

Interpretation and Application of Hague Conventions for protection of children in the Russian Federation.

1. The Russian Federation is a Contracting State of two international treaties for protection of children:
 - **the Convention of 25 October 1980** on the Civil Aspects of International Child Abduction (**HC1980**)
and
 - **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 (**HC1996**).
2. Until Russia's accession to HC1980 and HC1996 the only multinational treaty which contained provisions related to family law and to which Russia was a Contracting Party was the 1993 Commonwealth of Independent States (**CIS**) Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases (**CIS1993**), which currently has as the Contracting Parties several Independent States.
3. Russia is also a Contracting State to several bilateral Agreements on Legal Cooperation and Legal Assistance in Civil and Family Matters with many countries. But a significant number of such agreements were concluded during Soviet times and they do not cover all child-related issues which could arise from family relations or do not regulate them with the necessary level of detail.
4. Russia's accession to HC1980 and HC1996¹ was an extremely important event in regulation of cross-border family disputes involving children. When it happened in 2011-2013 we really hoped for closer cooperation between the countries with different legal systems and for the improvement of communication between the lawyers, judicial, governmental and administrative authorities of different countries.
5. **HC1980:**
 - (1) It was important for the Russian Federation to accede to HC1980 to rely on a common legal framework EU and common law countries and Russia to deal with cases of international child abduction.
 - (2) It became operative for Russia on 1, October 2011.

¹ In Russia it was also widely discussed the possible Russia's accession to the Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance (HCCH 2007 Child Support Convention) but it still did not happen.

- (3) Russia's accession to HC1980 was enacted through Federal Law No. 102-FL dated 31.05.2011 and then in 2014 through the Federal Law No. 126-FL dated 05.05.2014 HC1980 was incorporated into Russian domestic law.
- (4) Major amendments were introduced to Russian Civil Procedure Law (CPC) and Law on Enforcement.
- (5) Eliza Perez-Vera in her Explanatory Report writes: *“Co-operation could work only if there is a sufficient degree of mutual confidence amongst the Contracting Parties”*.
- (6) HC1980 has a so-called ‘semi-open’ character and the accession to the Convention is regulated by Art. 38. It stipulates that the Convention applies between the acceding country and such Contracting States as will have declared their acceptance of the accession.
- (7) Therefore, the countries decide whether to accept the accession of Russia, and when affirmative, a Member State makes the declaration of acceptance concerning Russia's accession to HC1980. Russia makes the declaration of acceptance concerning the accession of the countries which acceded to HC1980 later than Russia.
- (8) And although now HC1980 is in force between Russia and more than 80 countries, there are still countries which did not accept Russia's accession to HC1980. Among them: the U.S.A., Norway, Canada, Australia, Singapore and others.
- (9) The lack of a common legal framework with Russia aimed at solving sensitive cases of child abductions still creates many problems in cross - border international child abduction disputes.

6. HC1996:

- (1) HC1996 entered into force for Russia on June 1, 2013.
- (2) This Convention does not have the same ‘semi-open’ character as HC1980.
- (3) It applies to the recognition and enforcement of measures taken after its entry into force as between the State where the measures have been taken and the requested State.
- (4) HC1996 still does not have effect in the relations of Russia with U.S.A. and Canada as they did not ratify it.
- (5) The accession to HC1996 is stipulated by the Federal Law № of 5 June, 2012. If compared with HC1980, the accession to which required adoption of the numerous amendments to Civil Procedure Law and Law on Enforcement, no special implementation law was enacted on the accession to HC1996.
- (6) The overriding objective of HC1996 is to avoid competition between authorities having concurrent jurisdiction. Under HC1996 Convention the jurisdiction therefore fails to the country of the child's habitual residence (Art 5 of HC1996).

(7) Under CPC² foreign court judgments (including the amicable/settlement agreements affirmed by the foreign courts) are to be recognized and enforced if it is stipulated by an international agreement³.

7. Central Authorities (CA):

(1) Central Authorities were designated (pursuant to Art.7 of HC1980 and Art. 29-39 of HC1996) to co-operate on two levels: among the requested States and among the authorities competent for matters dealt with within the State.

(2) In Russia such Central Authority under both Hague Conventions is the Ministry of Enlightenment (former Ministry of Education), not the Ministry of Justice as under many other international treaties of the RF. I think it was decided so because these Conventions are the international instruments on protection of children.

(3) The choice of the Ministry of Enlightenment as the Central Authority in the Russian Federation creates some confusion especially when the courts apply HC1996, which is still not so well-known as HC1980. And it seems not all the officers of the Ministry of Justice of the Russian Federation know that in 2013 Russia did accede to HC1996.

(4) If a parent or another person leaves Russia with a child who was habitually resident in Russia immediately before his removal, a left-behind parent or any other person or body who has rights of custody of this child could ask the Russian Central Authority – the Ministry of Enlightenment for assistance in the summary return of the abducted child.

8. HC1980 places a Contracting State in obligation to enable the summary return of a child. An application for return of a child who was abducted from Russia to some other Contracting States has good chances of being granted. It is different when a child has been abducted to Russia.

9. **HC1980 applications for the summary return of a child.** There are 8 (eight) courts of the concentrated jurisdiction in the Russian Federation pursuant to Chapter 22.2 of CPC, created⁴ to consider the so-called “Hague” cases, the cases based on HC1980 provisions:

(1) One special “Hague” court for one federal region depending on the whereabouts of an abducted child,

(2) Where an abducted child is known to be in some federal region of Russia, the proceedings could be immediately commenced at a court of the concentrated jurisdiction in this federal region.

² The Civil Procedure Code of the Russian Federation.

³ Article 409 (1) of Civil Procedure Code of the Russian Federation (CPC).

⁴ There was adopted so-called ‘implementation’ law – the Federal Law ‘On Amendments of Certain Legislative Acts of the Russian Federation in Connection with Accession of Russia to the Hague Convention on Civil Aspects of International Child Abduction’ N 126-FZ dated 05.05.2014 which amended the civil and enforcement procedure and created the concentrated jurisdiction courts.

- (3) For example: if an abducted child is found in the Central federal region of Russia a competent court to consider the case for summary return of a child will be the Tverskoy District Court in Moscow.
- (4) If a left-behind parent does not know where the child was removed and the proceedings cannot be initiated, the Court Bailiff service at the request of the CA will be trying to locate a child.
- (5) If it is a case where there is a real flight risk and a taking parent could escape to another country, a competent court can make No-Exit Order, put a ban on the travels of the child out of Russia and put the child on the Watchlist at the Border Service.
- (6) Although in the cross – border abduction cases we always ask a competent Russian ‘Hague’ court to make an order that the passports of a child could be removed to the deposit of the court to be held during the pendency of the proceedings, the court does not always do this.
- (7) As it is already mentioned above, under HC1980 the nationality of a child and his parents should not play a key role in the abduction cases, as children and their parents could have several citizenships but only one place of their habitual residence but it is different at the Russian courts: a “citizenship” factor will be considered as one of the most significant here,
- (8) Children with the Russian citizenship abducted to Russia will be considered as “*our children*” whose best interests is to be not separated with their taking mother if she refuses to return to a country of the children’s habitual residence and wishes to stay in Russia,
- (9) Besides, as a mother in Russia is considered as the primary carer of children, in the situations when an abducting parent is a Russian mother, there are no adequate chances for success for a left-behind parent,
- (10) Exceptions: the situations when a mother is a drug or alcohol addicted person or if she suffers from some serious psychiatric disease,
- (11) Thus, the international abduction cases in Russia are really gender biased and, as a general rule, the courts in Russia will be reluctant to issue a Return Order.

10. HC1980 Case Law:

- (1) The first ‘Hague case’ which was considered by the Dzerzhinsky District Court⁵ was an abduction case where a 2 and a half child was wrongfully removed from Finland by his mother. The court made the Return Order, but it was set aside by the Saint-Petersburg City Court, a court of an appellate level. This case is known also as the first international abduction case in Russia after Russia’s accession to HC1980 which was considered by the ECHR in which the violation of Art. 8 of ECHR was established⁶. In this case the ECHR applied its general principles that had emerged in its previous case law on international child abduction. At the same time the dissenting opinion of the Russian Judge ECHR

⁵ The court of concentrated jurisdiction in the North Western Region of Russia.

⁶ [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-193878%22%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-193878%22%7D)

Dedov showed the persisting problems⁷ in interpretation and application of HC1980 provisions we still face in Russia.

- (2) The other interesting case of the same Dzerzhinsky District Court concerns 2 children of 10 and 12 years old who were habitually resident in the U.S.A. immediately before their wrongful removal to Russia.

This case is interesting as the country from which children were wrongfully removed to Russia – the U.S.A. As it was mentioned above the U.S.A. did not accept Russia's accession to HC1980. So HC1980 does not work in the relationship between the U.S.A. and Russia. The children had Russian, Israel and the U.S.A. citizenship. Their mother had the citizenship of the U.S.A. and Israel, the father had citizenship of Russia, the U.S.A. and Canada.

All the family were habitually resident in New York, the U.S.A. immediately before the children's wrongful removal to Russia by their father. On the day of their wrongful removal the father asked the mother to collect the children's swimming attire — swimsuits and crocks rubber shoes — since he was planning to take children out of the city to a lake in Pennsylvania, where his friends have a country house.

When the mother did not hear from the kids after 2 days she wrote to the father's cousin to find out the children's whereabouts. She got a message that the cousin was asked not to tell the children's mother that the father and children were not going to a country house in Pennsylvania but left for a country house near Saint Petersburg. Thus, the children were abducted to Russia without the consent of the mother and without the consent of the children themselves, in violation of the mother's rights of custody.

The court ruled that the children's country of habitual residence was the U.S.A., and the children were removed to Russia wrongfully in breach of their mother's rights and that they should be returned to the country of their habitual residence.

The argument in the rebuttal that the United States did not declare its acceptance of Russia's accession to HC1980 was set aside by the court as not a sufficient ground for denying the claim for summary return and that it was not evidenced that HC1980 should not apply in the said dispute.

The court also could not treat statements obtained from the children during their questioning at the court as objections to returning to the United States, given that the court concluded that the children have not achieved the necessary level of maturity and they did not express explicit objections or declare their firm intention to remain in the Russian Federation. The children's statements that they feel more comfortable living in the Russian

⁷ See the Article of Tine Van Hof, PhD researcher at the University of Antwerp/Vladimir Ushakov V. Russia – The 1980 Hague Convention, the child's best interests and gender biases. <https://strasbourgobservers.com/2019/08/21/vladimir-ushakov-v-russia-the-1980-hague-convention-the-childs-best-interests-and-gender-biases/> and Dissenting opinion of Judge Dedov <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-193878%22%5D%7D>

Federation were accompanied by hesitating intonations and obvious quotations from their father's statements and were clearly attributable to information conveyed to them by their father that he "would be imprisoned on return to the United States". The opinion expressed by the children that they feel more comfortable living in Russia was therefore formulated by the father and imposed on the children who were unable, because of their tender years, to resist their father's influence and who are dependent on him financially, emotionally, and psychologically.

- (3) This case of the same court of concentrated jurisdiction - Dzerzhinsky District Court in St. Petersburg is an abduction case between Russia and the Netherlands. And this case shows an exceptional situation when it would be possible to have a Return Order in the situation that a left – behind parent is a foreign father. In this case the Russian 'Hague' court issued a Return Order prescribing the return of a 6-year-old child to the Netherlands. The child had Russian and Dutch citizenship he was abducted by his mother to Russia.

His mother suffered from some serious genetic mental disease which was not discovered immediately. Although the boy had spent more than one year in total in Russia, his mother failed to help him to settle in his new environment. The child was discovered by the police. He was lost in the streets with his mother. She was taken to hospital, and the child was taken to a temporary transition shelter for children. The left-behind father immediately arrived from the Netherlands to pick the child up. After his return to the Netherlands, the boy was able to reunite with his family: his father, his elder sister and his grandparents. So, in this case the mother's serious mental condition and the fact that she could not take good care of her child made it possible for the Russian court to make a Return Order. The Order was enforced immediately. His mother is now back to the Netherlands too.

11. HC1996 applications:

- (1) The overriding objective of HC1996 is to avoid competition of authorities having concurrent jurisdiction. Under the 1996 Convention the jurisdiction therefore falls to the country of the child's habitual residence (Art 5).
- (2) It is possible to rely on HC1996 in the cross-border abduction cases as well when there is a Return Order in place made in the country of habitual residence of a child and HC1980 is not in force between the countries.
- (3) Applications could be made for recognition and enforcement of a foreign Return Order or any other measures relating to parental responsibility and protection of children.
- (4) Russian Family Code does not use the terms 'rights of custody' in regard to children who are not left without parental care, so it will be always a problem to recognize and enforce a foreign court order by which the sole custody rights were attributed to one of the parents.
- (5) In Russia parental rights and duties are equal irrespective of parents' status: if the parents are married or not or if they are divorced, live together or separately.
- (6) But in fact a parent (and in 85% of situations it will be a mother of a child) with whom a child resides (with whom the place of residence of a child is established under Russian

Family Law) has more volume of the parental rights or more power with regard to any decisions to be made concerning the child's upbringing and well-being.

12. HC1996 Case Law:

(1) Recognition of the French Custody Order by the St. Petersburg City Court. This case concerns the child who was 3 years old and lived in France with her parents: her mother (a Russian national) and her father (a Swedish national). They were divorced in France and the Court of Great Instance of Nanterre (**Tribunal de Grand Instance de Nanterre**) issued the Order by which the place of the child's residence was defined with her mother and the mother received a leave to relocate from France to Russia together with the child.

The Court made also a parental schedule for the father and established by the same Order his reasonable and wide access rights to his daughter.

When the child was 5 years old and she had been living already for two years in Russia with her mother, the father applied to the St. Petersburg City Court seeking for recognition and enforcement of the French Order.

It is interesting that on the first attempt to recognize and enforce this French order St. Petersburg City Court refused in accepting the father's application.

The Russian Court concluded (mistakenly) that:

- there is no international treaty between Russia and France,
- an application is contrary to the public order of the Russian Federation,
- such applications should be considered under the provisions of Chapter 22.2 CPC⁸,
- the French Order does not contain the measures that could be enforced.

Such rejection was successfully appealed, and the St. Petersburg City Court, as the court of the first instance, was made to consider this case on its merits.

Eventually, St. Petersburg City Court ruled to recognize and enforce the French Order in part as follows:

- Parents exercise their parental responsibility (*autorité parentale*) jointly,
- Primary residence of the child is established with her mother in Russia
- The father has the rights to exercise his parental responsibility and for this he informs the mother about his arrival to the Russian Federation in advance at least before 15 days of his arrival
- For exercising of his parental responsibility, he must confirm his residence in Russia.

⁸ Chapter 22.2 of the Russian Civil Procedure Code (CPC) governs consideration of the cross – border cases under HC1980 and applications are considered by 8 courts of concentrated jurisdiction pursuant to Art.244.11 of CPC.

At the same time the St. Petersburg City Court refused to recognize the detailed parental schedule established by the French court which included that the father could exercise his visitation rights freely in Russia - one weekend per month from Friday evening 6 p.m. to Tuesday evening 6 p.m.

The Russian court refused on the following grounds:

(i) Under Art. 17 of HC1996 the exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of a new habitual residence,

(ii) The French Order was adopted when child was 3 years old. After that the mother with the child relocated to Russia on the father's consent and the permission of the French Court. Only in 2 years the father applied for recognition and enforcement of the French Order when the child had been residing already for a considerable time in Russia. At the time of the recognition and enforcement proceedings based on HC1996 in Russia the child was 5 years old.

(iii) Under part 1 of Art. 38 of the Constitution of the Russian Federation provides that maternity, childhood and family shall be protected by the State,

(iv) The issues on parental responsibility should be governed by the Family Code of the Russian Federation.

(2) Recognition of the 17th Judicial Circle Court of Florida, U.S.A.⁹ Order by the St. Petersburg City Court. This case concerns a child, born in Miami, the U.S.A. national who was habitually resident in the U.S.A. Her father was the US national; her mother was Russian. At the age of 3 she was temporarily left without parental care because both of her parents were adjudicated guilty of illegal commercial activity and imprisoned.

By the Order of the 17th Judicial Circle Court of Florida child's Russian grandparents were granted temporary custody over the girl. When they brought her to Russia, she had a short-term visa which permitted her multiple entry to Russia for maximum of 6 months for 3 years. When her grandparents applied for her Russian citizenship on the consent of her parents to make her stay in Russia easier while her parents are in prison in the United States, they were refused as they were not treated as her legal guardians by the Russian administrative and governmental authorities.

We decided to risk and applied for recognition of the U.S. Order in the absence of any international treaty between the U.S. and Russia and it worked:

(i) The Court ruled that considering *the principles of reciprocity and international comity*, a petition for recognition of a foreign court decision may be granted by a competent Russian

⁹ The U.S.A. signed the HC1996 but not ratified it so this international treaty was not applicable in this case.

court even in the absence of a relevant international treaty, if, on the basis of reciprocity, the courts of a foreign state recognize decisions of the Russian courts,

- (ii) The case materials do not establish that, under the US law, cases of recognition of decisions of Russian courts are excluded, while the applicants have presented evidence of recognition of decisions of the Russian courts by the courts in the United States, in connection with which the petition is subject to consideration by a competent Russian court within the limits of its jurisdiction.
- (iii) There are no grounds to believe that the recognition and enforcement of a court decision issued by the Court in the U.S.A. may harm the sovereignty of the Russian Federation or threaten the security of the Russian Federation or contradicts the public order of the Russian Federation,
- (iv) Recognition of a foreign court decision regarding the appointment of grandparents as temporary guardians of a minor child, taking into account the legal meaning of Article 35 of the Family Code of the Russian Federation, Articles 11, 15 of the Federal Law dated 24.04.2008 No. 48-FZ "On Custody and Guardianship" will be the basis for their registration with the guardianship authority at the place of residence of the ward as guardians of the child.

(3) Another interesting case on application of HC1996 was considered by the Krasnodar Regional Court. The Court refused in recognition and enforcement of the High Court of Justice (Family Division) Order. The child of 9 years old in these proceedings was UK and Russian citizen. His mother removed the child from jurisdiction of England and Wales in breach of the father's rights of custody and retained the child in Russia. The English Court issued to bring back the child to the UK and to permit face to face contact with his father. The mother failed to comply with the English Order. The father applied to a competent Russian court in the Krasnodar Region of Russia seeking to recognize and enforce the English Court Order. The Russian Court refused in it on several grounds referring to:

- (i) Part 2 (c) of Art. 23 which states that recognition may be refused on the request of any person claiming that the measure infringes 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, and Part 1 (2) of Article 412 of the Russian Civil Procedure Code which provides that recognition may be refused if the party against whom the decision was made was deprived of the opportunity to participate in the proceedings due to the fact that it was not promptly and properly notified of the time and place of the hearing of the case;
- (ii) Part 2 (d) of Art.23 of HC1996 which provides that recognition may be refused if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child, and Part 1 (5) of Art. 412 of CPC which contains the similar provision: it may damage the sovereignty of the Russian

Federation or threaten the security of the Russian Federation or is contrary to public order of the Russian Federation;

- (iii) Art. 56 and 57 of the Russian Family Code, Art. 12 of the Convention on the Rights of the Child 1989 the Russian Court and Art. 13 and 20 of 1980HC – the opinion and views of the child who attained 10 years.

This case is a good example of the difficulties many encounters when trying to properly serve a party in another country. The High Court of Justice several times adjourned the hearing to give an Applicant time to properly serve a Respondent mother in Russia. The local lawyers in Novorossiysk in the town where the Respondent resided in Russia were hired to serve her personally, but the mother in person rejected to receive the letters delivered to her address and failed to pick up the letters from the post office at her respective address.

On the contrary she immediately received the letter from the Russian court sent to the same address when she was called by the Russian court to participate in the hearings for recognition and enforcement at the Krasnodar Regional Court.

The High Court of Justice concluded that *“parent W (the mother – L.Y.) knew that the British High Court of Justice had made orders in respect of the child and in respect where he should be living and how contacts with his father should be carried out and that appropriate steps had been taken to try to serve the mother with the English proceedings and to give her an opportunity to defend herself in those proceedings and that the failure to formally prove service is a consequence of the mother’s efforts to avoid service”*.

On the contrary the Russian court did not agree that the abduction of the child was an urgent case and concluded that the proper service for recognition and enforcement of a foreign court order would be to use Hague Service Convention 1965 (**HC1965**) to which UK and Russia are treaty partners too. Besides the Russian Federation made a reservation that service of documents by methods listed in Article 10 of the Convention is not permitted in the Russian Federation, i.e. Russia objects the freedom to send judicial documents, by postal channels, directly to persons abroad and other alternative service mentioned in Art. 10 of HC1965.

In its reasoning why the High Court of Justice Return Order might be contrary to public order of the Russian Federation and how it could threaten the security of the RF the Russian Court referred to Art. 38 of the Constitution of the Russian Federation and Art. 6 of the Federal Law N 124 – FL dated 24.06.1998 “On the basic guarantees of the children’s rights in the Russian Federation” which states that maternity, childhood and family shall be protected by the State and from birth, a child is entitled to and guaranteed by the state the rights and freedoms of a person and a citizen in accordance with the Constitution of the Russian Federation. The Russian Court emphasized that the protection of motherhood and childhood, which are constitutional human rights and freedoms, is the responsibility of the state and any infringement on them is contrary to the public order of the Russian Federation.

The Russian Court also concluded that the child has attained the degree of maturity and an age at which it is appropriate to consider his views and objections towards the return to the UK as his own well-formulated objections to return.

Unfortunately, the Court did not consider that the child was greatly alienated from his father and that he suffered from the conflict of loyalty after he was abducted to Russia.

As one of the Australian Judges Justice Bennet once said in another abduction case between Russia and Australia: *“The child must align himself with the parent who has possession of him and reject the left-behind parent in order to survive. Social science evidence given in our courts is that the emotional damage to such children is immediate and life-long”*. She also concluded that *“This matter would be made easier between our two jurisdictions if there could have been communication between myself and a Judge in the RF¹⁰ who is designated to Hague Network of Judges”¹¹* Hopefully it will happen in some nearest or distant future.

¹⁰ There is still no Judge designated from the Russian Federation to the Hague Network of Judges.

¹¹ Justice Bennett, an International Hague Network Judge from Australia since 2008 and the Judge of the Federal Circuit and Family Court of Australia.