

LAW LIBRARY OF CONGRESS

HONG KONG

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Since 1997, the former British Crown Colony of Hong Kong has been a Special Administrative Region (SAR) of the People's Republic of China (PRC). The PRC is not a party to the Hague Convention on the Civil Aspects of International Child Abduction,¹ but it has made the Convention applicable to the Hong Kong SAR.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Hong Kong Child Abduction and Custody Ordinance, promulgated in September 1997,² is subtitled "An Ordinance to give effect in Hong Kong to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980." This implementing law thus makes the Hague Convention part of the domestic law on child abduction since 1997.

Section 3 of the Ordinance stipulates that the provisions of the Convention, as set out in Schedule I, will have the force of law in Hong Kong. Section 4 states that for the purposes of the Convention, as it has effect under this Ordinance, the contracting states are those specified by an order issued by the Governor and published in the Gazette under this section. It further provides that an order under this section shall specify the date of the coming into force of the Convention between Hong Kong and any state specified in the order. Also, unless the order provides otherwise, the Convention will apply between Hong Kong and that state, only in relation to wrongful removals or retentions that occur on or after that date.

II. Domestic Laws Regarding Child Abduction and Parental Visitation**A. Child Abduction**

In addition to the Child Abduction and Custody Ordinance cited in Part I above, the following domestic law contains provisions pertaining to child abduction:

- the Protection of Children and Juveniles Ordinance, which specifically provides that any person who unlawfully takes or causes any unmarried female infant to be taken, or any young person or child to be taken against the father or mother's will, or any other person having the lawful care or charge of such an infant, young person, or child, is guilty of a misdemeanor³
- the Guardianship of Minors Ordinance, which stipulates that a mother and father are to have equal rights and authority in the custody or upbringing of a minor child⁴

¹ T.I.A.S. 11670.

² 31 LAWS OF HONG KONG, ch. 512.

³ 14A LAWS OF HONG KONG, ch. 213, § 26.

⁴ 3 LAWS OF HONG KONG, ch. 13, § 3

- the Separation and Maintenance Orders Ordinance, which gives the District Court power to issue an order providing that the legal custody of any children of the marriage be given to the husband or to the wife⁵
- the Matrimonial Causes Ordinance, under whose provisions the Supreme Court or the District Court is empowered to make orders providing for the custody of children.⁶

It should be noted that the Child Abduction and Custody Ordinance itself states that an order issued by the High Court in the exercise of its jurisdiction relating to wardship, so far as it gives the care and control of a child to any person, is within the definition of a custody order. Under the Convention, the removal or retention of a child would be considered wrongful if the removal or retention is in breach of custody rights granted under the law of Hong Kong (regarding a child who was a habitual resident immediately before such a removal or retention). Such custody rights may arise, according to the Convention, either by operation of law or by reason of a judicial or administrative decision, or by reason of a legal agreement under the law of that state.

B. Parental Visitation

Domestic laws governing questions of parental visitation are the Child Abduction and Custody Ordinance, previously cited, and the following:

- the Guardianship of Minors Ordinance, which contains a number of sections on court orders for custody and maintenance of minors, and specifically regarding the right of access to the minor of either parent. Both the High Court and the District Court are authorized under this ordinance to make such orders.⁷

III. Court System and Structure – Courts Handling the Hague Convention

In the Hong Kong SAR, the hierarchy of the court system is as follows: the Court of Final Appeal (taking the place of the Judicial Committee of the Privy Council), the Court of Appeal, the Court of First Instance, the District Court, and the Magistrates Court. A number of other courts and tribunals are also part of the court system; these bodies include the Coroner's Court, the Lands Tribunal, and the Juvenile Court, rulings from which may be appealed to either the Court of First Instance or the Court of Appeal. The High Court (formerly called the Supreme Court) is the amalgamation of the Court of Appeal and the Court of First Instance.⁸

The Court of Appeal hears both civil and criminal appeals arising from the Court of First Instance, the District Court, and the Lands Tribunal. Cases are heard by a panel of judges (usually three) but only after "leave" or special permission has been granted by the court to do so. The Court of First Instance has unlimited jurisdiction in both civil and criminal matters, and it has original or first instance jurisdiction in all civil matters that involve damages, where the claim involves an amount over HK\$120,000

⁵ *Id.* ch. 16, § 5(b).

⁶ 14 LAWS OF HONG KONG, ch. 179, § 48.

⁷ 2 LAWS OF HONG KONG, ch. 13, § 2.

⁸ See I. Dobinson and D. Roebuck, INTRODUCTION TO LAW IN THE HONG KONG SAR 68-71 (Hong Kong, Sweet & Maxwell, 1996), ch. 6, 68-71.

(US\$15,430). It also exercises exclusive jurisdiction over such matters as bankruptcy, adoption, and probate. The Court of First Instance tries serious crimes, although court proceedings in these cases are first heard by a Magistrates Court, unless the accused waives the right to committal and has the case go straight to the Court of First Instance. Criminal cases coming before the Court of First Instance are heard by a judge and a jury made up of seven or nine jurors. This Court also hears appeals from decisions of the Magistrates Courts, the Labour Tribunal, and the Small Claims Tribunal.

In its article 7, the Convention refers to Central Authorities, and the Hong Kong Child Abduction and Custody Ordinance provides that the functions under the Convention of a Central Authority are to be discharged by the Attorney General. The Ordinance further stipulates that any application made under the Convention by or on behalf of a person outside Hong Kong may be addressed to the Attorney General as the Central Authority in Hong Kong.⁹

Under the Hong Kong Child Abduction and Custody Ordinance cited above, the High Court, which is the Court of Appeal and the Court of First Instance, has the jurisdiction to hear and determine an application under the Convention on International Child Abduction.¹⁰

IV. Law Enforcement System

Reports are available on only two Hong Kong cases that involve child abduction or removal, and they were heard after the Convention came into force for Hong Kong in September 1997: the case of *S. v. S.*,¹¹ heard by the Court of First Instance in March, 1998 and the case of *N. v. O.*,¹² which came before the same court in October of that year. *S. v. S.* was initiated in January 1998, by the Department of Justice by means of an originating summons. The child had been abducted by the defendant, the child's mother, from the United Kingdom, after the Ordinance implementing the Convention had come into force in Hong Kong. On the plaintiff's application, the Lord Chancellor of Great Britain made a request to the Secretary for Justice in Hong Kong for the return of the child under the Convention. An application was also made to secure the whereabouts of the child, to prevent mother and child from leaving Hong Kong pending the hearing of the originating summons, and to secure the surrender of their passports. These orders were made by the court *ex parte*.

The case of *N. v. O.* involved an application made by the plaintiff, the child's father, a citizen of Luxembourg, for custody of his child, who had been taken to Hong Kong by the defendant, his mother, a citizen of the United States. The judge in this case issued a number of orders, including one making the child a ward of the Hong Kong court, one that the court itself would resolve the matter of the child's custody, and one that, pending the determination of the custody issue, the child was to remain in the care and control of his mother, the defendant. Another order was issued granting the father reasonable rights of access to the child to be exercised only in Hong Kong. The Court forbade either party from removing the child from Hong Kong without first obtaining the leave of the Court.

⁹ 31 LAWS OF HONG KONG, *supra* note 2, § 5.

¹⁰ *Id.* § 6.

¹¹ [1998] 2 HKC 316, retrieved from the LEXIS-NEXIS database.

¹² [1999] 1 HKLRD, at 68.

The Rules of Court which govern civil procedure in Hong Kong will be followed in giving effect to and enforcing orders made by the Hong Kong courts,¹³ including orders issued by the High Court in cases involving international child abduction regarding return of the child, visitation, or custody determinations. The Rules of Court dealing with the enforcement of judgments and orders in civil cases detail the methods by which such judgments are to be executed, *e.g.*, judgments for payment of money, for possession of land, delivery of goods, or for an act to be done or not done. Where a judgment or order requires an act to be done, such as the return of a child to a parent, the procedure is set out in detail in the rules, including such steps to be taken as serving a copy of the order to the person required to do the act. If a party does not obey the order, a writ of execution may be issued.

The Court may also exercise its power to punish a disobedient party for contempt of court by an order of committal. Civil contempt, or contempt in connection with civil proceedings, arises from the breach of a court order or from the breach of an undertaking made to the Court. Under the Rules of Court, “committal is available to enforce orders which are prohibitory or injunctive in nature and those mandatory orders which specify a time within which the act(s) must be done (mandatory ‘time’ orders).”¹⁴

V. Legal Assistance Programs

The Legal Aid Ordinance, chapter 91 of the Laws of Hong Kong, makes provision for the grant of such aid in civil actions, according to a test of eligibility that embraces both income and capital.¹⁵ In order to be eligible for legal aid, a ceiling is set on the amount of the person's financial resources. For most proceedings in the High Court or the Court of Appeal, the ceiling is now HK\$169,700 (US\$21,821).¹⁶

In 1984, the original Ordinance was amended to add a system of supplementary legal aid for any person not eligible under the provisions cited above because his financial resources exceed the ceiling, which at the time was HK\$120,000 (US\$15,429). The ceiling for such supplementary aid was readjusted in 1997 to HK\$471,600 (US\$60,639).¹⁷ These provisions have not been amended since this report was first written.¹⁸ However, the value of the Hong Kong dollar has increased slightly.

The Ordinance defines the scope of legal aid as, consisting of representation by the Director of Legal Aid¹⁹ or by a solicitor, and in so far as necessary, by counsel, including all such assistance as is

¹³ 2A LAWS OF HONG KONG, ch. 4.

¹⁴ G. N. Heilbronn, C. N. Booth, and H. McCook, ENFORCEMENT OF JUDGMENTS IN HONG KONG 129 (Hong Kong, Butterworth, 1998).

¹⁵ 8 LAWS OF HONG KONG, ch. 91.

¹⁶ *Id.* § 5.

¹⁷ *Id.* § 5A(6).

¹⁸ Hong Kong's laws can be found online in the Bilingual Laws Information System, available at <http://www.justice.gov.hk/Home.htm>.

¹⁹ This may include a Deputy Director of Legal Aid, Assistant Director of Legal Aid, or any Legal Aid Officer. 8 LAWS OF HONG KONG, *supra* note 15, § 6.

usually given by solicitor or counsel in the preliminary or incidental steps of any proceeding or in arriving at or giving effect to a compromise to bring to an end any proceeding.²⁰

Legal aid is available to any eligible person, whether plaintiff or defendant, including a person "taking, defending, opposing, or continuing...proceedings or being a party thereto."²¹ The language of the Ordinance would make legal aid extendable to appellate proceedings.

In the Magistrates Courts, there is a *duty lawyer* system whereby barristers and solicitors are assigned to provide "on-the-spot" advice, as well as to represent persons accused of certain crimes. Free legal advice is also available, given in the evenings by volunteer (i.e., unpaid) lawyers at offices in different locations.²² Like the *duty lawyer* system, this program is administered by the Law Society.²³

VI. Conclusion

Hong Kong has been extremely strict in its application of its Child Abduction and Custody Ordinance, the legislation passed to implement the Hague Convention. *S. v. S.*, discussed above, was the first ruling made in Hong Kong under this Ordinance. After the decision was handed down, the abducting wife was ordered to hand her child over to her husband, who was planning to take the child back with him to the United Kingdom. The case was heard in chambers before Justice William Waung Sik-ying between March 30 and April 3. On April 13, the wife killed both the child and herself by lethal injection. Social workers in Hong Kong have urged the Government to be more flexible in implementing the law.²⁴

The Law Reform Commission of Hong Kong released a report on international parental child abduction on April 29, 2002.²⁵ The Commission focused on ways to improve Hong Kong's legal protections against child abduction, under the Hague Convention on the subject, but did not recommend making it a crime for parents without custody to take their children out of Hong Kong.²⁶ The recommendations include the following suggestions:

- A provision should be added to the primary legislation on child abduction to restrict the removal of a child from the jurisdiction without the consent of the parent with custody, a parent with whom the child lives, or a parent with regular contact with the child. The provisions would apply in cases for which court orders are already in effect and would be modeled on the Children (Scotland) Act 1995.

²⁰ *Id.* § 5A.

²¹ *Id.* § 10(3).

²² P. Wesley-Smith, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 100 (Hong Kong, Oxford University Press, 1987).

²³ The Law Society is the governing body for solicitors, with responsibility for maintaining professional and ethical standards, and for considering complaints filed against solicitors. For barristers, the governing body is the Bar Committee.

²⁴ *New law was used on mother in killing* (South China Morning Post, Apr. 18, 1998), at 4.

²⁵ Text available at <http://www.info.gov.hk/hkreform>.

²⁶ *South China Morning Post*, Apr. 30, 2002, via LEXIS/NEXIS, Asiapc library.

- Courts should be granted the power to order the disclosure of the whereabouts of a child, modeled on Irish and Australian laws, together with the adoption of a provision specifying who should be entitled to apply for such an order.
- Provisions on orders to recover a child, modeled on the Australian Family Law Act 1975, should be adopted.
- Provisions should be introduced empowering the police to hold a child they reasonably suspect would soon be removed from the jurisdiction in breach of a court order, modeled on the Irish Child Abduction and Enforcement of Custody Orders 1991. The report did not propose a general power of arrest.

The report also concluded that:

- The current law in relation to court ordered surrender of passports should be maintained. The idea of implementing provisions of Australian law that give courts the power to order the surrender of passports was rejected as that law did not specify the length of time the passport could be held.
- The parents should have the responsibility to notify the Immigration Department when a court order is issued that prohibits the removal of a child from Hong Kong; such notification is at the discretion of the parents, but if one parent does notify the department, that parent must inform the other parent of the notification.
- The Administration may need to review the rules on applying a means test to the availability of legal aid to incoming applicants for such aid in Hague Convention cases. In addition, a review should be made of the current provisions regarding stays of custody proceedings pending the outcome of Hague applications and of provisions on the confidentiality of information of Hague proceedings.²⁷

These recommendations have not yet been implemented.

Prepared by Mya Saw Shin
Senior Legal Specialist
February 2000

Updated by Tao-tai Hsia,
Chief, Eastern Law Division, and
Constance A. Johnson,
Senior Legal Research Analyst
December 2003

²⁷ Executive Summary, at <http://www.info.gov.hk/hkreform/reports/abductions-e.doc>.