difficulties or conflicts with respect to other functions carried out by us as Central Authority.

6. *What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives appropriate protection, especially where issues of (alleged) abuse or violence have arisen?*

We have so far not encountered cases of this type.

In a case like this and in appropriate circumstances we would apply to the court to make the child a ward of court. The effect is that the court could ask for a social welfare report to be prepared and to grant appropriate orders to protect the child such as placement of the child by the Social Welfare Department etc.

If the Court feels that separate representation for the child is warranted, a request will be made to the Official Solicitor who will then be appointed as guardian ad litem to safeguard the interests of the child. The Official Solicitor in Hong Kong represents persons under a legal disability, i.e. minors or mentally incapacitated persons when no other suitable person or body is able and willing to act for the purpose of preventing a possible denial of justice and/or safeguarding the welfare of the person under disability.

In particular, does your Central Authority:

- a. *ensure that appropriate child protection bodies are alerted;*

In appropriate circumstances child protection bodies such as the Police and the Social Welfare Department would be alerted.

- b. *Provide information to either parent in respect of legal, financial, protection and other resources in your State;*

We would provide the relevant information to either parent subject to the general rule that the provision of information does not contravene confidentiality and personal data protection principles.

- c. *Facilitate contact with bodies providing such resources;*

We would facilitate such contact, by referring appropriate cases to the relevant bodies.

- d. *assist in providing any necessary care for the child pending custody proceedings;*

If circumstances require, the Social Welfare Department will arrange suitable placement to ensure the child's safety and well-being. A social worker will take up the case to ensure the needs of the child are met, such as providing counselling and support, accompanying the child to appear before the court.

- e. *Provide any other support, advice or information to a parent who accompanies the child on return;*

Counselling service to assist the parent to understand the situation and sort out emotions and anxiety, as well as welfare assistance will be arranged by the Social Welfare Department whenever necessary. In the case that the child is a ward of court, supervised access service will be provided to the parent by the Social Welfare Department, according to the court's instruction.

- f. *Provide any assistance in ensuring that undertakings attached to a return order are respected.*

We would liaise with relevant bodies to ensure that undertakings attached to a return order are respected as far as possible.

7. *What arrangements does your Central Authority make for organising or securing the effective exercise of rights of access (Article 7 f)? In particular, in the case of an applicant from abroad, does your Central Authority:*

a. *provide information or advice;*

We would provide information including supplying list of solicitors firms experienced in family law to advise on and handle the access application.

b. *facilitate the provision of legal aid or advice;*

We would facilitate the provision of legal aid or advice. (Please refer to our reply to question (1)4 regarding the availability of legal aid services.)

c. *initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;*

The solicitors firm selected by the applicant or assigned by the Legal Aid Department would initiate or assist in the institution of proceedings where appropriate on behalf of the applicant.

d. *assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;*

In Hong Kong, there is no direct enforcement of an access order made by a foreign jurisdiction, an application will have to be made to the local court for a new access order which may or may not be the same as the original order depending on the circumstances of the case.

e. *assist in cases where modification of existing access provisions is being sought.*

Same as the reply in (1)7b & c above.

8. *Please comment on any developments in relation to the maintenance of statistics concerning the operations of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?*

We maintain two sets of statistics for all the cases referred to us (both the outstanding and the completed cases) :-

- the number of incoming and outgoing cases according to countries and the number of cases according to the final results
- a running list of cases setting out the country, date request received or sent, legal grounds, date of commencement of proceedings/order/substantive response, counsel/solicitors involved, and present position.

We have recently returned to the Permanent Bureau annual statistics in accordance with the revised Hague standard forms and shall henceforth supply the requisite statistics on an annual basis.

9. *Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes ¹¹ and ¹²?*

¹¹ Conclusion IV of the first Special Commission called upon States to:

“... give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources,

We affirm support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12.

10. *Would you support any other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?*

We do not have particular recommendations to make at this stage.

(2) ***Judicial proceedings, including appeals and enforcement issues, and questions of interpretation***

1. *How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.*

Child abduction cases are dealt with at the Court of First Instance of the High Court of HKSAR. There is only one level of jurisdiction at first instance.

The relevant Hong Kong legislation restricts jurisdiction to the High Court. Accordingly, at first instance, only a High Court judge may hear an application for the return of a child. 25 judges sit at first instance in the High Court but only those with family law experience are allocated cases under the Convention. In effect, this means that 2 or 3 judges will deal with all Convention applications.

2. *Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?*

including modern means of communication, needed in order expeditiously to handle requests for return of children or for access". (Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, February 1990, Conclusion IV at p. 45.)

Conclusion 3 of the second Special Commission to review the operation of the Convention was as follows:

"The Central Authorities designated by the States Parties play a key role in making the Convention function. They should act dynamically and should be provided with the staff and other resources needed in order to carry out their functions effectively." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 3 at p. 16.)

¹² Respondents are reminded of the discussions which took place during the third Special Commission (see Report of the third Special Commission, op. cit. footnote 3, especially paragraphs 57 to 64 and Annexes I to III). The syntheses of that discussion, as drawn up by the Permanent Bureau (see Annex III), was as follows:

"1 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 h to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return until the jurisdiction of the appropriate court has been effectively invoked, in certain cases.

2 It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information respecting, legal, financial, protection and other resources in the requesting State, and facilitate contact with these bodies in appropriate cases.

[3 The measures which may be taken in fulfillment of the obligation under Article 7 h to take or cause to be taken an action to protect the welfare of children may include, for example:

- a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;
- b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;
- [c] providing the requested State with a report on the welfare of the child:]
- d) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.]"

While the High Court duty judge may hear urgent preliminary applications under the Convention, all substantive hearings are restricted to those 2 or 3 judges in the High Court with family law experience. In short, all Hague Convention cases are dealt with in the one court by a small pool of experienced judges.

3. *What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)? In particular:*

a. *is it possible for the application to be determined on the basis of documentary evidence alone?*

As a general rule, Hague applications before our courts are to be determined on the basis of affidavit evidence alone.

b. *what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?*

Our domestic rules on Hague proceedings provide for the exchange of affidavit evidence only. Oral evidence is generally not allowed and if allowed, it is at the discretion of the judge on a case by case basis. Relevant authorities on the prompt and summary nature of Hague proceedings and on the principle that oral evidence is allowed only in exceptional circumstances will be submitted to the court where necessary.

c. *who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?*

Our domestic rules laid down tight timetable after the filing of an application. For example, the time of acknowledging service of the application is 7 days instead of the normal 14 days if the Defendant is within jurisdiction. Thereafter, the Defendant has 5 days to file and serve his/her affidavit and the Plaintiff may have another 5 days to reply. A hearing can be held as soon as all affidavit evidence is filed subject to the court diary.

The parties need to comply with those rules and may apply to the court for interim directions. The court's power to grant interim directions at any time before the hearing of return application is specifically provided for in our rules. The application for interim directions could be made ex parte when the case is one of urgency.

The court exercises ultimate control over the procedures by making directions where appropriate on application of either party.

d. *what appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?*

An appeal from the decision of the Court of First Instance which heard the return application lies in the Court of Appeal as of right, with three judges hearing the appeal.

Under normal rules, the party who wishes to appeal has to lodge a notice of appeal setting out the grounds of appeal within 28 days after the date of the sealing of the order of the Court of First Instance granting or refusing return. In cases of utmost urgency, the normal appeal period can be abridged by making special arrangement with the appeal court. If such arrangements are made, the appeal hearing could take place within a matter of 2 – 3 weeks (in cases of pressing urgency) or 3 – 4 weeks (where the urgency is not so great).

Generally the ground of appeal is that the first instance judge was wrong in his decision whether on a point of law or of fact or of mixed fact and law. The appeal is by way of a rehearing. All the relevant affidavit evidence before the Court of First Instance will be placed before the appeal court.

4. *In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?*

The abducting parent has to first raise the child's objection as a defence in the Hague proceedings. The court would then determine it according to the principles set out in Article 13 as interpreted in decided cases, i.e. the child must have sufficient age and maturity and the child must express a valid objection to being returned. Depending on the circumstances, and invariably if both contesting parties agree, the court may see the child in chambers. Again, depending on the circumstances, this may or may not be in the presence of the contesting parties. The court will insist, however, on a neutral party being present (for example, a social welfare officer) and, before making any decision, will advise the contesting parties in general terms of what took place during the meeting.

As to the views of the objecting child, the Court can also seek the assistance of the Official Solicitor to represent the child to facilitate a determination as to whether a child objects to being returned pursuant to Article 13.

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

We do not yet have a decided case where the objections of the child are held to justify a refusal to return.

In our first Hague case, the child's objection was raised as a defence. The child was aged six at the time of the hearing and the court found that he was very young and not particularly mature and what had been expressed by him was really a wish or preference rather than a valid objection.

5. *Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?*

When the person opposing return raises defence under Article 13, the burden is on the Defendant to show that the risk of physical harm is weighty and of substantial and not trivial harm. The raising of Article 13 defence would not generally lead to delay as the issue is likely to be decided on affidavit evidence in accordance with the time frame for Hague cases. The court would not normally allow oral evidence or adjournment of the case solely because Article 13 defence is raised.

As yet, we have not come across a case raising Article 20 as a defence but the raising of same is unlikely to lead to delay in practice since the issue is also likely to be decided on affidavit evidence in accordance with the time frame for Hague cases.

6. *Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?*

When the court grants a return order, we would invite the court to make other orders dealing with the practical arrangements for the return of the child such as details of the departure flight, the person to accompany the child to the airport, the person to pick up the child in the country of habitual residence etc. The assistance of other government services such as the social welfare services, the immigration and the police would be enlisted where necessary. Depending on the facts of the case, all relevant concerns and issues affecting the prompt and effective implementation of the return order would be dealt with by the court at the same time as the return order is made.

So far all the return orders have been effected without much difficulty. The only exception is the first contested Hague case which was heard in March 1998. The abducting mother was ordered to return the child to UK after a 5-day hearing. She killed the child and then committed suicide on the eve of the scheduled return date (a deferred return of 11 days with interim access to the father who came to HK to collect the child). This is however a very exceptional case.

Return orders do not require separate enforcement procedures. Matters arising from the implementation of the return order can usually be dealt with and embodied in the order to address any anticipated difficulties in the implementation of the return order.

7. *Would you support any of the following recommendations?*

- a. *calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.*

We support this recommendation subject to judicial resources.

- b. *underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.*

We support this recommendation.

- c. *calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.*

We support this recommendation.

- d. *calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.*

We support this recommendation.

- e. *calling upon States Parties to enforce return orders promptly and effectively.*

We support this recommendation.

- f. *recommending that the "grave risk" defence under Article 13 should be narrowly construed.*

We support this recommendation.

- g. *proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.*

There is often the problem that the left-behind parent does not know the exact whereabouts of the child. It is therefore proposed that member states be urged to allocate more resources to enable their enforcement agencies to accord higher priority in locating children in Hague requests.

It is also proposed that the member states be urged to relax the legal requirements of privacy or personal data in Hague cases so that relevant information could be disclosed to facilitate the location of the whereabouts of the child and the abducting parent.

It is also proposed that the Central Authorities of the member states should be urged to consider how best to handle return requests to avoid any undue delay in processing the applications in cases where the applicant is neither eligible for legal aid or pro bono legal assistance nor can afford the costs of private legal representation. (Please refer to the final paragraph of our reply to question (1)4).

It is also proposed that the member states should be urged to consider and support the setting up of a central body within the Secretariat to monitor the efficiency and speed of the process of applications (Please see our reply to question (5)5).

8. *Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:*

- rights of custody (Article 3 a and Article 5 a);

There is no important development.

- habitual residence (Article 3 a and Article 4);

There is no important development.

- rights of access (Article 5 b);

There is no important development.

- the actual exercise (of rights of custody) (Article 3 b and Article 13 a);

There is no important development.

- the settlement of the child in its new environment (Article 12);

There is no important development.

- consent or acquiescence to the removal or retention of the child (Article 13 a);

There is no important development.

- grave risk (Article 13 b);

There is no important development.

- exposure to physical or psychological harm (Article 13 b);

There is no important development.

- intolerable situation (Article 13 b);

There is no important development.

- fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).

There is no important development.

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)

1. *To what extent are your courts, when considering a return application, entitled and prepared to employ “undertakings” (i.e. promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?*

Our courts would be prepared to employ “undertakings” in appropriate circumstances. For example, in our first contested Hague case, cross-undertakings and mirror undertakings were given by both parents pending further adjudication by the court of the requesting state in respect of the child. The subject matters of the undertakings include further medical assessment of the child, the living condition of the child, the undertaking not to institute contempt or criminal proceedings against the abducting parent, condition to prevent harmful effect to the child’s health etc.

2. *Will your courts/authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?*

Our courts/authorities would respect the undertakings made to the court of the requested country in respect of a child returned to our jurisdiction. We would as far as possible and subject to resources assist in implementing such undertakings.

Provided that the undertaking is made to the court or is embodied as part of the court order, there should not be a difference in its effect between an undertaking made by agreement or made at the request of the court.

3. *To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?*

There has not been a need to seek or require these orders in the cases we have dealt with so far. We are not aware of any reason why our courts would not be entitled or prepared to seek or require these orders in appropriate circumstances.

4. *Is consideration being given to the possible advantages of 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, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?*

We are not a party to the Hague Convention of 19 October 1996.

The possible advantages of the said Convention in providing a jurisdictional basis for protective measures associated with return orders in Article 7 will be considered in due course.

5. *Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawful retained? If so, how have such issues been resolved?*

We do not have experience of such cases.

6. *Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.*

For cases where the abducting parent is to return the child to our jurisdiction, there is not any one case known to us that there were criminal charges pending against the abducting parent. If there is such a case, we would liaise with the police and the social welfare agencies to ensure that the child is well taken care of on return.

For cases where the abducting parent is to return the child to the requesting jurisdiction, we will liaise with their Central Authority to ensure that the prompt and safe return of the child will not be affected by any pending criminal charges against the abducting parent.

7. *Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?*

We do not have experience in this aspect.

As regards procedural safeguards, we consider that such communication should be made known to all the parties at the earliest practicable opportunity to enable parties to make submissions to the deciding judge where appropriate.

8. *Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?*

One of our judges, the Hon Mr Justice Hartmann, has accepted the informal appointment of liaison judge. This is with the knowledge and blessing of the Chief Justice. All convention queries will therefore, in the first instance, be referred to him.

9. *Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?*

Our legal aid services cover legal proceedings concerning custody, maintenance and access as well as protection of a child.

Please refer to our reply to question (1)4 on coverage of legal aid.

10. *Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?*

Our court will hear any application for review/variation of the custody order upon application of either party to the custody proceedings, including the abducting parent. The court would no doubt take into account as a relevant factor the fact that the abducting parent had breached the custody order.

11. *Would you support any of the following recommendations?*

- a. *that Contracting States should consider ratification of or accession to 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, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.*

We will give due consideration to this recommendation and express our views in due course.

- b. *that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.*

We support this recommendation.

- c. *that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.*

We will give due consideration to this recommendation and express our views in due course.

- d. *that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's abduction / unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.*

We will give due consideration to this recommendation and express our views in due course.

- e. *that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.*

We support this recommendation.

- f. *that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.*

We support this recommendation.

(4) Procedures for securing cross-frontier access/contact between parent and child

1. *What provisions for legal aid/advice/representation in respect of a foreign application for an access order exist in your jurisdiction?*

We would provide the necessary assistance and advice as in return applications such as legal aid information, list of experienced firms of solicitors etc. (Please refer to our reply to question (1)4)

2. *On what basis do your courts at present exercise jurisdiction to:*

- a. *grant access / contact orders and*

Either in exercise of matrimonial or guardianship of minors jurisdictions, and in wardship proceedings.

b. *modify access/contact orders?*

Same reply as in (4)2a above.

The usual order for granting access is one of 'reasonable access'. It is left to the parents to agree what the access arrangements should be, and when they will take place. If there are problems between the parents regarding access, the court may 'define' access. The court can, on application by either parent make an order which defines access, i.e. states specifically when, where, how and with whom access visits can occur. The court also has the power to order that any access should be supervised by an independent third party.

3. *What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of 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?*

There is at present no such provision.

4. *What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?*

There is no specific provision in this respect.

5. *What facilities/procedures are in place to promote agreement between parents in international access/contact cases?*

There is no specific facility or procedure in this respect. However, the social welfare agencies would render assistance where appropriate. Family mediation service is available if both parents are within jurisdiction.

6. *Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?*

There is no presumption as such as our courts will decide applications for access/contact in accordance with the basic principle that the child's welfare is of first and paramount consideration.

7. *What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?*

The Court will impose those conditions it thinks necessary to prevent the re-abduction of the child. This may include orders that access be supervised or be conducted in a specific place. It may also include orders that the child's travel documents are to be held by the Official Solicitor or where the facts of a case so justified that the parent seeking access should surrender his or her travel documents when exercising access rights. The court also has the power to instruct the immigration authorities to stop that parent attempting to remove the child from the jurisdiction.

8. *What information concerning services and what other facilities are available to overseas applicants for access/contact orders?*

We will provide services similar to those in return requests such as legal aid information, list of solicitors firms etc.

Please refer to our reply to question (1)4.

9. *What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:*

a. *the effective exercise of rights of access in your / in the other jurisdiction;*

We have limited experience in access applications. It appears that financial constraints of the parties could be a source of problems in getting access agreed. (e.g. who should bear the costs of air-tickets of the child and the parent and the frequency of such overseas visits etc.)

b. *the granting or maintaining of access rights to a parent residing abroad / in your jurisdiction;*

Same reply as (4) 9a above.

c. *the restriction or termination of access rights to a parent residing abroad / in your jurisdiction.*

Same reply as (4) 9a above.

10. *What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (e.g. financial guarantees, surrender of passports)?*

There is no limitation to the type of available guarantees provided they are practical and effective having regard to the peculiar facts of a case. The temporary surrender of passports and the notification to the immigration authority should assist in allaying the concern of further abduction by the non-custodial parent.

11. *How in practice are access orders enforced?*

Access orders are enforced by the parties in the first instance. Lawyers will be brought in only if one of the parties is in breach of an access order. An application to vary an access order can be made as a last resort. In difficult cases, the Social Welfare Department may render assistance in implementing the terms of access as specified in the order.

The usual order for granting access is one of 'reasonable access'. It is left to the parents to agree what the access arrangements should be, and when they will take place. If there are problems between the parents regarding access, the court may 'define' access. The court can, on application by either parent make an order which defines access, i.e. states specifically when, where, how and with whom access visits can occur. The court also has the power to order that any access should be supervised by an independent third party.

12. *Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.*

We do not have any specific recommendation to make at this stage.

(5) *Securing State compliance with Convention obligations*

1. *Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.*

We are not aware of and have not experienced any serious problems of non-compliance with Convention obligations which have affected the proper functioning of the Convention.

2. *What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?*

We adopt a wait and see approach until there is a wider experience of their accession by the international community before deciding to accept a new accession.

3. *Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?*

As an alternative to our existing approach, we would favour the drawing up of a standard questionnaire to be completed by each newly acceding State to assist existing member states to decide whether or not to accept the accession.

We would like to ascertain from newly acceding states information on the following aspects :

- the legal and court system in general
- the family law system
- the legal aid position and pro bono representation
- social welfare services and facilities available for protection of children
- how disputes relating to children are normally resolved
- how legal costs are charged in general

4. *Are you in favour of an increase in the number of Special Commissions (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direction communications between judges at the international level, or the enforcement of return orders by Contracting States)?*

We consider that Special Commissions should not be held more frequent than at 3 - 4 yearly interval. However, smaller scale special meetings focusing on particular aspects of the operation of the Convention would be helpful to supplement Special Commissions. Small expert working groups may be established to deal with specific aspects of the operation of the Convention.

5. *Are there any other measures or mechanisms which you would recommend:*

- a. *to improve the monitoring of the operation of the Convention;*

We believe the establishment of a central body whereby the central authorities of member states can raise their grievances and difficulties arisen during the implementation of the Convention would help to improve the monitoring of the operation of the Convention. That central body can extract and collate relevant information on such referrals for circulation between all member states.

- b. *to assist States in meeting their Convention obligations;*

The same central body can provide guidance or relevant materials for reference by requesting member states and facilitate better communication between member states.

- c. *to evaluate whether serious violations of Convention obligations have occurred?*

The same central body can collate complaints, analyse and evaluate the same after giving a reasonable opportunity to the state being complained of to explain its position. In flagrant cases, there should be power for the central body to publicise details to all member states for information.

(6) *Miscellaneous and general*

1. *Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?*

We believe if the Permanent Bureau is adequately funded and staffed, it could play a greater role in promoting the effective functioning of the Convention by organising various activities (e.g. meetings focusing on specific issues between Special Commissions), assuming a monitoring role (see our reply to question 5 above) and disseminating material information for the benefit of all member states. Such activities should be adequately supported by member states. The member states may be encouraged to provide financial, personnel and technical support for the activities or for hosting of particular events.

2. *Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?*

Please see our reply to question (6)1 above.

We favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if additionally funded and staffed. This would assist all member states to decide whether and what extra functions and tasks they wish to have provided for and at what costs.

3. *Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?*

Absolutely. This helps gauge the implementation of the Convention at a regular interval.

4. *Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?*

Yes, this helps promote better understanding of the implementation of the Convention amongst member states. We also recommend that regional or local seminars should be held.

5. *Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?*

We believe more formal and informal communications at official level would help. Communications on an inter-governmental level or between Central Authorities should also be encouraged. Further, more non-member states should be invited to attend as observers at judicial and other seminars.

6. *Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.*

There are no such bilateral arrangements at this stage.

7. *Do you have any comments on the following proposition:*

“Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.”

It has not been our experience that the Hong Kong courts take a restrictive approach to relocation cases. In fact, although no statistics have been kept, it is believed that the great majority of cases allow relocation with the children of the marriage. However, we do agree that too restrictive an approach can adversely affect the operation of the Convention.

**The 4th Meeting of the Special Commission to review the operation of
the Convention on the Civil Aspects of
International Child Abduction**

**Supplementary Response to the Questionnaire
by the Central Authority of the
Hong Kong Special Administrative Region
of the People's Republic of China**

To reflect the position in respect of the application of international agreements to the Hong Kong Special Administrative Region (“HKSAR”) and the making of reciprocal juridical assistance arrangements between the HKSAR and foreign states, the Central Authority of the HKSAR wishes to supplement its responses to two of the recommendations set out in paragraph 3(11) of the Questionnaire as follows :

Recommendation at paragraph 3(11)(a) :

That Contracting States should consider ratification of or accession to 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, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.

According to the Basic Law of the HKSAR, which is the constitutional document of the HKSAR, the application to the HKSAR of international agreements limited to sovereign states will have to be decided by the Central Government of China, in accordance with the circumstances and needs of the HKSAR, and after seeking the views of the Government of the HKSAR.

As indicated in our response to the Questionnaire, we will give due consideration to this recommendation and express our views through the Central Government of China in due course.

Recommendation at paragraph 3(11)(e) :

That Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.

It is our understanding that the intention behind this recommendation is to create an international network of liaison judges to facilitate better understanding of each other's judicial systems and practices through informal contacts and communications between the judges, which will be beneficial to the implementation of the Convention. It is also our understanding that such arrangements are purely informal and do not involve any reciprocal juridical arrangements. It is on this understanding that we support the recommendation.

Should the recommendation entail more formal arrangements which amount to reciprocal juridical assistance, then according to the Basic Law of the HKSAR, we may make appropriate arrangements with foreign states with the assistance or authorisation of the Central Government of China.