IMPLEMENTATION OF 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 ("the 1996 Convention")

Annex 2

Scope of the Convention

1. All references to individual articles are to articles of the 1996 Convention. The Convention governs matters of jurisdiction to take measures directed to the protection of the person or property of the child; the law authorities exercising jurisdiction will apply, and questions of applicable law concerning parental responsibility for a child where there is no specific intervention by authorities (such as a court order); provision for the recognition and enforcement of measures in Contracting States; and for administrative co-operation between Contracting States as regards the proper operation of the Convention.

2. A.1(2) defines "parental responsibility" for Convention purposes as including "*parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.*".

This is a very wide concept and it can be seen that, in terms of wording at least, it is closely related to the definition in English law. However, in interpreting the Convention definition courts must not be bound by domestic understandings of the phrase – it is to be given an autonomous meaning[1]. It should be noted that (as in English law) PR – or elements of it - can be held by persons other than the parents (a guardian, for example).

3. The Convention applies to a child from the moment of his or her birth until he or she reaches the age of 18.

4. A.3 and A.4 give indications of what is within, and what is without, the scope of the Convention. A.3 is a non-exhaustive list of what is included, whereas A.4 works as an exhaustive list of what is excluded. Further discussion of both is to be found in the Explanatory Report at paragraphs 18 to 36. The following discussion seeks to pick up points of particular relevance to implementation.

5. Firstly, public authority intervention regarding a child is clearly covered by the Convention[2] by reference to A.3(e) and (f), which would for example cover applications for a care order under s.31 of the Children Act 1989 where the plan was to put the child in foster care, or for a supervision order under that provision. However, adoption and "measures preparatory to adoption" would not be included within scope.

[1] See further the explanatory report, written by Paul Lagarde, at para 14.
[2] The case of *C* (C-435/06) established conclusively that public law measures taking a child into care and placing him in foster care are within the Brussels IIA regulation.

6. Secondly, the child's property. The Convention does not seek to interfere with substantive rules of property or trusts law[3]. The reference in A.3 is only to "the administration, conservation or disposal of the child's property" and so is directed to the authority of a person to represent the child in this regard (e.g. giving valid receipt for a sale of a chattel)[4].

7. Maintenance of, and financial provision for, children. This is excluded from the 1996 Convention by A.4(e) (by contrast with administration of property which the child owns). A separate convention was recently concluded on this topic in the Hague (in November 2007), and there is a pre-existing Hague Convention (from 1973) on the issue to which the UK is a Contracting State.

Chapter II – Jurisdiction – Articles 5 to 14

8. The scheme of the Convention as regards which Contracting State's courts or administrative authorities have jurisdiction to take measures protecting the child's person or property starts from the principle that it is those of the child's habitual residence[5] which are best placed to decide the case. A.5 therefore provides the primary ground of jurisdiction, the habitual residence of the child.

[3] See para 32 of the Explanatory Report.
[4] See the Explanatory Report at para 32.
[5] The European Court of Justice decided to give an autonomous meaning to "habitual residence" in European law in the case of *A (C- 523/07).* The Court concluded that the concept of "habitual residence" under the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case and in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State.

9. Where a child is a refugee, the courts of the country in which the child is present have jurisdiction – A.6(1). This also applies where a child's habitual residence cannot be established at all.[6]

10. A.7 deals with the situation where there has been a wrongful removal or retention of the child (defined in A.7(2)) - child abduction.

11. The point of A.7 of the 1996 Convention is to ensure that the jurisdiction of the court of the child's habitual residence, from which the child has been abducted, retains its jurisdiction over all matters governed by the 1996 Convention until the conditions of A.7(1) are fulfilled (whereby, if the child has otherwise acquired a new habitual residence in the state to which he or she is abducted, it is appropriate for jurisdiction to pass). This mechanism is used both in the 1996 Convention and in Brussels IIA (see A.10 of the latter, which seeks to preserve the jurisdiction of the original State of habitual residence much more strictly) to ensure that an abductor doesn't gain an unfair advantage (through their own wrongdoing) by retaining the child away from his or her country of habitual residence until the child acquires a new habitual residence so that jurisdiction is then established in the country in which the child was wrongfully retained.

12. There is one other point to note about A.7. The courts of the Contracting State to which the child is abducted have particularly limited jurisdiction to deal with the

[6] Explanatory report at paragraphs 44 and 45.

protection of the child whilst he or she is in their territory. By A.7(3), only A.11 urgent provisional measures can be taken – A.12 territorial measures are not available.

13. Articles 8 and 9[7] are to some extent mirror images of each other. They provide for the possibility of transfer of jurisdiction by the court with jurisdiction under the rules of the Convention to a court of another Contracting State better placed to decide an issue by virtue of its connection to the child, appropriate connections being those described in A.8(2). Transfer might be at the request of the court with jurisdiction, or the court wishing to exercise jurisdiction, and achieved either by direct request or (in the case of A.8) staying the case in order for the parties to apply to the other court. Transfer requires both courts to agree, and must be in the best interests of the child. A.15 is the equivalent in Brussels IIA. Transfer can only be to the authorities of another Contracting State.

14. A.10[8] allows prorogation of jurisdiction in favour of the courts of a Contracting State exercising jurisdiction on the application for divorce, annulment of marriage or legal separation of the child's parents, although the child might be habitually resident in another Contracting State. A.10 is not in itself a direct ground of jurisdiction and so will effectively "piggy back" on the provisions of the Domicile and Matrimonial Proceedings Act 1973, s.5(2) (for England and Wales). The conditions for such assumption of jurisdiction are laid down in A.10(1) and include the requirement for the parents and any person with PR to agree to this jurisdiction, and for the jurisdiction to be in the child's best interests. The equivalent provision in Brussels IIA is A.12, which allows such prorogation on a wider basis by adding a second

[7] Explanatory Report at paragraphs 53 to 60.
[8] Explanatory Report at paragraphs 61 to 66 refers.

category of cases in which prorogation is permitted (A.12(3) – the child has a substantial connection with another EU MS, the parties agree to assumption of jurisdiction, and it is in the child's best interests).

15. A.11[9] allows the courts of a Contracting State in whose territory the child or his/her property is present, to take necessary measures of protection in urgent cases, notwithstanding that jurisdiction under the Convention lies with authorities of another Contracting State. Provision is made at A.11(2) and (3) for the time limits on such orders according to whether jurisdiction is with a contracting, or non-contracting, state. The equivalent provision in Brussels IIA is A.20. This provision would, for example, enable such a court to authorise emergency medical treatment for a child, or provide for his care whilst a determination is made on return of the child following abduction.

16. A.12[10] permits the taking of provisional measures regarding the child's person or property by the courts of the Contracting State on which the child or his property is present, provided that such measures are not incompatible with those taken by authorities with jurisdiction under A.5 to 10. Similar provision is made to that in A.11 regarding the lapsing of such orders. The situations to which A.12 applies do not need to be urgent, so could be used to protect a child where the child was temporarily on the territory of the state in question for a holiday stay, for example. This provision cannot be used in the situation of an abduction – see A.7(3).

[9] Explanatory Report at paragraphs 68 to 73.
[10] Explanatory Report at paragraphs 74 to 77.

17. A.13[11] provides a *lis pendens* rule, which is necessary because there might be more than one Contracting State with concurrent jurisdiction under the terms of the Convention (for example, the child is habitually resident in one state but the terms of A.10 are met regarding prorogation). A.13 therefore ensures that only one court should be seised of a specific PR issue at one time by requiring that courts seised after the first court should suspend the exercise of jurisdiction unless and until the court first seised declines it. A similar rule is expressed at A.19(2) of Brussels IIA.

18. Finally, A.14 ensures that there is no gap in the protection of the child when a change of circumstances (such as change of the child's habitual residence) eliminates the basis on which jurisdiction was taken, by requiring that the measures continue in force until those authorities which now have jurisdiction modify, replace or terminate them.[12]

Chapter III – Applicable Law – Articles 15 to 22

19. There are no applicable law rules in Brussels IIA, and generally speaking, the Convention will supply these rules as between Member States. By A.20 of the Convention, it is clear that the provisions on applicable law under Chapter III of the Convention apply regardless of whether the applicable law is the law of a Contracting State or not.

[11] Explanatory report paragraphs 78 to 80.
[12] Explanatory report paragraphs 81 to 83.

20. By A.46 of the Convention, a Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the Convention to conflicts solely between such different systems or sets of rules of law. Clearly this would apply to the situation of the UK.

21. *Article 15* governs the applicable law where a court is exercising jurisdiction to "take measures" directed to the protection of the child or his property. Because, in most cases, the court will have jurisdiction under A8. of Brussels IIA (equivalent to A.5 of the Convention), so by virtue of the child's habitual residence, this rule ensures that in most cases the law applied to the child's situation is that of his or her habitual residence. Clearly, in the UK, the court will usually be applying English (or Scottish or Northern Irish) law. However, A.15(2) permits for the exceptional application of the law of another State with which there is a substantial connection. By A.15(3), where the child acquires habitual residence in another Contracting State, the law of that state governs the conditions of application of the earlier measure. This does not apply if the move is to a non-contracting state, in which case that State's internal private international law rules will apply.

22. *Article 16.* This provision governs how parental responsibility which arises by operation of law, or agreement, should be treated in cross-border cases. It relates to attribution and extinction of the status, not exercise or termination (by order) of parental responsibility (which, by A.17 and 18 are controlled in most cases by the law of the habitual residence of the child). It will affect persons having parental responsibility and those they deal with as representatives of the child. In particular,

there will frequently be no judicial intervention in the assessment of what rights and duties a person has in these cases, unless of course a dispute arises, and by virtue of this provision the parental responsibility attaching to a person may not be exactly the same as that understood under English law.

23. The point of Article 16 is to ensure that there is no "gap" in protection for the child where the child moves from state A to state B and a person who has PR in state A might not have PR, or at least not the same PR, under the law of state B.

24. The starting point is A.16(1), *"the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child"*. The key point to note is that there is no temporal limit on *when* one assesses the child's habitual residence. Therefore, as the explanatory report by Paul Lagarde points out (para 100), it is open to a state to rely on its <u>own</u> law as to attribution of PR by operation to law in a situation where the child arrives from another state and becomes habitually resident on its territory. There is no need to look to earlier events or bases of attribution in the child's life, nor work out the position under the law of an earlier habitual residence. However, in saying this the effect of A.16(3) (discussed below) should be borne in mind.

25. Provided that the child is habitually resident in UK territory, attribution of PR by operation of law for the child will follow the legal rules for the relevant territory of the UK. This is a welcome effect since it ensures a good degree of predictability for third parties dealing with those purporting to represent and have authority for a child.

26. None of this of course prevents a person obtaining PR by way of court order – the relevant law there is governed by A.15 and in practice will almost always be the law of the forum, as at the time the order is made (recognition and enforcement will apply to an order made elsewhere, which will then "overtake" the acquisition of PR by operation of law in the "new" habitual residence).

27. A.16(2) deals with the attribution or extinction of PR through agreement or unilateral act (an example of the latter might be testamentary disposition, for example appointment of a guardian). This is treated differently to attribution by operation of law, the relevant law being determined by the child's habitual residence *at the time of* the *agreement or unilateral act.* For example, a French father who obtains PR in France under an agreement with the mother should find his agreement automatically applicable in the UK, without having to make any application.

28. A.16(3) "sweeps up" the cases in which (1) a person has rights and/or duties under the law of another state regarding a child in the UK which qualify as PR under the Convention but (2) that person does not come within our system of attribution of PR by operation of law, nor has an agreement, nor a court order that could be recognised. The extent of such a person's PR will be the rights and duties they have had under the foreign law – it is not possible under the Convention to somehow assimilate those rights with what domestic law provides. Regard may be had in court proceedings to the extent of the foreign law which, as experience in child abduction proceedings has shown, may be complex. It would be possible that a person from a contracting state may wish to rely on A.16(3) rather than A.16(1) because the parental

authority conferred on him or her by that state could be wider than that conferred by PR under UK law.

29. That might complicate the position of a third party dealing with such a person, although A.19 provides protection to the third party in this situation. Most cases will be dealt with under A.16(1). Where there is an agreement, or a court order (a request for recognition can be made under A.24 which might furnish useful "proof"), or a certificate under A.40 emanating from the previous state, there will probably be useful proof of the person's status in any event.

30. Exercise of PR is governed by the law of the child's habitual residence (A.17). Therefore, it is possible to control undesirable effects of foreign PR, and indeed by A.22 the applicable law indicated by these provisions does not have to be applied if this would be manifestly contrary to public policy, taking into account the best interests of the child.

31. A.20 makes clear that the applicable law designated by the rules of the Convention must be applied even if it is the law of a non-contracting state. A.21 indicates how rules of private international law in contracting, and non-contracting states should be taken into account.

Chapter IV – Recognition and Enforcement – Articles 23 to 28

32. The provisions of the 1996 Convention regarding recognition and enforcement of decisions within the scope of the convention operate only between Contracting States,

as one might expect. However, in relation to the European Community, A.61 of the Brussels IIA regulation states,

"this Regulation shall apply…(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third state which is a contracting Party to the [1996] Convention".

Therefore, as regards recognition and enforcement between EU MS, there is a complete disconnection from the 1996 Convention and the situation will be governed purely by Brussels II A.

33. A.23(1) of the Convention indicates that recognition of a measure from one Contracting State in another will be "by operation of law". It should therefore not be necessary to commence proceedings in the latter state in order for the measure to be recognised. However, as indicated by A.24, it must be possible for an interested person to apply for recognition, or non-recognition of a measure in the requested state. This provision is likely to be used pre-emptively in many situations, for example to ensure that the contact order in favour of the father made by State A will be enforceable in State B before State A's courts authorise removal of the child by the mother to State B.

34. A.23(2) lists the circumstances in which it will be open to the requested state to refuse recognition, including the possibility (by contrast with Brussels IIA) of

reviewing the basis of jurisdiction on which the other court took the decision[13], subject to being bound by the findings of fact on which that court took jurisdiction (A.25). It should be noted that A.23(2) allows for discretionary, not mandatory, refusal of recognition where a ground of refusal is made out.

35. A.26 addresses the mechanics of enforceability. Enforcement is governed by the law of the state addressed (see A.28) but in order for enforcement proceedings to be taken, the courts of the requested state need to make a declaration of enforceability, or register the measure for enforcement.

36. A.27 lays down what is very much a standard rule regarding recognition and enforcement in international matters – there can be no review by the requested court of the merits of the decision which it is being asked to recognise and, in appropriate cases, enforce. The only possibility for refusing recognition is contained in A.23.

37. Finally, A.28 deals with enforcement itself. This is a matter for the law of the state addressed, so that the order which is registered for enforcement will be treated as if made domestically and the domestic enforcement law applied as it would be with a domestic order. However, the Convention does add a substantive rule – enforcement is to the extent provided by the law of the state addressed, *"taking into account the best interests of the child"*.

Chapter V – administrative co-operation

[13] Compare A.23(2)(a) of the Convention to A.23 of the regulation, and in particular A.24 of the Regulation.

38. This chapter lays down obligations on and powers of authorities of Contracting States to co-operate administratively for the protection of children across international boundaries.

39. There will be separate Central Authorities ("CAs") for each territorial unit of the UK. Their specific obligations and powers are laid down in Articles 30 to 32. They are not obliged to fulfil these directly, it being possible to undertake these actions through public authorities and other bodies. Apart from general duties to co-operate to achieve the purposes of the Convention (A.30), they have obligations to take all appropriate steps to facilitate communication across borders under the Convention; to facilitate agreed solutions for the protection of children under the Convention; and to assist in locating a child present in their territorial unit and in need of protection, upon request from a competent authority of another Contracting State. By Article 32, they may, upon request from a CA or competent authority of another Contracting State, provide a report on the situation of a child habitually resident and present in their area; as well as request "competent authorities" domestically to consider whether measures should be taken to protect a child. Domestically, this would mean telling local authorities if a child seemed to be at risk.

40. Article 33 is broadly the equivalent of Article 56 of Brussels IIA. It is addressed to authorities with jurisdiction under Articles 5 to 10 of the Convention, and deals with the situation where such an authority contemplates placing a child in foster care, or institutional care, in another Contracting State. It provides a mechanism to ensure that such placement cannot occur without the prior approval of the authorities of the

requested Contracting State. A failure to consult will enable the requested state to refuse recognition of the order (see Article 23(f)).

41. Article 34 provides a power for an authority considering taking measures to protect the child to request "any" authority of another Contracting State which has relevant information to share it. The request can only be made "if the situation of the child so requires". There is no obligation on the requested authority (which can only be a public authority) to respond, but it may do so. Implementing regulations will ensure that requested authorities have a power to respond and can therefore do so in compliance with the data protection legislation if they wish. The UK will be making the A.34(2) declaration, so that such requests must all be routed through CAs.

42. Article 35 provides for practical co-operation between authorities of Contracting States, in particular in relation to facilitating exercise of contact ("rights of access"). A.35(1) relates to provision of practical help, for example, it might involve ensuring that persons involved in contact cases under the Convention can make use of facilities such as contact centres in the UK. A.35(2) provides a mechanism to enable a parent residing in one Contracting State who is seeking access orders in another Contracting State (most usually because that is where the child is habitually resident) to request a report from domestic authorities about his or her suitability to have access. This report must then be admitted in the overseas proceedings as part of the evidence. There is no obligation on the requested authorities to respond to requests under A.35(1) and (2) – the response is discretionary.

43. Article 36 imposes a duty on competent authorities which are taking, or are considering taking, measures to protect a child, to inform authorities of another State of any serious danger to the child, where they told that the child has moved to that State. Article 37 imposes a duty on *all* authorities not to request or transmit information under the Convention where that information is likely to place the child or his or her family in danger.

Chapter VI – general

44. Two specific points require to be raised as regards Chapter VI. Firstly, no provision will be made for the provision of certificates under Article 40, which is not a compulsory provision of the Convention. However, UK authorities will, of course, be required to take note of such a certificate produced from another Contracting State, as raising a presumption that the capacity and powers indicated in it are vested in the holder in the absence of proof to the contrary.

45. Secondly, the declaration at Article 55 will not be made. There are a number of reasons for this, namely;

(a) provisions regarding protection of the child's property under the Convention do not extend to substantive rights of property, only to the right to represent the child in relation to dealings with the property and to make decisions on behalf of the child in relation to it (for example, whether to sell an asset to fund education for the child).

(b) the Convention does not extend to any matter concerning trusts. In England and Wales, a child cannot hold real property, his or her interest being held in trust. The rules of the Convention therefore do not affect real property nor any other property held in trust. Most assets of serious value would be very likely to be held in trust where children are concerned.

(c) the Brussels IIA regulation also governs such measures, and no derogation is possible. The UK has therefore been applying such a regime for some years apparently without difficulty, and it would seem inconsistent and confusing to apply a different regime depending on whether the child's situation was governed by Brussels IIA or the Convention.