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## The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency

Rhona Schuz

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# THE DOCTRINE OF COMITY IN THE AGE OF GLOBALIZATION: BETWEEN INTERNATIONAL CHILD ABDUCTION AND CROSS-BORDER INSOLVENCY

*Rhona Schuz\**

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## INTRODUCTION

Comity has long been recognized as a fundamental principle in private international law. It is widely assumed that the advent of globalization, which has resulted in the expanded movement of persons, goods, services, and capital, has increased the need for international comity in general and respect for decisions of foreign courts in particular.<sup>1</sup> However, this Article challenges this assumption and urges caution when using comity as a tool to inform interpretation and application of international instruments. In order to test the proper scope of comity in the global era, this Article develops a theoretical framework for analysis, which is rooted in the original basis of that doctrine and which distinguishes between two types of sovereign interests of states: comity interests and substantive interests. Making use of governmental interest analysis techniques, this framework facilitates evaluation of whether deferring to a foreign state in any given situation actually promotes the relevant sovereign interests of the two states involved.

The scope of international comity has been described as “elusive”<sup>2</sup> and as “one of the most important, and yet least understood, international law canons.”<sup>3</sup> A common justification for

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<sup>1</sup> Elizabeth Buckel, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 GEO. J. INT’L L. 1281 (2013).

<sup>2</sup> Donald .E. Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 79 (2010).

<sup>3</sup> *Id.* at 13.

comity is that it recognizes the interdependence of legal systems,<sup>4</sup> creates intra-system harmony,<sup>5</sup> and promotes international or, perhaps more accurately, supra-national interests. However, the true and original basis of the doctrine is advancement of the interests of individual sovereign states<sup>6</sup> via the benefits which comity ought to bring, in particular the maintenance of amicable working relationships between nations<sup>7</sup> and the facilitation of international commerce and mobility.<sup>8</sup> In this sense, the increasing dependence of national economies on trade with other states in the global era appears to make the need for comity greater.<sup>9</sup>

Thus, it is hardly surprising that, although U.S. courts continue to insist that “the principle of comity has never meant categorical deference to foreign proceedings” and that “it is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States,”<sup>10</sup> there is evidence of increased use of the doctrine by U.S. courts in recent years.<sup>11</sup> Indeed, it has been claimed that, in the “tension between respecting fair foreign proceedings and shielding U.S. citizens from foreign laws,” the pendulum has swung toward recognition of foreign decisions.<sup>12</sup> For example, Folkman shows that U.S. courts give greater deference to the decisions of foreign courts than they

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<sup>4</sup> Peter Hay, *On Comity, Reciprocity, and Public Policy in U.S. and German Judgments Recognition Practice*, in PRIVATE LAW IN THE INTERNATIONAL ARENA: FROM NATIONAL CONFLICT RULES TOWARD HARMONIZATION AND UNIFICATION 237 (Jurgen Basedow et al. eds., 2000).

<sup>5</sup> *Id.* at 249.

<sup>6</sup> Childress, *supra* note 2, at 20 (explaining Huber) and 25–28 (explaining Story); E. Lorenzen, *Story's Commentaries on the Conflict of Laws – One Hundred Years After*, 48 HARV. L. REV. 15, 35 (1934) (describing Story's comity doctrine as based on “self-interest”); K.W. PATCHETT, RECOGNITION OF COMMERCIAL JUDGMENTS AND AWARDS IN THE COMMONWEALTH 47–48 (1984) (arguing that comity is a rule of domestic law and not of international law).

<sup>7</sup> Childress, *supra* note 2, at 14.

<sup>8</sup> Lorenzen, *supra* note 6. For a reference to “today's highly interdependent commercial world,” see *F. Hoffman Law-Roche Ltd v. Empagran SA*, 542 U.S. 155, 164–65 (2000).

<sup>9</sup> Joel Paul, *Transformation of International Comity*, 71 LAW & CONTEMP. PROB. 19 (2008) (referring to the modern phenomenon of “deference to the market.”).

<sup>10</sup> *In re Treco*, 240 F.3d 148, 157 (2d Cir. 2001).

<sup>11</sup> Childress, *supra* note 2, at 63.

<sup>12</sup> Buckel, *supra* note 1, at 1286–87.

would give to those of sister states under the doctrine of full faith and credit.<sup>13</sup>

Certain scholars, however, have been critical of the almost “blind” reliance of some judges on the doctrine of comity and claim that they do not take into account sovereign interests. In particular, Childress argues that the promotion of sovereign interests—the original rationale for the doctrine—has disappeared in U.S. jurisprudence. Rather, in the United States, comity is treated as requiring the application of foreign law without consideration of sovereign interests.<sup>14</sup>

As the number of bilateral and multilateral treaties, along with other international instruments governing the recognition of foreign judgments, arbitral awards, and applicable law, increases, it might be expected that there will be less need for judicial reliance on the doctrine of comity because the treaties themselves set the boundaries for giving effect to foreign law or judgments and reflect the legislature’s view as to the optimal balance between comity and other competing domestic interests. In practice, however, the doctrine of comity is still relevant in the interpretation of these instruments<sup>15</sup> and in exercising any discretion which they confer.<sup>16</sup> Thus, questions still arise as to the appropriate scope of the doctrine and, in particular, as to the extent to which the judicial use of the doctrine accurately reflects sovereign interests in the global era.

This Article will focus on the judicial use of comity in the interpretation and application of the Hague Convention on Civil Aspects of International Child Abduction of 1980 (“the Abduction Convention”).<sup>17</sup> Additionally, in order to provide a broader perspective, this Article will briefly consider the use of comity by

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<sup>13</sup> T. Folkman, *Two Modes of Comity*, 34 U. PA. J. INT’L L. 823 (2013).

<sup>14</sup> Childress, *supra* note 2, at 60–61.

<sup>15</sup> It should be noted that comity has also been used in interpreting domestic statutes, such as the Foreign Sovereign Immunities Act. Childress, *supra* note 2, at 50.

<sup>16</sup> Discretion may be conferred under these treaties in a variety of ways. Most commonly, treaties may give courts discretion to deviate from particular rules where one of a number of exceptions is established. *See* discussion *infra* Parts II.B and IV.B.

<sup>17</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Abduction Convention], available at <http://www.hcch.net/upload/conventions/txt28en.pdf>. Enacted in the United States in International Child Abduction Remedies Act, 42 U.S.C. § 1160 (1988). Enacted in the United Kingdom as the Child Abduction and Custody Act 1985.

U.S. courts in applying the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (“The Model Law”).<sup>18</sup> While international child abduction and cross-border insolvency may seem unlikely bed-fellows, examination of these two regimes reveals remarkable similarities and comparison between them provides insight as to the way that the doctrine of comity is—and ought to be—used by judges in the modern age. In particular, the backdrop to both the Abduction Convention and the Model Law is expanding globalization, which, together with other sociological and economic factors,<sup>19</sup> has brought in its wake a significant increase in the phenomena both of international child abduction and of multinational insolvencies, specifically creditors based in different jurisdictions pursuing assets situated in more than one country.<sup>20</sup>

This Article assesses the extent to which the judicial use of comity in Abduction Convention cases reflects the real interests of the states involved by making use of governmental interest analysis methodology.<sup>21</sup> Part I provides the theoretical basis for this Article, briefly examining the origins and rationales for the doctrine of comity, the justification for using interest analysis methodology, and an explanation of how that methodology will be used in this Article. Part II sets out the mechanisms and objectives of the Abduction Convention and then explains the ways in which the doctrine of comity has been used by the judiciary in the United States, and other common law systems, in interpreting and applying the Convention. Part III applies interest analysis methodology to the use of comity in abduction cases. Part IV provides a brief discussion of the use of comity in U.S. Model Law cases and draws comparisons between the approach in these cases with the approach in the Abduction Convention

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<sup>18</sup> Enacted in the United States as Chapter 15 of the U.S. Bankruptcy Code, 11 U.S.C. (by title VIII of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Enacted in the United Kingdom as the Cross-Border Insolvency Regulations 2006, SI 2006/1030.

<sup>19</sup> Factors such as increase in rates of marriage breakdown and widespread economic recession.

<sup>20</sup> See data in relation to multi-national companies in *Developments in the Law: VII. Chapter 15 and Cross-Border Bankruptcy*, 124 HARV. L. REV. 1292, 1292 (2011).

<sup>21</sup> As suggested by Childress, *supra* note 2, at 78–79 (arguing that reliance on the doctrine of comity should be predicated on the use of governmental interest analysis to expose and articulate the sovereign interests at stake).

cases discussed in Part III. Finally, Part V synthesizes these analyses and proposes a conclusion.

## I. THEORETICAL BACKGROUND

After a discussion of the development of the doctrine of comity, this part will briefly explain interest analysis methodology and set out the rationale for employing this methodology in analyzing the use of comity in the interpretation of international instruments.

### A. *The Doctrine of Comity*

The idea that private international law is based on comity dates back to Huber<sup>22</sup> and was adopted by Story.<sup>23</sup> The latter wrote on private international law as follows:

The true foundation on which the subject rests is that rules which are to govern are those which arise from mutual interest and utility; from the sense of the inconveniences which would arise from a contrary doctrine; and from a sort of moral necessity to do justice in order that justice may be done to us in return.<sup>24</sup>

Story's concept of comity clearly includes a number of different elements and it is therefore unsurprising that the notion of comity has been understood differently by various scholars and judges. It is also unsurprising that the exact status of the doctrine of comity is still unclear.<sup>25</sup> The substantive lack of clarity surrounding the doctrine is exacerbated by terminological confusion, at least in the United States, where the phrase "to extend comity" has been used generally to refer to the recognition of a foreign judgment.<sup>26</sup>

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<sup>22</sup> Ulrich Huber (1635–94) was a Frisian jurist, whose writings about the conflict of laws were extensively cited in Anglo-American cases. ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS 2* (University of Georgia Press, 1992).

<sup>23</sup> Joseph Story, a Professor of Law at Harvard and a judge, is regarded as the "prime architect of nineteenth-century American conflicts law." *Id.* at 2. For a persuasive analysis of how Story misunderstood Huber, see Watson, *id.*

<sup>24</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 35 (1834).

<sup>25</sup> Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1, 44 (1991). For changes in the meaning of comity over the years, see Paul, *supra* note 9.

<sup>26</sup> See, e.g., *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997); *Diorinou v. Mezitis*, 237 F.3d 133, 145 (2001); *Asvesta v. Petrousas*, 580 F.3d 1000 (9th Cir. 2009).



One sense in which comity has been understood is that of reciprocity.<sup>27</sup> According to this theory, one state (the “forum state”) applies laws and recognizes judgments of another state (“the foreign state”), so that other states will, in turn, apply the forum state’s law and recognize the forum state’s judgments.<sup>28</sup> Thus, some legal systems refuse to recognize the judgments of those states that do not reciprocate.<sup>29</sup> Moreover, many modern bilateral and multilateral treaties are premised on the reciprocal undertakings of the Contracting States to apply the law of the other signatory states, or recognize their judgments in accordance with the rules in the Convention.<sup>30</sup> Indeed, it has been said that comity, in this sense of reciprocity, is “at the heart” of the Abduction Convention<sup>31</sup> because Contracting States are only required to return children who were habitually resident in another Contracting State at the date of the wrongful removal or retention.<sup>32</sup>

It seems, however, that the primary use of comity is in the sense of judicial courtesy.<sup>33</sup> That is, foreign laws are applied in

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<sup>27</sup> Paul, *supra* note 9, at 20 (citing *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)); Hans Smit, *International Res Judicata and Collateral Estoppel*, 9 UCLAL REV. 44, 53 (1962). *Cf.* Hay, *supra* note 4, at 237 (contrasting reciprocity and comity as two separate concepts, and explaining that reciprocity emphasizes local concerns that may disfavor recognition of foreign judgments).

<sup>28</sup> Patchett, *supra* note 6, at 50.

<sup>29</sup> *Hilton v. Guyot*, 159 U.S. at 126–131. For the rather patchy history of the requirement of reciprocity in the United States, see V. Singal, *Preserving Power Without Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L. J. 943, 947–958 (2008). In Israel, section four of the Foreign Judgments Enforcement Law predicates enforcement of foreign judgments on reciprocal enforcement of Israeli judgments by the judgment rendering state. Foreign Judgments Enforcement Law, 5718–1958, 12 L.S.I. 82 § 4 (1958) (Isr.).

<sup>30</sup> *E.g.*, Council Regulation No. 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) (EC).

<sup>31</sup> *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999).

<sup>32</sup> See ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION 426, ¶ 37 (1982) [hereinafter PEREZ-VERA REPORT], available at <http://www.hcch.net/upload/expl28.pdf> (explaining that the rights and duties under the Convention do not apply to non-member states because mechanisms under the Convention are largely dependent on cooperation between Central Authorities).

<sup>33</sup> See, for example, *Hughes v. Cornelius* (1680) 2 Show 232 (US), DICEY’S CONFLICT OF LAWS 7 (London, Stevens, Sweet and Maxwell eds., 9th ed, 1973) and generally Paul, *supra* note 9, at 21–27. *Cf.* J. FAWCETT, J.M. CARRUTHERS,

preference to forum law, and foreign judgments are recognized, without review of the merits,<sup>34</sup> in order to show deference to other sovereign states.<sup>35</sup> Yet, even if this use of comity is accepted as the standard, there is still doubt as to the exact nature and scope of the doctrine. Story, in contrast to Huber,<sup>36</sup> clearly stated that comity did not impose an absolute obligation, but rather left each state with discretion to determine the extent to which it would respect foreign law and judgments.<sup>37</sup> Moreover, many doubt whether comity can provide an adequate basis for actually constructing choice of law rules<sup>38</sup>—or even recognition rules.<sup>39</sup> Thus, the doctrine may be understood as a theory which provides general justification for the need to apply foreign laws and recognize foreign judgments in certain circumstances,<sup>40</sup> in accordance with whatever choice and recognition rules have been chosen.

Nonetheless, it has been argued that in U.S. case law, comity has become a rule of law that obligates courts<sup>41</sup> to apply foreign law in some circumstances and to recognize foreign judgments,<sup>42</sup>

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& P. NORTH, CHESHIRE, NORTH AND FAWCETT, PRIVATE INTERNATIONAL LAW (Oxford University Press, 14th ed., 2008) (claiming that courtesy is a matter for sovereigns and not judges).

<sup>34</sup> *Hilton v. Guyot*, 159 U.S. at 202–03.

<sup>35</sup> Paul, *supra* note 9, at 20.

<sup>36</sup> Watson, *supra* note 22, at 19–22.

<sup>37</sup> “[E]very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.” *Id.* at 20.

<sup>38</sup> Inter alia, because it cannot determine which of a number of connected laws should apply, J.H.C. MORRIS, THE CONFLICT OF LAWS 506 (Stevens ed., 3d ed. 1984) and because of the vagueness of the doctrine. FRIDERICH C. VON SAIVGNY, A TREATISE ON THE CONFLICT OF LAWS 76 (1869).

<sup>39</sup> The main reason for this doubt is that, on the assumption that comity does not impose an absolute obligation, recognition would then be based on judicial discretion as opposed to the rights of the parties. MORRIS, *supra* note 38, at 506. Similarly, Slade LJ in *Adam v. Capes Industries*, [1991] 1 All E.R. 929 at 1037, commented that the society of nations will work better if some foreign judgments are enforceable, but that this truth does not identify which foreign judgments should be recognized.

<sup>40</sup> Childress, *supra* note 2, at 13.

<sup>41</sup> Paul, *supra* note 9.

<sup>42</sup> See also Hay, *supra* note 4, at 239 (explaining that, in those states where there is no statutory framework, the recognition and enforcement of foreign judgments is based on comity). In relation to recognition of foreign custody or-

subject to certain limitations,<sup>43</sup> and thus functions not only as a justification for deferring to foreign law, but also as a conflicts rule.<sup>44</sup> Even so, it is clear that the doctrine of comity is characterized by ambiguity, particularly regarding the extent to which it is binding.<sup>45</sup> For example, courts still quote the famous dictum from the leading nineteenth century case of *Hilton v. Guyot*<sup>46</sup> that extension of comity to a foreign judgment is “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”<sup>47</sup>

For the purpose of this Article, it is almost<sup>48</sup> unnecessary to decide which of the latter two approaches is correct because the instruments in question provide rules as to the circumstances under which foreign judgments or law must be respected, subject to stated exceptions and to those circumstances where there is discretion.<sup>49</sup> Thus, when courts in Abduction Convention and Model Law cases refer to comity, the courts are interpreting and applying the rules and exceptions in these international instruments in a way that is consistent with the theoretical justification for applying foreign law and recognizing foreign judgments. Accordingly, in the context of these instruments, comity cannot be seen as a binding rule, but is rather a guiding principle.

Still, the history of these differing views is relevant to this Article’s argument. In particular, Story’s notion of comity is based on the premise that foreign law need only be respected to the extent that it is not prejudicial to the interests of the forum state.<sup>50</sup> Childress notes that Story’s original concern with sovereign interests has disappeared in U.S. jurisprudence, in which

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ders in the United States on the basis of comity, see D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM L. Q. 547, 554–55 (2004).

<sup>43</sup> One such limitation being the need for reciprocity. See *Hilton v. Guyot*, 159 U.S. 113, 131 (1895).

<sup>44</sup> Paul, *supra* note 9.

<sup>45</sup> Paul, *supra* note 9, at 10–11, 78 (“comity is regarded both as legally compelled and discretionary”).

<sup>46</sup> *Hilton*, 159 U.S. 113.

<sup>47</sup> *E.g.*, *Asvesta v. Petrousas*, 580 F.3d 1000, 1011 (9th Cir. 2009).

<sup>48</sup> Except in relation to the issue of recognition of non-return orders.

<sup>49</sup> In relation to the Abduction Convention see *infra* at II.A; in relation to the Model Law, see *infra* at IVA.

<sup>50</sup> Lorenzen, *supra* note 6, at 33–35; see also Watson, *supra* note 22, at 20–22.

the doctrine of comity is treated as requiring application of foreign law without consideration of sovereign interests.<sup>51</sup> Accordingly, Childress argues that there is a need to restore the centrality of sovereign interests and that reliance on the doctrine of comity should be predicated on the use of governmental interest analysis to expose and articulate the sovereign interests at stake.<sup>52</sup> As stated above, this Article will adopt this suggestion, and, thus, the next section considers briefly how governmental interest analysis methodology can be used in the current context.

### *B. Governmental Interest Analysis and Comity*

Disillusionment with traditional jurisdiction selection and mechanical choice of law rules led Currie to develop the governmental interest analysis approach to choice of law.<sup>53</sup> This approach is based on the premise that there are public interests at stake, even in disputes between private individuals, and that governments have an interest in local law applying where the policy that informed that law is engaged.<sup>54</sup> Thus, a judge must determine what the policies behind the respective laws are, so that he can conclude whether each state has an interest in its law being applied.<sup>55</sup> Where this analysis reveals that only one of the states has an interest, then the apparent conflict between the two laws turns out to be false, and the law of the state that does have an interest must be applied.<sup>56</sup> But, the situation is not so simple where there is a real conflict, and this situation is recognized as the “Achilles’ heel” of the theory. Over the years, various ap-

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<sup>51</sup> Childress, *supra* note 2, at 60–61. Thus, the rule adopted by some U.S. courts, that foreign custody decrees, rendered by foreign courts with jurisdiction, would only be refused recognition where they were inconsistent with the strong public policy of the forum state. Blair, *supra* note 42, at 554. It should be noted that statutory effect has been given to this policy by section 105 of the Uniform Child Custody Jurisdiction and Enforcement Act. (UCJJE), 9 U.L.A. (Part 1A) 649 (1999); Blair, *supra* note 42, at 560–62.

<sup>52</sup> Childress, *supra* note 2, at 78–79.

<sup>53</sup> See Brainerd Currie, *Selected Essays on the Conflict of Laws* 190–94 (1963); see generally PETER HAY, PATRICK J. BORCHERS, & SYMEON C. SYMENOIDES, *CONFLICT OF LAWS* 27–31 (5th ed., 2010).

<sup>54</sup> Currie, *supra* note 53, at 189.

<sup>55</sup> *Id.* at 184.

<sup>56</sup> HAY ET AL., *supra* note 53, at 31.

proaches have been suggested, including Currie's solution of applying forum law, Baxter's "comparative impairment" theory<sup>57</sup> and other versions of functional analysis which weigh the competing interests in different ways.<sup>58</sup>

While Currie's theory has had limited influence on judicial decision-making,<sup>59</sup> it has had a deep impact on academic writing in the field<sup>60</sup> and, despite considerable criticism, is still defended by many leading scholars.<sup>61</sup> As already mentioned, Childress has urged that interest analysis be employed in order to determine when the doctrine of comity should be used.<sup>62</sup> Indeed, because the original notion of comity was rooted in sovereign interests, Currie's interest analysis theory provides an appropriate analytical tool for determining the scope of the doctrine. Indeed, some of the criticisms of interest analysis theory do not seem to apply in the comity context. For example, the claim that states do not have an interest in the outcome of disputes between private parties is not tenable in this context, since the doctrine of comity itself is based on the assumption that states do have such interests.

Moreover, some of the practical problems of interest analysis methodology are of less significance when interest analysis is being used to indicate whether the doctrine of comity should be a relevant factor in interpreting an international instrument, or in exercising discretion conferred by that instrument, and not in the traditional context of determining which law should apply. Thus, for example, the uncertainty caused primarily by the difficulty in identifying governmental sovereign interests<sup>63</sup> is far less important in the context of interpretation of international conventions. Similarly, the limited nature of the inquiry in this Article makes it possible to adopt a broad weighing of interests approach to real conflicts.

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<sup>57</sup> William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

<sup>58</sup> HAY ET AL., *supra* note 53, at 45-51.

<sup>59</sup> *Id.* at 114.

<sup>60</sup> *Id.* at 37.

<sup>61</sup> *Id.*

<sup>62</sup> Childress, *supra* note 2, at 62. However, my analysis identifies sovereign interests on the basis of policies, as in Currie's theory, and does not suggest any input from the Executive in ascertaining these interests, as does Childress. *Id.* at 67-68.

<sup>63</sup> HAY ET AL., *supra* note 53, at 30 n.16; Morris, *supra* note 38, at 520.

Childress argues that U.S. courts that have engaged in governmental interest analysis to determine the scope of comity, have taken inconsistent approaches, and that it is not always clear whether courts are looking for a conflict between laws, proceedings, or policies.<sup>64</sup> Furthermore, some courts have distinguished between different comity contexts.<sup>65</sup> Thus, there is no authoritative approach, in the United States, to the use of interest analysis in determining the role of comity.

The analysis in this Article focuses on the policies of the two states involved. It differs from a traditional governmental interest analysis in that it expressly considers conflicting interests within each state. Its starting point is the assumption that both the forum state and the foreign state (i.e., the state that rendered the judgment or whose law is applicable) have a shared interest<sup>66</sup> in deferring to the foreign state's adjudication, applicable law or judgment. This Article refers to this shared interest as a "comity interest." The forum state's interest is essentially one of maintaining good international relations, which has been expressed by one author as "the fear of being seen to sit in judgment on the courts of other nations and the fear of causing diplomatic problems."<sup>67</sup> The foreign state's interest is in having its applicable law or decisions respected by the forum state without review. Additionally, since the two international instruments on which this Article focuses determine which state should adjudicate in the main proceedings, the comity interests of the foreign state also include deferral to its adjudication therein by the forum state, without review of its legal system.<sup>68</sup>

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<sup>64</sup> Childress, *supra* note 2, at 51–56.

<sup>65</sup> *E.g.*, legislative comity, executive comity, and adjudicative comity. *Id.* at 48–55.

<sup>66</sup> As assumed by Lorenzen, *supra* note 6 and accompanying text.

<sup>67</sup> T. Folkman, *Two Modes of Comity*, 34 U. PA. J. INT'L L. 823, 826 (2013). This comment was made in the context of the United States. There is no reason, however, to assume that these concerns, which reflect the importance attached to a positive international image, and cordial international relations with other states, are unique to the United States. On the contrary, courts in less powerful states, which are more dependent economically, and politically, on pleasing others, are likely to be even more influenced by these considerations.

<sup>68</sup> *See e.g.*, *Gross v. British Broadcasting Corp.*, 386 F.3d 224 (2d Cir. 2004) (discussing the imposition of conditions on forum non conveniens dismissals, and warning that courts should not impose conditions that may be viewed as having the effect of undermining the considered policies of the transferee forum, because comity demands respect for these policies).

However, in addition to the comity interests, it is also necessary to take into account the substantive interests of each state in relation to the subject matter of the dispute in question. While the substantive interests of the states involved may be consistent with their comity interests, there will inevitably be certain situations in which the substantive interests of one or both states may diverge from their respective comity interests. These substantive interests will considerably weaken, and may even prevail over, the comity interests as described above. Accordingly, the impact of these countervailing substantive interests may lead to two scenarios. The first is where, in the circumstances that have evolved, the foreign state does not, in fact, have a real interest in having its judgment recognized or its relevant law applied without review. This lack of a real interest automatically removes the rationale for the forum state's interest in respecting the foreign law or judgment, and so there is a false conflict. The second scenario is where the substantive interests of the forum state, which militate against deferral to the foreign law or judgment, prevail over its comity interests, and so there is a real conflict of interests with the foreign state.

In the first situation, there is clearly no room for use of comity, as this will produce a result which is inconsistent with the interests of either state. Better, then, that the forum state should apply its own law. In the second scenario, the question is whether the forum's substantive interests should prevail over the foreign state's comity interest in having its law or judgment respected without review. This Article uses a weighing-of-interests approach to answer this second question—an approach that includes consideration of both the comity interests and the substantive interests of each state. Where the answer is negative (i.e., where the forum's substantive interests do not prevail over the foreign state's comity interest), then comity is relevant and the foreign law or judgment must be respected. But, where the answer is positive, the substantive interests of the forum must supersede and deference will not be extended to the foreign law or judgment.

## II. THE ABDUCTION CONVENTION

The first section in this part will explain briefly how the Abduction Convention operates and the objectives that it is designed to achieve. The second section will survey the ways in

which the concept of comity has been used in Abduction Convention case law.

### *A. Mechanism and Objectives*

The Abduction Convention mandates that the judicial or administrative authorities in the state to which a child has been wrongfully removed or retained—the requested state or the state of refuge—to order the immediate return of an abducted child to the state of his or her habitual residence—the requesting state or the state of origin—prior to the abduction,<sup>69</sup> unless one of the narrow exceptions in the Convention is established.<sup>70</sup> Ninety-three countries have now ratified the Abduction Convention,<sup>71</sup> and around 2,000 applications to return abducted children are made under the Convention each year.<sup>72</sup> The Abduction Convention expressly states that its objectives are as follows:

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<sup>69</sup> Speed is of the essence in Abduction Convention proceedings, and the aim is to complete the proceedings within six weeks. See Abduction Convention, *supra* note 17, art. 11.

<sup>70</sup> The exceptions are as follows: (i) twelve months have passed since the date of wrongful removal or retention and the child is settled in his new environment (“the passage of time and settlement exception”) *id.* art. 12(2), (ii) the left-behind parent was not exercising custody rights at the time of removal or retention or had agreed to, or subsequently acquiesced, in the removal or retention (“the consent or acquiescence exception”) *id.* art. 13(1)(a), (iii) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (“the grave risk exception”) *id.* art. 13(1)(b), (iv) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views (“the child objection exception”) *id.* art. 13(2), or (v) return of the child would not be permitted by the fundamental principles of the requested state relating to protection of human rights and fundamental freedoms (“the human rights exception”) *id.* art. 20.

<sup>71</sup> *Status Table*, HAGUE CONFERENCE ON PRIVATE INT’L L., [www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited Feb. 2, 2015).

<sup>72</sup> According to information provided by central authorities from sixty of the then eighty-one signatories to the Convention, 1,965 applications were submitted under the Convention worldwide in 2008, and return was ordered in forty-six percent of cases. Eighteen percent of the applications were withdrawn, and eight percent were still pending at the termination date of the survey. NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2008 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6, 12 (2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.



- (a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) To ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States.<sup>73</sup>

The Preamble to the Abduction Convention explains that the rationale behind these objectives is the belief that the best interests of children are paramount in custody matters.<sup>74</sup> The objective of prompt return is based on the premise that the welfare of children is best promoted by reversing the effect of abductions as quickly as possible for three reasons.<sup>75</sup> First, a prompt return will negate the harm often caused to children who are suddenly removed from their environment.<sup>76</sup> Second, the knowledge that immediate return will be ordered is likely to deter potential abductors.<sup>77</sup> Third, the child's interests can best be protected by litigating the merits of the dispute in the forum *conveniens*, which will usually be the place of the child's habitual residence.<sup>78</sup> Accordingly, the requested state is not permitted to consider the merits of the custody dispute between the parents, and its role is further limited to determining whether the conditions for application of the Convention are met and, if so, whether one of the exceptions applies.<sup>79</sup> Although a prompt return will not promote the child's welfare in each case, any attempt to ascertain what the child's welfare requires automatically jeopardizes the objective of prompt return in every case.

The drafters, therefore, chose a mechanism of mandatory return, which requires the judicial or administrative authorities in the requested state to order the return of a wrongfully removed

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<sup>73</sup> Abduction Convention, *supra* note 17, art. 1.

<sup>74</sup> *Id.* Preamble.

<sup>75</sup> Rhona Schuz, *The Hague Child Abduction Convention and Children's Rights*, 12 *TRANSNAT'L L. & CONTEMP. PROBS.* 393, 398 (2002).

<sup>76</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 25.

<sup>77</sup> *Id.* at ¶¶ 16–17, 25.

<sup>78</sup> It is important to keep in mind that the Abduction Convention is intended to be "first aid" only, and that the merits of the custody dispute will be decided in the courts of the requesting state after return of the child. *See* PEREZ-VERA REPORT, *supra* note 32, ¶ 16.

<sup>79</sup> The conditions are that the child has been wrongfully removed or retained, he is not yet sixteen years old, and his habitual residence immediately prior to the wrongful removal or retention was in a Contracting State. *See* Abduction Convention, *supra* note 17, arts. 3–4. For exceptions, see PEREZ-VERA REPORT, *supra* note 32, ¶ 113.

or retained child without any investigation of the merits of the case,<sup>80</sup> subject to a number of narrowly drawn exceptions,<sup>81</sup> commonly referred to as defenses. The burden is on the abductor to prove the establishment of the exceptions and, in relation to two of them,<sup>82</sup> the U.S. legislature required a heightened evidentiary burden of “clear and convincing evidence.”<sup>83</sup> Where one of the exceptions is established, the “gate is unlocked,” and the court has discretion whether or not to return the child.<sup>84</sup>

The Preamble of the Abduction Convention leaves little doubt that the central objective of the Convention is the protection of the interests of children. Nonetheless, the reference to recognition of rights of custody and access in the objects of the Convention, together with the use of breach of custody rights attributed to a person, institution, or other body as the trigger for the mandatory return mechanism,<sup>85</sup> shows that an additional objective is the protection of the parental rights of the parent from whom the child was taken—the “left-behind parent.” Restoration of the status quo ante, via return of the child, thus also achieves justice between the parents.<sup>86</sup>

An additional, albeit subsidiary, objective of mandatory return is to uphold the rule of law. In other words, the abductor is not allowed to gain any advantage as a result of his wrongdoing.<sup>87</sup> But, the very fact that the drafters provided exceptions to mandatory return shows that they understood that other policies, and protection of children’s interests, in particular, should take precedence over the adult-centric policies of justice between the parents and upholding the rule of law.

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<sup>80</sup> Abduction Convention, *supra* note 17, art. 12.

<sup>81</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 113.

<sup>82</sup> The grave risk exception in Art 13(1)(b) and the human rights exception in Art 20. *Id.*

<sup>83</sup> 42 U.S.C.A. § 11603(e)(2)(A).

<sup>84</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 113.

<sup>85</sup> Abduction Convention, *supra* note 17, art. 3

<sup>86</sup> *See e.g.*, FHU v. ACU, 48 A.3d 1130, 1147 (N.J. Super. Ct. App. Div., 2012). Stating that the Convention “seeks to right a wrong.”

<sup>87</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 71; *see also, e.g.*, Re E, [2011] UKSC 27, [2012] 1 A.C. 144; RFamA 1855/08 Plonit v. Ploni, ¶ 23 (Aug. 4, 2008) (unpublished) (Isr.), available at <http://elyon1.court.gov.il/files/08/550/018/r03/08018550.r03.pdf>; [INCADAT cite: HC/E/IL 923].

Finally, cooperation is an important element in the Abduction Convention's scheme.<sup>88</sup> In particular, Contracting States are obliged to designate Central Authorities,<sup>89</sup> who are, in turn, required to "cooperate with each other and to promote cooperation amongst the competent authorities in their respective states" in order to achieve the objects of the Convention.<sup>90</sup>

### *B. The Abduction Convention and Comity*

This section will survey five different ways in which the doctrine of comity has been referred to by courts in cases involving the Abduction Convention. The first method uses comity in the sense of reciprocity. The second uses comity to narrowly interpret the exceptions and the third is the use of comity as a factor in exercising the discretion that arises where one of the exceptions is established. The fourth concerns the impact of comity on the practice of requiring undertakings. The fifth relates to recognition of non-return orders of the requested state.

#### 1. Reciprocity

Some judges have expressly relied on the reciprocal nature of the Abduction Convention to support decisions to return abducted children to other Contracting States, so that those states will reciprocate by returning children abducted from the judges' own states.<sup>91</sup> Even when this consideration is not expressed, it

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<sup>88</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 37.

<sup>89</sup> Abduction Convention, *supra* note 17, art. 6.

<sup>90</sup> *Id.* art. 7.

<sup>91</sup> *E.g.*, *Souratagar v. Lee*, 720 F.3d 96, 108 (2d Cir. 2013) ("We are also mindful of the need for comity as '[t]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations—whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection.") (citing *Blondin v. Dubois*, 189 F.3d 240, 242 (2d Cir. 1999)); *DP v. Commonwealth Cent. Authority* (2001) 206 CLR 401 para. 155 (Kirby, J., dissenting) ("To the extent that Australian courts, including this Court, do not fulfill the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody (and residence) decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in the aggregate, be in the best interests of children generally and of Australian children in particular."); *see also* *Duran v. Beaumont*, 534 F.3d 142, 152–53 (2d Cir. 2008) (Wesley, J., dissenting).

may well influence judicial decision making. Others have used the concept of reciprocity to refer generally to the importance of mutual respect between Contracting States,<sup>92</sup> rather than to reciprocity between two particular Contracting States.<sup>93</sup> There is some evidence that this concern is greater where the case is one to which the Brussels II bis Regulation applies.<sup>94</sup> This increased concern is due to the close economic, social, and legal ties between the EU Member States, which go far beyond abduction cases.<sup>95</sup>

## 2. To Support a Narrow Interpretation of the Exceptions

As explained above, the Abduction Convention contains a number of exceptions to mandatory return. Most courts have interpreted these exceptions restrictively, out of concern, that, otherwise, the Convention would become “a dead letter” or ineffectual.<sup>96</sup> In relation to two of the exceptions, comity has been cited as one of the reasons for the narrow interpretation and these will be now considered in turn.

### (a) *The Grave Risk Exception*

The grave risk exception applies where the abductor establishes that “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise

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<sup>92</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 37 (referring to the need for cooperation between Central Authorities, which is based on reciprocal rights and duties).

<sup>93</sup> See, e.g., *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 1A(2)(c) (Austl.) (providing that the regulations are to be construed *inter alia* “recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of convention countries.”).

<sup>94</sup> Council Regulation 2201/2003, 2003 O.J. (L 338) (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility). See e.g., *Vigreux v. Michel* [2006] EWCA (Civ.) 630, [78]–[82] and *Re F.* (Abduction: Joinder of Child as Party) [2007] EWCA (Civ.) 393, [2] (Thorpe L.J.) (Eng.).

<sup>95</sup> For impact of political “europeanisation” considerations on the EC legislation relating to cross-border family disputes, see KATERINA TRIMMINGS, *CHILD ABDUCTION WITHIN THE EUROPEAN UNION* 9 (2013) and Peter McEleavy, *The Brussels II Regulation: How the European Community has Moved Into Family Law*, 51 INT’L & COMP. L.Q. 883, 893 (2002).

<sup>96</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 34.

place the child in an intolerable situation.”<sup>97</sup> The concept of comity has been used to justify a narrow interpretation of this exception, on the assumption that other Contracting States will be just as willing and able to protect children as the requested state, and it is therefore not appropriate to examine whether this is indeed the case.<sup>98</sup> According to this view, then, return can only expose the child to a grave risk of harm or place him in an intolerable situation if circumstances outside the control of the requesting state exist, such as famine or war.<sup>99</sup>

*(b) The Human Rights Exception*

Article 20 of the Abduction Convention provides that return of the child may be refused “if this would not be permitted by one of the fundamental principles of the requested State relating to protection of human rights and fundamental freedoms.”<sup>100</sup> The notion of comity between signatory states has been used as a reason to reject claims invoking this exception. For example, in the case of *Caro v. Sher*,<sup>101</sup> where the Spanish law did not meet the standards of due process in the United States,<sup>102</sup> the court justified its refusal to invoke the Article 20 defense on the basis that there was no reason to prefer the jurisprudential precepts of one Member State over that of another.<sup>103</sup> The court also pointed out that one of the objectives of the Convention was to ensure mutual respect for rights of custody and access.<sup>104</sup> Similarly, an Israeli court has held that, in applying the Convention,

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<sup>97</sup> Abduction Convention, *supra* note 17, art 13(1)(b).

<sup>98</sup> See *e.g.* *Blondin v. Dubois*, 189 F.3d 240, 248–49 (2d Cir. 1999) (“In the exercise of comity . . . we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.”); *Miller v. Miller*, 240 F.3d 392, 402 (2001) (citing *Friedrich v. Friedrich* 78 F.3d 1060, 1068 (1996); *In the Marriage of Gsponer*, (1988) 12 Fam LR 755 (Austl.); *Murray v. Director, Family Services (Act)*, (1993) 16 Fam LR 982 (Austl.).

<sup>99</sup> See, *e.g.* *Friedrich*, 78 F.3d at 1068.

<sup>100</sup> Abduction Convention, *supra* note 17, art 20.

<sup>101</sup> *Caro v. Sher*, 687 A.2d 354 (N.J. Super. Ct. Ch. Div. 1996).

<sup>102</sup> Because there would be a four-year delay in hearing the child’s relocation petition. *Id.* at 361.

<sup>103</sup> See also *Escaf v. Rodriguez*, 200 F. Supp. 2d 603, 614 (E.D. Va. 2002) (stating, in reliance on State Department legal analysis, that “Article 20 does not contemplate that courts applying the provision must copy the due process safeguards provided in the petitioner’s country with those provided in the respondent’s country or with some ideal notion of due process.”).

<sup>104</sup> *Id.*

it must be presumed that all Member States observe human rights<sup>105</sup> and that, therefore, it will normally only be possible to invoke Article 20 successfully where there has been a change of regime since the accession of the requesting state to the Convention.<sup>106</sup>

### 3. In the Exercise of Discretion to Order Return Where an Exception has been Established

The fact that an exception to mandatory return has been established does not automatically preclude return of the child.<sup>107</sup> Rather, it means that the court has the discretion as to whether to return the child.<sup>108</sup> This discretion is “at large,”<sup>109</sup> and the Convention does not provide any guidelines regarding its exercise. Some of the cases set out a list of relevant factors<sup>110</sup>

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<sup>105</sup> FamC (RG) 74430/99 *Ploni v. Almonit* (unreported, 14.12.1999). *See also* Re S [2000] 1 FLR 454, 463 (Eng.). (arguing that it was not “appropriate to treat Israel as a case separate and apart from the other signatories to the Hague Convention because of the dual system available in that country.”) *Id.* (referring to the jurisdiction of religious courts in family matters); *Cf.* dissenting judgment of Justice Steiner in the European Court of Human Rights decision in *Neulinger & Shuruk v. Switzerland*, App. No. 41615/07 Eur Ct. H. R. (Jan 8, 2009) (casting doubt on the assumption of the majority that the mother’s involvement in the child’s education would be protected by the Israeli authorities on the basis that traditional religious rules applied by the Israeli religious courts are “sometimes significantly different from those with which we are familiar in Europe.”). This assertion is patently unfounded and demonstrates complete ignorance as to the nature of the Israeli legal system and to the fact that, in this case, the secular Family Court was seized of all matters relating to the upbringing of the child.

<sup>106</sup> FamC (RG) 74430/99 (citing BEAUMONT & MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 174 (Oxford University Press, 1999)). *Cf.* *Borisovs v. Kubiles*, [2013] O.N.C.J. 85, para. 46 (Can.) (holding that the Article 20 exception was established in a case where the child had been granted refugee status because of the father’s abuse—abuse that had not been dealt with by the Latvian courts).

<sup>107</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 113.

<sup>108</sup> *Id.*; Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, 28.

<sup>109</sup> Re M (Children) (Abduction: Rights of Custody), [2008] 1 A.C. (H.L.) 1288 (Baroness Hale of Richmond) (appeal taken from England.) In Australia, the discretion has been referred to as “unconfined except in so far as . . . a particular consideration is extraneous.” *Kilah v. Department of Community Services*, (2008) 39 Fam LR 431, ¶ 28.

<sup>110</sup> *See, e.g.* W v. W (Child Abduction: Acquiescence) [1993] 2 FLR 211, 219 (Eng.).

that includes welfare of the child, forum conveniens, and considerations arising from the underlying policy of the Convention, sometimes referred to as Convention considerations.<sup>111</sup> Within those purported Convention considerations, some courts have specifically referred to comity as a relevant consideration, militating in favor of ordering return, despite the fact that one of the exceptions has been established. The weight given to comity, however, may well differ depending on which exception is applicable. The interplay between three such exceptions and comity considerations that influence discretion will now be considered.

*(a) Passage of Time and Settlement*

Article 12(2) provides that a court is not obliged to return the child where twelve months have passed since the date of wrongful removal or retention, and the child is settled in his new environment.<sup>112</sup> It is not clear from the wording of the Abduction Convention whether, when this exception is established, there is indeed discretion to order return. Most courts, however, have held that there is such discretion,<sup>113</sup> and comity has occasionally been mentioned as one of the factors relevant to exercising this discretion.<sup>114</sup>

*(b) The Child Objection Exception*

A court may refuse to order return where “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.”<sup>115</sup> Comity

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<sup>111</sup> For detailed discussion, see RHONA SCHUZ, *THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS* 257–61 (2013).

<sup>112</sup> Abduction Convention, *supra* note 17, art. 12(2).

<sup>113</sup> For a detailed discussion of this issue, see *Re M (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [42]–[44], [2008] 1 A.C. (H.L.) 1288 (Baroness Hale of Richmond) (appeal taken from Eng.) and *Lozano v. Alvarez*, 134 S. Ct. 1224, 1237 (2014) (Alito J., concurring). For an argument that this approach is misconceived, see Rhona Schuz, *In Search of a Settled Interpretation of Article 12(2) of the Hague Child Abduction Convention*, 20 *CHILD & FAM. L.Q.* 64, 65 (2008).

<sup>114</sup> *E.g.* *Re S (A Minor) (Abduction)*, [1991] 2 FLR 1 at 24 (Eng.). See also, *F.H.U. v. A.C.U.*, 48 A.3d 1130, 1147 (N.J. Super. Ct. App. Div., 2012) (justifying its decision to return a settled child—even though the passage of time and settlement exception was established—based on the need to give effect to an international accord designed to ensure adjudication in the place of habitual residence, despite the fact that it causes austere results)

<sup>115</sup> Abduction Convention, *supra* note 17, art. 13(2).

is sometimes mentioned as one of the Convention considerations against which the court must balance the child's wishes,<sup>116</sup> when exercising its discretion in cases where the child objects to return.<sup>117</sup>

In the case of *Re T (Abduction: Child's Objections to Return)*,<sup>118</sup> Lord Justice Ward held that "in the particular and exceptional circumstances of this case, the interests of the children in remaining here should not be sacrificed on the altar of comity between nation states." This comment's implication is that, in other cases, the child's interests should be so sacrificed. Indeed, even where comity is not mentioned expressly, it may still be seen as one of the Convention considerations taken into account in deciding what weight ought to be placed on the views of the child.<sup>119</sup>

In a recent British Columbia case,<sup>120</sup> an interesting distinction was drawn between cases in which the retention of the child breached a court order, and those where retention simply breached an agreement between the parties. The court took the view that, while the expression of comity toward custody and access rights under the laws of a Contracting State was one of the foundations of the Convention, this policy consideration has less force where there had not been a breach of a foreign court order.<sup>121</sup>

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<sup>116</sup> *E.g.*, *Vigreux v. Michel* [2006] EWCA (Civ) 630, [78]–[82]; *JPC v. SMW & Anor*, [2007] EWHC (Fam) 1349, [50] (Eng.).

<sup>117</sup> There is some confusion in the case law as to whether this discretion is exercised in determining whether the exception is established, or in determining whether the child should be returned despite the fact that the exception is established. There is not, however, any practical difference between the two approaches, because, regardless, the court must decide how much weight to place on the child's objections. For detailed discussion, see SCHUZ, *supra* note 111, n. 319–22.

<sup>118</sup> *Re T (Abduction: Child's Objections to Return)*, [2000] 2 FLR 192, 220 (Eng.).

<sup>119</sup> *See e.g.* *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, 730–31 (per Balcombe LJ) and *Re W (Minors)*, [2010] EWCA (Civ) 520, [26] (Eng.). Indeed, prior to the House of Lords decision in *Re M (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [42]–[44], [2008] 1 A.C. (H.L.) 1288 (Baroness Hale of Richmond) (appeal taken from Eng.). United Kingdom courts took the view that Convention considerations should prevail, other than in exceptional cases.

<sup>120</sup> *R. (G.A.G.) v. W. (T.D.)*, [2013] BSCS 586, [86] (Can.).

<sup>121</sup> *Id.* at [89].



*(c) The Consent or Acquiescence Exception*

A court may refuse to order return where the abductor shows that the left-behind parent had agreed to, or subsequently acquiesced in, the removal or retention.<sup>122</sup> In such cases, comity is sometimes mentioned as one of the relevant factors in exercising the discretion to return the child, despite the fact that an exception has been established.<sup>123</sup> Indeed, Baroness Hale, when comparing these defenses with the more child-centric “grave risk” and “child objection” exceptions, voiced the following opinion: “[i]n consent or acquiescence cases, on the other hand, general considerations of comity and confidence . . . might point to a speedy return so that [the child’s] future can be decided in her home country.”<sup>124</sup> The implication of Lady Hale’s words is that, where one of the child-centric defenses is established, comity should not be a relevant factor when exercising judicial discretion.<sup>125</sup>

## 4. In Relation to Undertakings

This sub-section will start by explaining the development of the practice of requiring undertakings in order to protect returning children and then proceed to consider two main ways in which some courts have used the doctrine of comity to limit the use of undertakings and their utility.

*(a) The Practice of Requiring Undertakings*

The practice of making return orders subject to the provision of undertakings by the applicant or imposition of conditions by

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<sup>122</sup> Abduction Convention, *supra* note 17, art. 13(1)(a). Consent and acquiescence are irrevocable since, by definition, the exception is only relied on where the left-behind parent has reneged and seeks return of the child. SCHUZ, *supra* note 111, at 251; *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam. 106 (Eng.).

<sup>123</sup> *E.g.* *Re M (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [42]–[44], [2008] 1 A.C. (H.L.) 1288, para. 45 (Eng.); *BT v JRT (Abduction: Conditional Acquiescence and Consent)* [2008] EWHC (Fam) 1169.

<sup>124</sup> *Re M (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [42]–[44], [2008] 1 A.C. (H.L.) 1288, para 45 (Eng.).

<sup>125</sup> There is some evidence that this approach has been accepted in relation to the child objection exception in the United Kingdom. *See, e.g.* *AF V. MBF*, [2008] EWHC (Fam) 272 (Eng.); *Re F (A Child)*, [2009] EWCA Civ. 416, [5] (Eng.); *De L v. H*, [2009] EWHC (Fam) 3074 (Eng.); *M v. B* [2010] EWCA (Civ) 178 (Eng.); *Re WF v. RJ* [2010] EWHC (Fam) 2909 (Eng.); *A, Petitioner* [2011] CSOH 215 (Scot.).

the court,<sup>126</sup> designed to protect the child, has developed mainly in common law countries.<sup>127</sup> Effectively, these ameliorative measures are designed to neutralize any harm to which the child might be exposed, or to make what would otherwise be an intolerable situation tolerable, and thus prevent the need to refuse return under the Article 13(1)(b) grave risk exception.<sup>128</sup> Examples of common undertakings are commitments by the left-behind parent to pay the return expenses<sup>129</sup> and to provide financial support and/or accommodation for the child and returning abductor,<sup>130</sup> pending a decision of the court in the country of origin on these issues. Additionally, in cases where there are allegations of domestic violence, the abusive left-behind parent may be required to undertake not to harass the returning abductor. Also, in some cases, the left-behind parent may be required to undertake not to press criminal charges, to withdraw charges that have already been brought,<sup>131</sup> or to obtain assurances from the prosecuting authorities<sup>132</sup> in the requested state that criminal proceedings will not be instigated or will be discontinued.<sup>133</sup>

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<sup>126</sup> For convenience, the term “undertakings” will be used to include conditions.

<sup>127</sup> For general discussion of this phenomenon, see SCHUZ, *supra* note 111, at 289–98.

<sup>128</sup> *Id.* at 290.

<sup>129</sup> The Court might otherwise require the abductor to cover the cost of return expenses under Art 26 of the Convention. *See generally*, Rhona Schuz and Bin-yamin Shmueli, *Between Tort Law, Contract Law and Child Law: How to Compensate the Left-Behind Parent in International Child Abduction Cases*, 23 COLUM. J. GENDER & L. 64, 84 (2012).

<sup>130</sup> *E.g.*, *Sonderup v. Tondelli* 2001 (1) SA 1 (CC) at para. 56 (S. Afr.); CA 4391/96 Ro v. Ro 50(5) PD 33 [1997] (Isr.).

<sup>131</sup> *E.g.* *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at \* 14 (N. D. Ill. 2000).

<sup>132</sup> *See* Hague Conference on Private International Law, PERMANENT BUREAU, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Mar. 22–28, para. 5.2 (2011).

<sup>133</sup> *E.g.*, *Sonderup v. Tondelli* 2001 (1) SA 1 (CC) at para. 52 (S. Afr.) (requiring an order from the Court of British Columbia confirming that criminal proceedings were no longer pending against the mother). In the Israeli case of RFamA 1855/08 RB v. VG, 8 April 2008 (Isr) [INCADAT cite: HC/E/IL 923], *available at* <http://elyon1.court.gov.il/files/08/550/018/r03/08018550.r03.pdf>. The Supreme Court required, *inter alia*, that such assurances be obtained from the prosecution authorities in France, where proceedings had already been commenced against the abducting mother. But, when there was a delay in obtaining these assurances, the Israeli Supreme Court held that the child should be

Finally, in some cases, the return order is conditioned upon obtaining a temporary custody order in favor of the returning abductor.<sup>134</sup> The main reason for the evolution of the practice of undertakings is that, often, the abductor is the mother, who was the primary caretaker of the child before the abduction,<sup>135</sup> rather than, as the drafters of the Convention had envisaged, a noncustodial father.<sup>136</sup>

Some commentators, however, have claimed that undertakings are of no real value,<sup>137</sup> and it has been suggested that they, “may simply be sophisticated forms of judicial conscience appeasement.”<sup>138</sup> Indeed, there is evidence to support the claim that undertakings do not achieve their purpose of safeguarding abducted children from harm.<sup>139</sup> The main reason for this is that undertakings are often not enforceable in the requesting state.<sup>140</sup> In particular, in civil law jurisdictions,<sup>141</sup> the concept of

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returned immediately. The child then disappeared and has not been seen during the five years which have elapsed. The mother has now been convicted of criminal child abduction for not returning the child to the father and sentenced to five years imprisonment. CrimA 5463/11 RB v. State of Israel [2013].

<sup>134</sup> *E.g. Sonderup v. Tondelli* 2001 (1) SA 1 (CC) at para. 52 (S. Afr.); RFamA 1855/08 RB v. VG, 8 April 2008 (Isr) [INCADAT cite: HC/E/IL 923], available at <http://elyon1.court.gov.il/files/08/550/018/r03/08018550.r03.pdf>.

<sup>135</sup> In the 2008 Statistical Survey, 69 percent of abductors were mothers and 73 percent of abductors were the child’s primary caretaker or joint primary caretaker. LOWE, *supra* note 72.

<sup>136</sup> See SCHUZ, *supra* note 111, at 55.

<sup>137</sup> See *e.g.*, Merle Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593 (2000).

<sup>138</sup> Marilyn Freeman, *Primary Carers and the Hague Child Abduction Convention* (2001) *INT’L FAM. L. J.* 140, 146 (2001).

<sup>139</sup> R. Hoegger, *What If She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 *BERKELEY J. GENDER L. & JUST.* 181 (2003); Weiner, *supra* note 137.

<sup>140</sup> Interviews with left-behind parents reveal that some had been advised by their lawyers in advance to agree to the undertakings precisely because they were not enforceable, and, ultimately, would amount to nothing. REUNITE INTERNATIONAL, *THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION* 33 (2003), available at: <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf>.

<sup>141</sup> Even common law jurisdictions will not always enforce undertakings. *E.g.*, *Roberts v. Roberts*, C.A. No. 95-12029-RGS, 1998 U.S. Dist. LEXIS 4089, at \*46–48 (D. Mass. Feb. 27, 1998). For reference to correspondence between the U.S. State Department and the Lord Chancellor’s Office in the United Kingdom in relation to British concerns that U.S. courts were not enforcing undertakings, see *Danaipour v. McLarey*, 286 F.3d 1, 22 (1st Cir. 2002).

undertakings is unknown.<sup>142</sup> Thus, the abductor is effectively dependent on the left-behind parent's willingness to keep his word, or on the possibility of obtaining appropriate protection quickly from the courts of the requesting state. The left-behind parent is not always so trustworthy,<sup>143</sup> and, quite often, the unavailability of the protections that undertakings are meant to afford was the reason for the abduction in the first place.<sup>144</sup> The undertakings problem is particularly acute in domestic violence cases, both because of the likelihood that abusive persons will not balk at violating their undertakings,<sup>145</sup> and because of the substantial risks of renewed violence.<sup>146</sup> Indeed, one limited study showed that, in all of the six cases in which undertakings were given relating to violence or molestation, each of these undertakings was violated.<sup>147</sup>

Some courts have addressed the unenforceability of undertakings<sup>148</sup> and required left-behind parents to prove the efficacy of their undertakings.<sup>149</sup> Moreover, various attempts have been made to overcome the unenforceability of undertakings in requesting states. For example, the court of the requested state might require the left-behind parent to obtain an order—known as a mirror order—from the court of the requesting state, which

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<sup>142</sup> Per Baroness Hale and Lord Wilson in *Re E*, [2011] UKSC 27, [7] [2012] 1 A.C. 144; Christer Sjodin, Swedish Report in *Special Focus: Enforcement and Return of Access Orders*, INT'L CHILD PROTECTION, Spring 2004, at 46.

<sup>143</sup> *E.g.* *PW v. AL*, (2003) S.C.L.R. 478, [43] (Scot.), in which after return to Australia, the court there reduced the sums of maintenance that the father had undertaken to pay in the Scottish court. When the father refused to pay even the reduced amount, the mother took the children back to Scotland. Christer Sjodin, Scottish Report in *Special Focus: Enforcement And Return Of Access Orders*, INT'L CHILD PROTECTION, Spring 2004, at 65.

<sup>144</sup> For example, the mother may have only abducted because she was unable to obtain protection from the father's violence. *See Weiner, supra* note 137, at 624–26.

<sup>145</sup> *E.g.*, *Simcox v. Simcox*, 511 F.3d 594, 600 (6th Cir. 2007) (suggesting that, because the applicant had exhibited, “an arrogance, a need to be in control and a tendency to act out violently,” there was doubt as to his willingness to abide by the court's undertakings. *Id.* *See also*, *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000) (taking into account the fact that the father had previously breached court orders, when refusing return).

<sup>146</sup> *E.g.* JEFFREY EDELSON ET AL, MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES 180–83 (2010).

<sup>147</sup> REUNITE INTERNATIONAL, *supra* note 140, at 31.

<sup>148</sup> *E.g.*, *McOwan v. McOwan* [1994] FLC 92-451 (Austl.).

<sup>149</sup> *E.g.*, *Simcox*, 511 F.3d at 611.

would contain undertakings parallel to those given to the court of the requested state.<sup>150</sup> Since the mirror order is made by the court of the requesting state, the undertakings in that order will be enforceable there. Additionally, communication between judges in the two relevant states, via the Hague network of judges,<sup>151</sup> might provide the judge in the requested state with information that enables him to make an informed decision as to whether a child might safely be returned to the requesting state. Nonetheless, as will be seen below, some courts have taken the view that the doctrine of comity places severe limitations on the practice of requiring undertakings—and on attempts to ensure that such undertakings are enforceable.

*(b) Using Comity as a Reason not to Check Enforceability of Undertakings*

Some courts have relied on the doctrine of comity as a basis to assume that the requested state will enforce undertakings, and as a reason to refuse to make inquiries to enable confirmation of the assumption.<sup>152</sup> It is ironic that the concept of comity has been invoked by courts in requested states to justify their presumption that the undertakings will be honored,<sup>153</sup> but

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<sup>150</sup> *E.g.*, *C v. C (Minor: P Rights of Custody Abroad)* [1989] 2 All E.R. 465, 471; *Re G (a Minor) (Abduction)* [1989] 2 FLR 475; *Re W (Abduction: Domestic Violence)* [2004] EWHC (Fam) 1247.

<sup>151</sup> *See generally*, Hague Conference on Private International Law, PERMANENT BUREAU, *Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for Judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges*, Prel. Doc. No 3A (July 2012), available at [www.hcch.net/upload/wop/abduct2011pd03ae.pdf](http://www.hcch.net/upload/wop/abduct2011pd03ae.pdf); Rule 1.1–1.8 and discussion in SCHUZ, *supra* note 111, at 296–98.

<sup>152</sup> *E.g.* *Re K (Abduction: Physical Harm)* [1995] 2 FLR 550 (quoting the non-Convention case of *Re M (Abduction: Non-Convention Country)* [1995] 1 FLR 89); Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL'Y, 285, 331 (2000). (arguing that the adequacy of the safeguards should not be checked because this will lead to unequal treatment of different countries). *See also Re E*, [2011] UKSC 27 (Eng.) (refusing to follow up unsatisfactory answers provided by foreign judges in order not to waste valuable judicial time).

<sup>153</sup> *E.g.*, *RK v. JK, (Child Abduction: Acquiescence)* [2000] 2 I.R. 416 (Ir.).

requesting states have not used comity as a basis to enforce undertakings that the requested state has required or imposed.<sup>154</sup>

*(c) Using Comity to Restrict the Use of Undertakings and Mirror Orders*

U.S. courts have not accepted undertakings that require action or enforcement by foreign authorities, on the basis that doing so would violate international comity.<sup>155</sup> For example, the California Court of Appeal in *Maurizio* stated that the trial court “overstepped its bounds” when it made a return order contingent on the left-behind father providing an assurance from the Italian government that it would not arrest or prosecute the returning mother.<sup>156</sup> Indeed, when agreeing to accept undertakings that can be fulfilled by the left-behind parent, U.S. courts sometimes expressly comment that these undertakings do not offend notions of international comity because they do not require the involvement of foreign authorities.<sup>157</sup>

Similarly, the U.S. Court of Appeals for the First Circuit has rejected the practice of mirror orders, on the basis of the doctrine of comity.<sup>158</sup> The First Circuit stated that the practice of conditioning return upon the making of an order by the court in the requested state “would smack of coercion of the foreign court,”<sup>159</sup> and that expecting the foreign court simply to copy and enforce the order of the court of the requested state “offends notions of international comity.”<sup>160</sup>

### 5. In relation to Recognition of Foreign Non-Return Orders

While the Abduction Convention requires the requested state (i.e., the state of refuge) to give force to the judicial decisions of the state of habitual residence (i.e., the requesting

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<sup>154</sup> Hoegger, *supra* note 140; Weiner, *supra* note 137.

<sup>155</sup> *Danaipour v. McLarey*, 286 F.3d 1, 22–23 (1st Cir. 2002). The judicial policy reflects that of the U.S. State Department, which has declared that it “does not support conditioning the issuance of a return order on the acquisition of [an] order from a court in the requesting state.” *See id.*

<sup>156</sup> *Maurizio R v. LC*, 201 Cal. App 4th 616, 644 (2011).

<sup>157</sup> *E.g. Kufner v. Kufner*, 519 F.3d 33 (1st Cir. 2008); *Krefter v. Wills*, 623 F. Supp. 2d 125 (D. Mass 2009); *Wilchynski v. Wilchynski*, No. 3:10-CV-63-FKB, 2010 U.S. Dist. LEXIS 25903 (S.D. Miss. Mar. 18, 2010).

<sup>158</sup> *Danaipour*, 286 F.3d at 22.

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* at 25

state),<sup>161</sup> there is no parallel requirement for the latter state to recognize decisions made under the Abduction Convention by the requested state. Thus, if the requested state makes a no-return order, there is no obligation on the requesting state to recognize that decision.<sup>162</sup> This issue is most relevant where the left-behind parent counter abducts the child back to the requesting state after the non-return order, and the original abducting parent requests that the child be returned to the state of refuge (i.e., the original requested state) in reliance on the non-return order, and subsequent custody order, in his or her favor. In cases where the left-behind parent does not counter abduct the child, he or she may be able to obtain an order from the courts of the requesting state requiring the abductor to bring the child back, or awarding the left-behind parent custody. Any such orders, however, will have no practical effect,<sup>163</sup> unless the abductor or child leaves the state of refuge.<sup>164</sup>

One might expect that the doctrine of comity would require giving deference to the non-return order of the foreign court. Indeed, the Israeli Supreme Court in the case of *P.R. v. T.A.E.*<sup>165</sup> ordered the return of children<sup>166</sup> who had been counter abducted back to Israel, from Italy, following a non-return order by the

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<sup>161</sup> Abduction Convention, *supra* note 17, art. 3.

<sup>162</sup> The U.S. case law uses the phrase “extending comity” to foreign decisions interchangeably with the terms “recognizing” and “extending deference.” In order to avoid confusion with the doctrine of comity, this Article uses the latter two terms only.

<sup>163</sup> See Transcript of Judge Mizdol’s Ruling, *Ben-Haim v. Ben-Haim*, No. FD 02-906-11 (NJ Super Ct Aug 25, 2011) (making orders, including an arrest warrant against the mother, that cannot be enforced while the mother remains in Israel).

<sup>164</sup> See *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008) (discussing a mother, who had abducted the child to Spain, returned to the United States, and was imprisoned for contempt of a U.S. court, which ordered her to bring the child back to the United States).

<sup>165</sup> RFamA 672/06 PR v. TAE, 61(3) PD 24.

<sup>166</sup> This return was ordered despite the objections of the thirteen and eleven year old children, on the basis of their lack of ability to understand the long term implications of staying in Israel with the father, and the fact that their wishes were not “dominant and of special force.” The aftermath of the case, however, casts doubt on the correctness of the decision, since the mother successfully obstructed the father’s attempts to visit the children in Italy. (personal communications to the author from the lawyer representing the father and from a lawyer in the Israeli Central Authority)

Italian courts on the basis of “deference to foreign courts.”<sup>167</sup> Significantly, the Israeli court gave effect to the Italian decision, even though it expressed the view that the Italian court had not applied the Hague Abduction Convention properly, because there had not been any basis for invoking the grave risk exception.<sup>168</sup>

In contrast, courts in North America have only extended comity to foreign non-return orders after careful, detailed review of the foreign decision, in order to ensure that the Abduction Convention was properly applied,<sup>169</sup> and, on a number of occasions, refused to recognize such non-return orders where foreign courts have, in their view, misapplied the provisions of the Hague Convention.<sup>170</sup> Indeed, in *Asvesta v. Petrousas*,<sup>171</sup> in circumstances almost identical to those in *P.R. v T.A.E.*, the Court of Appeals for the Ninth Circuit declined to recognize a Greek non-return order, on the basis that the Greek court had wrongly focused on the merits of the custody dispute.<sup>172</sup> Accordingly, the Ninth Circuit did not order return of the child, who had been counter abducted by the father to the United States.

Similarly, in the case of *Ben-Haim v. Ben-Haim*, the Superior Court of New Jersey declined to recognize an Israeli non-return order, which was based on the father’s consent to or acquiescence in the child’s staying in Israel.<sup>173</sup> Reviewing the decision of the majority of the Israeli Supreme Court,<sup>174</sup> the U.S. court concluded that an unexecuted agreement could not constitute consent or acquiescence, and that, in any event, any consent could

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Pitts v. De Silva*, [2008] O.J. No. 36 (Can Ont. Ct. App.) (QL); *Diorinou v. Meztis*, 237 F.3d 133, 142 (2001). This case was cited as supporting the proposition that courts may give res judicata effect to foreign judgments on the basis of comity in the cross-border insolvency case of *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

<sup>170</sup> *E.g. Asvesta v. Petrousas*, 580 F.3d 1000 (9th Cir, 2009); *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008).

<sup>171</sup> *Asvesta v. Petrousas*, 580 F.3d 1000 (9th Cir, 2009).

<sup>172</sup> *Id.*

<sup>173</sup> *Ben-Haim v. Ben-Haim*, appeal Docketed No. FD 02-906-11 (NJ Super Ct Aug 25, 2011)

<sup>174</sup> RFamA 741/11 *OB-H v. ShB-H*, available at <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>.



not have been freely given, because the whole situation was laden with duress.<sup>175</sup>

Likewise, in the case of *Carrascosa v. McGuire*,<sup>176</sup> the U.S. Court of Appeals for the Third Circuit declined to extend deference to a Spanish non-return order, on the basis that the mother had sole rights of custody under Spanish law and that restricting her right to travel to Spain was a violation of her fundamental human rights under Article 20 of the Abduction Convention.<sup>177</sup> The Third Circuit held that the Spanish decision “departed from the fundamental premise of the Hague Convention” by not applying New Jersey law to the determination of custody rights.<sup>178</sup>

### III. INTEREST ANALYSIS OF USE OF COMITY IN ABDUCTION CONVENTION CASES

In this part, the application of interest analysis methodology to Abduction Convention cases is carried out in three stages. First, the interests of the states involved in international abduction cases are identified. Second, this section determines whether the apparent conflicts between the interests of different states in international abduction cases are false or real. Third, this section analyzes whether, in cases where there is a real conflict of interest, reliance on comity does, in fact, achieve an appropriate balance between those interests.

#### A. *The Governmental Interests at Stake*

##### 1. Interests of the Requesting State

The impression given by courts that refer to comity in Abduction Convention cases is that the requesting state has a strong interest in securing summary return of the child—an interest that will be harmed by a non-return order.<sup>179</sup> A closer examination, however, reveals that this assumption is too simplistic.

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<sup>175</sup> The mother had obtained a *ne exeat* order, preventing the father from leaving Israel. The fact that the mother had this order revoked, pursuant to the unsigned agreement, was the main basis of the decision of the majority in the Israeli Supreme Court that the unsigned agreement did constitute consent or acquiescence.

<sup>176</sup> *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008).

<sup>177</sup> *Id.* at 261.

<sup>178</sup> *Id.* at 263.

<sup>179</sup> See *e.g.*, cases cited *supra*, at note 99.

First, the use of the term “requesting state” is liable to be misleading because the left-behind parent, and not the requesting state, is the applicant in the proceedings.<sup>180</sup> Even the fact that the Central Authority of the requesting state is supporting the application does not mean anything other than that the basic conditions for applicability of the Convention appear to apply—the Central Authority has no discretion in the matter at this point.<sup>181</sup>

Second, while, in many cases, the return of the child is required by substantive policies of the requesting state,<sup>182</sup> there are cases where some, or all, of these policies will not apply.<sup>183</sup> Moreover, in some situations, return of the child might be inconsistent with substantive policies of the requesting state. For example, in cases where the left-behind parent has abused the child or abductor, returning the victims to an abusive situation is inconsistent with the policy of combatting domestic violence.<sup>184</sup>

Third, in some cases, the connection of the child with the requesting state may not be strong. While the requirement that the child was habitually resident in that state was designed to indicate such a connection, shifting interpretations of the concept of “habitual residence”<sup>185</sup> mean that the connection is not

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<sup>180</sup> In Australia, the requested state is the applicant. See SCHUZ, *supra* note 111, at 45.

<sup>181</sup> For example, the U.S. Central Authority has supported applications made by left-behind parents who appear to be living in the United States illegally. See e.g., FamA (Dist TA)1382/04 *Plonit v. Ploni*, Nevo, 1/5/06 (allowing an appeal against a return order, inter alia, because the applicant had subsequently left the United States, as he was there illegally).

<sup>182</sup> Policies such as child protection, deterring abductions, and the rule of law.

<sup>183</sup> Such as where the removal was with consent. For a general discussion of the Abduction Convention’s treatment of consensual removals as wrongful, see SCHUZ, *supra* note 111, at 261–62.

<sup>184</sup> For a discussion of these policies, see U.N. Secretary-General, *Intensification of Efforts to Eliminate all Forms of Violence against Women: Report of the Secretary-General*, U.N. Doc. A/65/208 (Aug. 2, 2010), available at [www.unhcr.org/refworld/docid/4cf4e25a2.html](http://www.unhcr.org/refworld/docid/4cf4e25a2.html); See generally Hague Conference on Private International Law, PERMANENT BUREAU, *Domestic and Family Violence and the Article 13 ‘grave risk’ exception in the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper*, Prel. Doc. No. 9, (May 2011), available at [http://www.hcch.net/upload/wop/abduct\\_2011pd09e.pdf](http://www.hcch.net/upload/wop/abduct_2011pd09e.pdf).

<sup>185</sup> See generally Rhona Schuz, *Disparity and the Quest for Uniformity in Implementing the 1980 Hague Abduction Convention*, 9 J. COMP. L. 3, 6–10 (2014).

always apparent. Particularly, the result of the “parental intention” approach adopted in most U.S. Circuits<sup>186</sup> means that a child may be found to be “habitually resident” in a state with which he did not have a strong connection at the time of the wrongful removal or retention.<sup>187</sup> In some of these cases, there will be a strong connection between the left-behind parent and the requesting state, such as nationality, which appears to support the assumption that the requesting state has a strong interest in the return of the child. The strength of this interest, however, evaporates upon inspection, because the central objective of the Abduction Convention is to protect children who are the primary victims of the Abduction—not to enforce parental rights.

Fourth, the return of a child may place a burden on the resources of the legal system, law enforcement authorities, and social services in the requesting state. For example, any litigation in the requesting state, subsequent to the return of the child, will involve the court system, and relocation disputes are particularly lengthy and expensive. Additionally, the returning child and abducting parent may require financial support from governmental welfare services. Sadly, in cases of domestic violence, law enforcement resources may be also required to ensure the safety of the returning child and abducting parent. While these resource considerations alone cannot determine whether the requesting state has an interest in the return of the child, they can strengthen other, more substantive reasons for casting doubt on the interest of the requesting state—such as cases where the child only has a weak connection with that state, or cases where

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<sup>186</sup> Under the “parental intention” approach, the child may remain a habitual resident in a country where he has not lived for many years, if one of his parents has not abandoned the intention to return there. *See, e.g., Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004). For the development of this approach, see SCHUZ, *supra* note 111, at 188–89.

<sup>187</sup> *See e.g., Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548 (Eng.), (where a child had only lived in Australia for three months). *See also Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) (holding that children were habitually resident in the United States, even though they had lived in Mexico for the past three years, simply because mother had not intended to abandon the United States). Compare with the factual, child-centric approach adopted in some circuits (*e.g., Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2004)) by the European Court of Justice, (*Case C – 49710PPU, Mercredi v. Chaffe*, 2012 E.C.R. 22) and by the UK Supreme Court (*In the Matter of A Children (AP)* [2013] UKSC 60).

the return seems inconsistent with the policy of preventing domestic violence.

In the light of the above four reasons for questioning the interest of the requesting state, there will be cases where the real interest of the requesting state is to adjudicate the merits of the custody dispute, rather than to secure that child's immediate return. Indeed, empirical evidence shows that courts in requesting states quite often allow returning abductors to relocate back to the state of refuge (i.e., the requested state).<sup>188</sup> Thus, in these cases, the interest of the requesting state is to determine where the child should live, rather than that he should permanently return to that state.

In the past, it was not practical to separate adjudication from return because the court in the requesting state could not decide on the merits of the dispute without the physical presence in that jurisdiction of the abducting parent and the child. With modern technological means, such as video conferencing and satellite links,<sup>189</sup> however, it is possible for the court in the requesting state to hear the substantive dispute, without the child and abducting parent returning.<sup>190</sup> Indeed, in abduction cases between European Community ("EC") states, the Brussels II Regulation<sup>191</sup> provides that, where a non-return order is made on the basis of one of the exceptions in Art. 13 of the Abduction Convention, the requesting state retains jurisdiction to determine the merits of the case.<sup>192</sup> This option does not exist, however, in non-EC states. Nonetheless, in a few cases where the courts in

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<sup>188</sup> REUNITE RESEARCH UNIT, THE OUTCOME FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION 37 (Sept. 2003), available at [www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf](http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf) [hereinafter REUNITE OUTCOMES STUDY].

<sup>189</sup> See e.g. *Re A* (Custody Decision after Maltese Non-Return Order) [2006] EWHC 3397 (Eng.).

<sup>190</sup> It is also possible to obtain a welfare report on the child through International Social Services or by sending social workers to the country where the child is currently living—as was done in an Israeli case concerning a child who was living in Sweden—whose father refused to bring him to Israel as originally agreed. See *FamC 10706499 KL v. DSh* (Dec. 30, 2003).

<sup>191</sup> Council Regulation 2201/2003, 2003 O.J. (L 338) 1 (EC) (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

<sup>192</sup> *Id.* art. 10. If the requesting state decides that that child should be returned, that decision trumps the earlier non-return order. *Id.* art. 11(8).

the requesting state have already been seized of the custody dispute, a similar result has been achieved by staying the return order until the final determination of the custody dispute.<sup>193</sup>

In summary, the automatic assumption that the requesting state has a strong interest in the return of the child is misconceived. Particularly, in cases where the child's habitual residence is not obvious or where there exists a basis for invoking one of the exceptions, the interest of the requesting state in the child's return may be quite weak or nonexistent.

## 2. Interests of the Requested State

A number of interests of the requested state may be engaged in the child abduction scenario. In the past, it was assumed that the requested state would have an interest in deciding the substantive custody dispute itself, because of its inherent interest in protecting children subject to its sovereignty and applying the best-interests-of-the-child standard, which, under most domestic laws, is the paramount consideration in issues concerning children.<sup>194</sup> Where the abductor was a national of the requested state, the state's interest in supporting that parent would also militate toward local adjudication.<sup>195</sup> Thus, the drafters of the Abduction Convention took the view that the only way to overcome these interests was to mandate immediate return subject to narrowly defined exceptions.<sup>196</sup> Indeed, the suggestion to include a general public policy exception was rejected precisely because of concerns that such an exception might give requested states discretion to give precedence to local interests.<sup>197</sup>

The assumption about the interest of requested states, however, has largely been stood on its head, at least in some Contracting States. Today, courts and others seem to take the view that states actually have an interest in returning abducted children so that the international community will consider those states to be compliant with the Convention. For example, while

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<sup>193</sup> See e.g., *F v. M and N*, (Abduction: Acquiescence: Settlement) [2008] EWHC (Fam) 1525; *JPC v. SMW*, [2007] EWHC (Fam) 1349.

<sup>194</sup> Adair Dyer, *Report On International Child Abduction By One Parent (Prelim. Doc. No. 1 of Aug. 1978)*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 12, 22 (1982).

<sup>195</sup> *Id.* at 20.

<sup>196</sup> BEAUMONT & MCELEAVY, *supra* note 106, at 21.

<sup>197</sup> *Id.* at 22–23.

devising a project for mediation in abduction cases, Reunite<sup>198</sup> stated that “it was of paramount importance that the United Kingdom’s reputation as an enthusiastic and reliable upholder of the Hague Convention should not be undermined.”<sup>199</sup> Likewise, in the first case between England and South Africa, when declining to give leave against the trial judge’s refusal to return under Article 13(1)(b), on the basis of the father’s history of violence, Lady Justice Butler-Sloss ordered that a copy of the decision be sent to the South African Central Authority, with an explanation that this was an unusual decision, and was not representative of the English approach to the Abduction Convention.<sup>200</sup>

Similarly, the an analysis of over a decade of Israeli courts’ decisions under the Abduction Convention, which show that foreign left-behind parents fare much better than applicants of Israeli origin,<sup>201</sup> may be partly explained by the fact that Israeli courts are keener to order return in cases involving foreign applicants, out of concern for their own international image.<sup>202</sup>

These examples may simply reflect the “comity interests” of the requested states,<sup>203</sup> and it is likely that consistent failure to comply with the Convention will detrimentally affect the international reputation of requested states.<sup>204</sup> Indeed, some have even proposed to levy economic sanctions on such noncompliant

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<sup>198</sup> Reunite is a prominent charity, which engages in research and provides support for those involved in child abduction cases.

<sup>199</sup> REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE, MEDIATION IN INTERNATIONAL PARENTAL CHILD ABDUCTION, THE REUNITE MEDIATION PILOT SCHEME 7 (2006), available at <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf>.

<sup>200</sup> *Re M (Abduction: Leave to Appeal)* [1999] 2 FLR 550.

<sup>201</sup> See SCHUZ, *supra* note 111, at 60.

<sup>202</sup> Some support for this hypothesis can be found in *Crim.C. (Dist BSH) 8150/08 State of Israel v. RB, Nevo*, 16/6/11, in which the judge, when sentencing the mother, who had been found guilty of disobeying a court order to return her child to Belgium following the child’s disappearance, remarked that her conduct, which had prevented the enforcement of the decisions of the Israeli and foreign courts, had harmed the status of Israel as a state where law ruled.

<sup>203</sup> See definition of comity interests, *supra* at I.B.

<sup>204</sup> Indeed, the U.S. State Department prepares an annual report on states that fail to comply with the Convention, in accordance with ¶ 11611 of ICARA. See Caitlin Bannon, *The Hague Convention On The Civil Aspects Of International Child Abduction: The Need For Mechanisms To Address Noncompliance*, 31 B.C. THIRD WORLD L.J. 129, 150–53 (2011).

states.<sup>205</sup> But, the apparent equation of compliance with ordering return is problematic. As explained above,<sup>206</sup> the Convention does contain exceptions, which “are as much a part of the philosophy of the Convention as prompt return and respect for rights of custody and access between Contracting States.”<sup>207</sup> Thus, refusal to return, in cases where one of the exceptions is established, is actually compliance with the Convention—not departure therefrom.<sup>208</sup>

It may be an unfortunate consequence of the excellent statistical surveys carried out on behalf of the Permanent Bureau of the Hague Conference on Private International Law,<sup>209</sup> which give outcomes for each Member State, that compliance is measured by return rate. This is problematic at a technical level as well as a substantive level. On the technical level, in countries with relatively few cases, the figures are not statistically significant. For example, in a country which has only ten cases per year, the decision in each case affects the return rate by 10 percent. On the substantive level, a preoccupation with statistics obscures the truth that the success of the Abduction Convention is not determined by how many children are returned, but whether return is being ordered in those cases in which the children should indeed be returned.<sup>210</sup>

Thus, we may conclude that, while the requested state does indeed have a comity interest in being compliant with the Convention, compliance cannot per se be equated with the rate of return orders issued. Rather, a state’s interest is only engaged if the case is indeed one in which the child should be returned under the Convention. Accordingly, taking into account the interest in compliance in interpreting the Convention provisions, in

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<sup>205</sup> *Id.* at 158–61.

<sup>206</sup> See Part II.A.

<sup>207</sup> *Per Family Court of Australia in State Central Authority v. Papastravrou*, [2008] Fam LR 1120 [147] (Austl.). See also *R.M. v. J.S.*, 2012 ABQB 669 (Can.) (“Article 13 is part of the Hague Convention. It has to have a purpose. It cannot simply be ignored.”) (Comment of Ontario Court of Appeal).

<sup>208</sup> *JLM v. Director-General NSW Department of Community Services*, [2001] HCA 39, 43–44 (Austl.).

<sup>209</sup> See LOWE, *supra* note 72.

<sup>210</sup> Rhona Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law* 44 INT’L & COMP. L.Q. 771 (1995). A similar comment was made by Professor William Duncan, then Secretary-General of the Hague Conference, at the opening session of the Sixth Special Commission in June 2011. (Author’s personal notes).

order to determine whether the child should be returned, is circular reasoning.

Furthermore, the requested state has a moral, and often a legal, duty to take reasonable steps to protect a child under its jurisdiction from harm, even if the child is only temporarily within that state's jurisdiction.<sup>211</sup> That state has an interest in carrying out this duty to protect that may prevail over its comity interest. Indeed, the notion that comity and reciprocity are outweighed by the welfare of the child<sup>212</sup> is expressed in the English common law rule that foreign custody decisions cannot be enforced.<sup>213</sup> While, of course, this rule is not applicable in Abduction Convention cases, it does not mean that this state interest does not exist. Rather, in cases that are properly within the scope of the Abduction Convention, other interests prevail. Nonetheless, this sovereign interest may be a relevant factor in determining the scope of the obligation to return under the Convention, namely in interpreting and applying the exceptions, and in exercising discretion where one of these exceptions has been established.

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<sup>211</sup> Under the general doctrine of *parens patriae* or specific legislation.

<sup>212</sup> FAWCETT, *supra* note 33, at 1130.

<sup>213</sup> *McKee v. McKee*, [1951] A.C. 352 (P.C.) (appeal taken from S.C.C.). Similarly in the United States, traditionally, foreign custody awards were readily subject to modification on the ground of change of circumstances. A Shapira, *Private International Law: Aspects of Child Custody and Child Kidnapping Cases*, in RECUEIL DES COURS 129, at 185; HAY ET AL., *supra* note 53, at 770. Moreover, comity would not be extended to foreign custody determinations where the foreign court did not apply the best interests of the child standard. Blair, *supra* note 42, at 554. Under § 8(b) of the UCCJA, the rule preventing modification of a custody decree following wrongful removal or retention did not apply where exercise of such jurisdiction was required in the interests of the child and, thus, comity was not extended to foreign custody determinations where it could be shown "that conditions in the custodial household would be harmful to the children." *Hovav v. Hovav*, 458 A.2d 972 (Pa. 1983). But, the possibility of refusing comity to foreign custody orders has been considerably restricted by § 105 of the UCCJEA, Blair, *supra* note 42, under which courts are obliged to recognize and enforce custody determinations of foreign states, unless the "child custody law of a foreign country violates fundamental principles of human rights." In order to reconcile this requirement with the state's interest in protecting the child, it is necessary to invoke the exception in cases of domestic violence, as suggested by Blair, *supra* note 42, at 565–77, or to expand creatively the emergency jurisdiction granted under the Act. *Id.* at 577–78.



### *B. False Conflicts*

This Article will now analyze the ways in which courts in the United States, and other Contracting States have relied on the doctrine of comity in Abduction Convention cases,<sup>214</sup> in the light of the theoretical basis of the comity doctrine, the objectives of the Abduction Convention, and the respective comity and substantive interests of the requesting and requested states, identified in Part III.A. The current section will discuss the use of comity in four contexts in which there is unlikely to be a real conflict between the interests of the two states: (1) where comity is used in the sense of reciprocity, (2) where the passage of time and settlement exception has been established, (3) where a mature child objects to return, and (4) where there has been consent or acquiescence by the left-behind parent.

#### 1. Reciprocity

As seen above, courts sometimes invoke the concept of reciprocity to support interpreting the Convention in a way that results in a return order.<sup>215</sup> However, requested states do not, when deciding particular cases, take into account the return record of the requesting state, either generally or in relation to abductions from that state. Moreover, no mechanism presently exists for imposing sanctions against states that fail to implement the Convention properly.<sup>216</sup> Thus, there is no basis for any requested state to assume that its failure to return abducted children, in accordance with the Abduction Convention, will result in refusal of other Contracting States to return children abducted from that state. Furthermore, non-return of a child in a particular case is not a breach of the mutual trust between the signatory states, so long as the provisions of the Convention have been interpreted and applied properly, in the light of the objectives of the Convention and other relevant legal norms. Thus, reference to reciprocity of returns in interpreting the Convention is misguided.

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<sup>214</sup> As discussed *supra*, in Part II.B.

<sup>215</sup> See *supra* at II.B.1.

<sup>216</sup> The idea that the Permanent Bureau should monitor compliance was rejected at the Sixth Special Commission Meeting in January 2012. See *Protocol of Meeting No. 23 of the Sixth Special Commission Meeting* (on file with author) and author's notes of that meeting. For a discussion of bills introduced into the U.S. Congress that would impose economic and other political sanctions against noncompliant countries, see Bannon, *supra* note 204, at 156 *et seq.*

While both requested and requesting states have an interest in reciprocity, generally,<sup>217</sup> the existence of this general interest does not help to determine the correct application of the Convention in a particular case. Accordingly, since both states' interests are in proper application of the Convention, using the concept of reciprocity of returns as a factor in interpreting the provisions of the Convention does not per se promote the interest of either state.

## 2. Exercise of Discretion

Where the settlement, child objection, consent, or acquiescence exceptions have been established, there is no conflict of interests between the two states for a number of reasons. First, in these exceptional situations, non-return is not noncompliance with the Convention.<sup>218</sup> Second, non-return does not ipso facto imply disrespect for the foreign decision, or lack of confidence in the legal system of the foreign state. The reasons for this are that the establishment of an exception is usually based on a significant change in the situation that existed at the time of the unlawful removal or retention, and that exceptions reflect substantive policies, which are shared by both states. A brief examination of each of the three relevant exceptions will illustrate this point.

### *(a) Passage of Time and Settlement (Article 12(2))*

Where a year has passed and the child has become settled, the fundamental change in circumstances that has occurred since the wrongful removal or retention has made the foreign law or legal decision largely irrelevant. Thus, the requested state may well become the forum conveniens for deciding the custody dispute. Therefore, the common interest of both states in protecting

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<sup>217</sup> The difference between general and specific reciprocity can be seen in Israeli case law, which holds that the requirement of reciprocity in the Enforcement of Judgments Law 1958 refers to general reciprocity. Accordingly, an English judgment ordering maintenance payments was enforced because England generally enforces Israeli judgments, even though, at that time, England did not enforce maintenance judgments at common law because they were not final. C.A. 619/89 Casson v. Casson PD 45(2) 656 [1991] (Isr.).

<sup>218</sup> See *supra* at II.A.

a child who has become settled in the requested state,<sup>219</sup> and, in some cases, states' common interest in having the case decided in the forum conveniens, must prevail over any interest of the requesting state in respect for its law or judgment.<sup>220</sup> Lady Hale's comment that, the farther away one gets from speedy return, the less weight should be given to Convention considerations such as comity, supports this view.<sup>221</sup> As such, only in cases where returning a settled child will not prejudice his or her welfare should considerations of comity be taken into account.

*(b) Child Objections (Article 13(2))*

Where a mature<sup>222</sup> child objects to her return, allowing comity to override the objections would ignore the fact that the right of the child to have appropriate weight attached to her views is entrenched in Article 12 of the United Nations Convention on the Rights of the Child.<sup>223</sup> While the child's views are not always determinative,<sup>224</sup> it is difficult to see how comity, instead of factors relating to the particular child, is relevant in determining the weight to be attached to the child's views.<sup>225</sup> Thus, if the

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<sup>219</sup> See PEREZ-VERA REPORT, *supra* note 32, ¶ 107 ("after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it . . .").

<sup>220</sup> In a Canadian case, the left-behind parent's claim that the refusal to return on the basis of Art 12(2) did not give effect to comity was rejected because most of the evidence relating to the child's best interests could be obtained in Canada. *Kubera v. Kubera*, (2010) 317 D.L.R. 4th 307 (Can. B.C. C.A.).

<sup>221</sup> *Re M (Children) (Abduction: Rights of Custody)*, [2007] UKHL 55, [42]-[44], [2008] 1 A.C. (H.L.) 1288 (Baroness Hale of Richmond) (appeal taken from Eng.).

<sup>222</sup> The Convention does not give any age limit. For discussion of the way in which courts have interpreted the requirement of age and maturity, see SCHUZ, *supra* note 111, at 323-27.

<sup>223</sup> Convention on the Rights of the Child [CRC] art. 12, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, 44. The CRC has been ratified by all the signatories of the Abduction Convention, except the United States. Thus it should be considered part of the policy of both the requesting and requested states—unless one of the parties is the United States. For the view that because of its widespread acceptance, the CRC has become part of customary international law and so may be used in US courts, see Linda D. Elrod, "Please Let Me Stay": *Hearing The Voice of The Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 672 (2010-2011).

<sup>224</sup> *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, at [46].

<sup>225</sup> See *e.g.*, *Desilva v. Pitts*, 481 F.3d 1279, 1286 (10th Cir. 2007) ("a court must not focus solely on the general goal of the Convention—to protect children from the harmful effects of wrongful removal—but must also carefully determine

child is sufficiently mature and her objections are sufficiently valid and strong, then those objections should be determinative—notwithstanding the mandatory return policy of the Convention—unless there is some other countervailing reason to the contrary.<sup>226</sup> Moreover, refusing to order return on the basis of the child's objections cannot in any way be seen as an expression of lack of confidence in the legal system of the requesting state on the part of the requested state.

Indeed, U.K.<sup>227</sup> and U.S. courts have not taken into account comity considerations in cases of children's objections in recent years.<sup>228</sup> In one U.S. case, the court expressly stated that it would not exercise its discretion to order return because the children were well settled in a healthy environment. The court reasoned that return, in this case, would be inconsistent with the Convention's goals of treating the interests of abducted children with "paramount importance" and protecting abducted children "from the harmful effects of their wrongful removal or retention."<sup>229</sup> Furthermore, another U.S. court has recently held that "[t]he purpose of the mature child exception is to give a voice to a child who has attained a certain age and maturity, even if those wishes run counter to the lofty public policy purposes for which the Convention was adopted."<sup>230</sup>

The argument that the requesting state has an interest as the appropriate forum to consider the child's wishes misses the point; the child objects to the very act of being returned. This

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that the particular child 'has obtained an age and degree of maturity at which it is appropriate to take account of its views.')

 (quoting *Blondin v. DuBois*, 189 F.3d 240, 247 (2d Cir. 1999).

<sup>226</sup> See *Re R* (Child Abduction: Acquiescence) [1995] 1 FLR 716, 734 (Millett LJ) (Eng.).

<sup>227</sup> *E.g.*, *Re W* (Minors), [2010] EWCA (Civ) 520, [26] (Eng.).

<sup>228</sup> *De Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007); *Vasconcelos v. Batista*, 512 F. App'x. 403 (5th Cir. 2013). But, in some cases, comity and other "Convention considerations" influence the court's narrow approach to the requirements of age and maturity and to its assessment of the strength and validity of the child's objections. See generally, Rhona Schuz, *Protection or Autonomy—The Child Abduction Experience*, in *THE CASE FOR THE CHILD—TOWARDS THE CONSTRUCTION OF A NEW AGENDA* 269–308 (Ya'ir Ronen & Charles W. Greenbaum, eds., 2008).

<sup>229</sup> *Ramirez v. Buyausakas*, No. 11- 6411, 2012 U.S. Dist. LEXIS 24899, at \*62 (E.D. Pa. Feb. 24, 2012) (quoting from the Preamble to the Abduction Convention).

<sup>230</sup> *Vujicevic v. Vujicevic*, No. C13- 0204RSL, 2013 U.S. Dist. LEXIS 82110, at \*16–17 (W.D. Wash. June 11, 2013).

argument, however, could support a legal regime that separates return from adjudication, and thus enables the requesting state to decide the substantive custody dispute, while simultaneously allowing the child to remain in the requested state pending the custody decision.<sup>231</sup> Such a regime seems to maximize the interests of both states. The requested state protects the participation rights of the child within its jurisdiction, and the requesting state adjudicates a dispute concerning a child who was habitually resident in its jurisdiction prior to the abduction. But, in fact, this conclusion is dependent on the availability of a mechanism to allow the requesting state to ascertain and give proper weight to the child's views in determining the substantive custody issues, when the child is physically in another country.<sup>232</sup> The problem is that any attempt by the requested state to check whether the requesting state has such a mechanism is liable to violate the comity interests of the requesting state in not having its legal system subject to scrutiny by another state.

*(c) The Consent or Acquiescence Exception*

Where there has been consent or acquiescence by the left-behind parent, non-return should not be seen as lack of deference to the requesting state. Non-return is, in such a case, a direct result of the left-behind parent's waiver of his or her rights. Indeed, the Convention's treatment of removals carried out with the prior consent of the left-behind parent is anomalous. The main justification for inclusion of consensual removals within the Convention scheme is that such inclusion makes it possible to order return of the child where his removal from his natural environment is harmful to him, despite the consent of the left-behind parent.<sup>233</sup> In other words, the scope of the Convention has been widened in order to protect children who are harmed by a consensual removal. However, where the consensual removal has not caused them harm, there is no reason to order

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<sup>231</sup> This situation can occur in some cases of non-return under the Brussels II bis Regulations. Council Regulation 2201/2003, 2003 O.J. (L 338) (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

<sup>232</sup> See warning in NIGEL LOWE, ET AL., *THE NEW BRUSSELS II REGULATION: A SUPPLEMENT TO INTERNATIONAL MOVEMENT OF CHILDREN* 32–33 (2005).

<sup>233</sup> For detailed analysis of the Convention's approach to consensual removals, see SCHUZ, *supra* note 111, at 261–62.

return, and it is, therefore, difficult to see how comity can be a relevant factor in exercising the discretion.

Moreover, there is no conflict of sovereign interests in consent exception cases, because, at least where consent was given before the removal or retention, the “abduction” does not violate the law or substantive policies of the requesting state.<sup>234</sup> Also, it is not clear that the requesting state retains an interest in adjudicating the merits of the dispute where the left-behind parent has waived his right thereto.<sup>235</sup> Therefore, the requesting state cannot have an interest in the return of a child, beyond its interest in protecting that child’s welfare. Thus, the child’s best interest should be the primary, or even the sole, criterion in exercising discretion.

### *C. Real Conflicts*

This section will analyze four of the contexts discussed above, in Part II.B, where comity is used by courts in interpreting and applying the Abduction Convention and in which there appears to be a real conflict between the interests of the requesting and requested states. These are (1) the application of the grave risk exception, (2) the application of the human rights exception, (3) the practice of requiring undertakings, and (4) the recognition of non-return orders.

#### 1. The Grave Risk Exception

A finding by the requested state that the grave risk exception is established infringes the requesting state’s comity interests, in that it effectively refuses to defer to that state’s right to adjudicate because of lack of confidence in its legal system. Furthermore, in order to support the establishment of the exception, the requisite investigation of the alleged risk of harm per se involves questioning the administration of justice in the requesting state, which violates the concept of deference to that state, upon which the doctrine of comity is founded.<sup>236</sup>

Some courts have realized, however, that interpreting the grave risk exception to exclude situations where the risk of harm stems from the inability of the requesting state to protect the

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<sup>234</sup> See *supra* at III.A.1

<sup>235</sup> *Id.*

<sup>236</sup> See *supra* at I.A.

child, rather than a factor outside its control, such as war or famine, disregards the wording of the Convention, which does not restrict the grave risk of harm exception in this way.<sup>237</sup> Furthermore, some courts have recognized that it may not be realistic to assume that the requesting state will protect the child, and that they must therefore satisfy themselves that the child will be protected “in fact, and not just in legal theory.”<sup>238</sup> These courts appear to have recognized that the requested state does have a substantive interest in protecting the child that may override its comity interests.

But, these courts have not always taken this axiom to its logical conclusion. For example, in a much-cited quotation, the U.S. Court of Appeals for the 7th Circuit stated that the “[c]oncern with comity among nations argues for a narrow interpretation of the ‘grave risk of harm’ exception; but the safety of children is paramount.”<sup>239</sup> While the recognition that the safety of children takes precedence is most welcome, this statement contains a logical inconsistency. If the safety of children is paramount, then the only relevant consideration in determining whether the grave risk of harm exception exists is whether the return of the child threatens his safety. Thus, there is no room to interpret the provision narrowly on the basis of comity. Even from the requesting state’s perspective, its interest in protecting the child should outweigh its interest in not having its laws and decisions scrutinized by the requesting state—in which case, there will not be any conflict between the interests of the

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<sup>237</sup> *Van de Sande v. Van de Sande*, 431 F.3d 567, 571 (7th Cir. 2005). It is also clear from the travaux préparatoires and the PEREZ-VERA REPORT, *supra* note 32, ¶¶ 25, 116, that the drafters did not envision such a limited scope for the defense. SCHUZ, *supra* note 111, at 300–01.

<sup>238</sup> *Van de Sande*, 431 F.3d at 571. See also *Danaipour v. Mclarey*, 286 F.3d 1, 24–25 (1st Cir. 2002) (holding that the Swedish evaluation would not satisfy U.S. standards). See also *Khan v. Fatima*, 680 F.3d 781 (7th Cir. 2012) (“The Convention says nothing about the adequacy of the laws of the country to which the return of the child is sought—and for good reason, for even perfectly adequate laws do not ensure a child’s safety.”). See also *Borisovs v. Kubiles*, [2013] O.N.C.J. 85 (Can. Ont. C.J.) (accepting that the mother and child could not be adequately protected from domestic abuse in Latvia.).

<sup>239</sup> *Van de Sande*, 431 F.3d at 572 (cited in *Norinder v. Fuentes*, 657 F.3d 526, 535 (7th Cir. 2011) and *Estrada v. Salas-Perez*, No 12C 1016, 2012 U.S. Dist. LEXIS 139897, at \*29 (N.D. Ill. Sept. 28, 2012).

two states. Moreover, to the extent that a real conflict exists, the requested state's interest in protecting the child, in accordance with its own substantive policies and the objectives of the Abduction Convention, must prevail.

## 2. The Human Rights Exception

The doctrine of comity is a "nearly insurmountable barrier"<sup>240</sup> for litigants claiming that the child should not be returned because of bias, or other forms of unfairness, inherent in the foreign system.<sup>241</sup> Here, there appears to be a real conflict between the requesting state's interest in not having the fairness of its system reviewed, and the requested state's interest in ensuring the fair treatment of the parties upon their return. This conflict is present in all cases where litigants challenge a forum non conveniens dismissal by claiming that the foreign legal system is prejudiced or unfair. Those arguing that, in such a situation, comity should not override policies of justice and fairness,<sup>242</sup> seem to take the view that the current forum's substantive interests in justice and fighting corruption should prevail over its own comity interests and those of the foreign forum conveniens.

In Abduction Convention cases, however, the requested state's reluctance to consider claims of unfairness in the foreign legal system seems justified, where the requesting state is a newly acceding state. This is because the Convention does not come into force automatically between existing Contracting States and newly acceding states.<sup>243</sup> Rather, the accession only has effect in regards to the relations between the acceding state and other Contracting States who positively accept that accession.<sup>244</sup> Thus, each Contracting State has an opportunity to examine the

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<sup>240</sup> This expression is taken from Virginia. A. Fitt, *Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021, 1044 (2009).

<sup>241</sup> See *supra* at II.B.2(b)

<sup>242</sup> Fitt, *supra* note 240, at 1042–44 (arguing inter alia that in order to fight corruption, the evidentiary burdens required to show the unfairness of the legal system in foreign forum conveniens should be lowered).

<sup>243</sup> Abduction Convention, *supra* note 17, art. 38.

<sup>244</sup> *Id.* However, a Contracting State cannot exclude application of the Convention viz-a-viz a Contracting State which was a Member of the Hague Conference on Private International Law at the time of the XIVth Session. *Id.*, art. 37; BEAUMONT & MCELEAVY, *supra* note 106, at 174.



standards of justice in the new Contracting State before confirming the accession.<sup>245</sup> Accordingly, acceptance of a state's accession to the Abduction Convention is effectively an "implied acceptance of the social and legal regime prevailing in that state at that time."<sup>246</sup>

Yet, the fact that most Contracting States have accepted most accessions<sup>247</sup> might suggest that states do not exercise great caution before accepting accessions. It may also suggest that states are concerned about the political and diplomatic ramifications of refusing to accept an accession.<sup>248</sup> Alternatively, states may believe that the advantages of accepting an accession outweigh concerns about the legal system of the foreign country.<sup>249</sup> Thus,

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<sup>245</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 41 (explaining that the choice of a system based on express acceptance of accessions "sought to maintain the requisite balance between a desire for universality and the belief that a system based on cooperation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence."). *See e.g.*, *Sourtaga v. Lee*, 720 F.3d 96, 108 (2d. Cir. 2013) (referring to U.S. State Department's approval of Singapore when rejecting a claim that the Sharia courts in Singapore violated human rights).

<sup>246</sup> BEAUMONT & MCELEAVY, *supra* note 106, at 174. Compare with cases under § 105 of the UCCJEA, under which U.S. courts are expected to recognize custody determinations of all foreign countries that comply with the jurisdictional standards in the Act, provided that the custody law of the foreign country does not violate fundamental principles of human rights. Blair, *supra* note 42, at 565. Courts should, perhaps, be more willing to invoke this exception in cases where there was no prior opportunity to vet the foreign legal system.

<sup>247</sup> *See* Acceptance of Accessions Table, [http://www.hcch.net/upload/abduct-overview\\_e.pdf](http://www.hcch.net/upload/abduct-overview_e.pdf) (last visited February 2nd, 2015). Nevertheless, there are a few acceding states whose accessions have not been accepted by a substantial number of other Contracting States. *E.g.*, South Africa (Convention not in force with forty-five states), Ukraine (Convention not in force with twenty-seven states), and Zimbabwe (Convention not in force with fifty-four states). *Id.* Where other states acceded after these states, the latter may have refused the accession of the newly acceding states.

<sup>248</sup> BEAUMONT & MCELEAVY, *supra* note 106, at 174; Carol Bruch, *Religious Law, Secular Practices and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 N.Y.U. J. INT'L & POL. 49 (2000).

<sup>249</sup> For example, Israel hurried to accept Russia's accession to the Abduction Convention in 2011, apparently because a number of children have been abducted from Israel to Russia, and in the past it has not been possible to secure the return of these children. This consideration seems to have outweighed concerns expressed in Israeli legal circles about corruption in the Russian legal system and the evidence that Russian courts favor local nationals. *See* Personal communication to the author by a leading Israeli lawyer. For general concerns

it is unclear whether acceptance of the accession of a state is a guarantee of the standards of justice in the acceding state.

Therefore, it is necessary to weigh the comity interests of both states against the substantive interest of each forum in protecting the child, as well as the abducting parent, from an unfair judicial system. On the one hand, it is not reasonable to require the requesting state to meet the requested state's standards of justice,<sup>250</sup> and care must be taken not to use Article 20 "as a vehicle for . . . passing judgment on the political system of the country from which the child was removed."<sup>251</sup> On the other hand, the requested state must be prepared to invoke the Article 20 human rights exception in cases of manifest procedural or substantive injustice.<sup>252</sup>

For example, an Australian court refused to order the return of a child to the United States because the mother was unable to obtain a visa to enter the United States.<sup>253</sup> While the decision was based on the Article 13(1)(b) "grave risk of harm" exception, the court commented that the Article 20 human rights exception, which had not been pleaded, would also have succeeded, because the custody of the child could not be fairly determined where the mother was denied the right to appear.<sup>254</sup>

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about the Russian legal system, see Fitt, *supra* note 240, at 1035. For doubts about the likelihood of proper compliance with the Abduction Convention by Russia, see *No More Child Abduction*, RUSSIAN LAW ONLINE, <http://www.russianlawonline.com/content/children-abduction-no-more> (last visited Oct. 1, 2014). More than three years after Russia's accession to the Convention, in October, 2011, only thirty six states had accepted the accession. See Acceptance of Accessions Table, *supra* note 247. It is not possible to know whether this reflects states' decisions not to accept the accession, or simply the slow the speed of these decisions in some states.

<sup>250</sup> For a similar approach under the Model Law, see *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010). *Cf.* Fitt, *supra* note 240, at 1041 (suggesting that this approach reflects fear of a "a global perception of U.S. moral imperialism.").

<sup>251</sup> Hague International Child Abduction Convention 51 Fed. Reg. 10510–11 (1986).

<sup>252</sup> For a discussion of the implications of the different cultural norms of the requesting state, see generally Rhona Schuz, *The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes*, 12 J. L. & FAM. STUD. 453 (2010).

<sup>253</sup> *State Central Authority of Victoria v. Ardito*, (Unreported, Family Court of Melbourne, 29 Oct. 1977) (Austl.).

<sup>254</sup> *State Central Authority of Victoria v. Ardito*, (Unreported, Family Court of Melbourne, 29 Oct. 1977) (Austl.). *Cf.* Swiss decisions *arrêt du TC VD du 17.11.2010*, 214, consid 3c, discussed in AC Alfieri, 'Enlèvement international

Yet, even where the human rights exception has been pleaded, reliance on the grave risk exception is preferable.<sup>255</sup> Invoking the human rights exception discredits the foreign legal system ipso facto and, thus, seriously harms the requesting state's interest in not having its legal system evaluated. In contrast, the grave risk exception focuses on the harm to the specific child. Even though the risk of such harm may reflect on the inadequacy of the legal system in the requesting state, this reflection is limited to its inability to protect the particular child and is, thus, a lesser infringement of the comity interests of the requesting state. The interest of the requested state is to protect the child; this interest is equally realized whichever exception is used as the basis for refusing return.<sup>256</sup>

Indeed, it is difficult to imagine a violation of a child's human rights that is serious enough to warrant invoking Article 20, but does not also come within the grave risk exception. Take, for example, the case of *Walker v. Kitt*,<sup>257</sup> where the parties belonged to the Black Israelite community in Dimona, Israel. The mother, who had abducted her daughter to the United States, claimed that the return of the child would constitute a breach of the child's human rights within the Article 20 exception, because the Black Israelite community practices polygamy and treats women as subservient to men.<sup>258</sup> The U.S. District Court, commenting that there was no U.S. decision in which return had been refused on the basis of Article 20, refused to "pass judgment

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d'enfants: premières expériences avec la LF-EEA', *La pratique du droit de la famille* ch-2012-550, 555-56. Here, the children were returned to the United States, despite the fact that the mother could not obtain a visa. *Id.* The court found that the Article 13(1)(b) grave risk exception was not established and the Article 20 human rights exception was not pleaded. *Id.*

<sup>255</sup> There is no equivalent exception under the UCCJEA, and the violation of fundamental principles must be interpreted more widely in that context. See Blair, *supra* note 42, at 578-80.

<sup>256</sup> But, where the Brussels II Regulation applies, a court may, in fact, prefer to rely on Article 20, so as to avoid triggering the procedure in Articles 11(6) and 11 (7) of the Regulation, under which the requesting state may "trump" the non-return order, after considering the merits of the case. See K. TRIMMINGS, *CHILD ABDUCTION WITHIN THE EUROPEAN UNION* 110-19 (Hart Publishing, 2012) (suggesting that this might have been why Article 20, rather than Article 13(1)(b), was used to refuse return in the Irish case of *Foyle Health and Social Services Trust v. EC and Anor*, [2006] IEHC 448).

<sup>257</sup> *Walker v. Kitt*, 900 F. Supp. 2d 849 (N.D. Ill., 2012).

<sup>258</sup> It was claimed that, while polygamy is illegal in Israel, the authorities did not enforce the law. *Id.*

on the culture and political system” of the requesting state.<sup>259</sup> While accepting that “cultural gender inequality was a serious issue,” the court stated that invoking the Article 20 defense, “for anything less than gross violations of human rights[,] would seriously cripple the purpose and effectivity of the Convention.”<sup>260</sup> Of course, this statement begs the question as to what qualifies as a gross violation of human rights. In this particular case, it is difficult to fault the decision because the alleged breach of the child’s human rights relates to the future and is not caused directly by the return itself. Additionally, no evidence was brought to show that the mother could not raise her concerns in Israeli domestic custody proceedings.<sup>261</sup> Moreover, the mother could even seek permission from the Israeli courts to relocate to the United States.

There may also be cases in which the abducting parent’s, rather than the child’s, human rights would be violated upon return. For example, the requesting state’s judicial system might discriminate against the returned abducting parent on the basis of gender.<sup>262</sup> Where this discrimination creates a grave risk of harm to the child, then the grave risk exception can be invoked. Thus, in the case of *Sourtaga v. Lee*, the U.S. court understandably refused to accept the abducting mother’s claim that adjudication in Singaporean Sharia courts per se violated human rights.<sup>263</sup> But, had there been evidence that, under the law applied in those courts, custody would be awarded automatically to the father, without taking into account the potential harm to the child of taking him away from the mother, it would have been appropriate to consider the grave risk exception.

Nonetheless, the issue still arises as to whether discrimination against women in the foreign court will lead to establishment of the Article 20 human rights exception, in cases where harm to the child cannot be shown.<sup>264</sup> In such a case, the requested state’s substantive interest in ensuring equality for women,

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<sup>259</sup> *Id.* at 864.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 862.

<sup>262</sup> *E.g.* in legal systems which apply Sharia law, the father is usually given legal guardianship and physical custody of older children, see Urfan Khaliq & James Young, *Cultural Diversity, Human Rights and Inconsistency in the English Courts*, 21 *LEGAL STUD.* 192, 217–19 (2001).

<sup>263</sup> *Sourtaga v. Lee*, 720 F.3d 96, 108 (2d Cir. 2013).

<sup>264</sup> A paternal preference principle per se is insufficient to establish the grave risk exception. See *Schuz*, *supra* note 252, at 480–81.

which is an international norm, is inconsistent with its comity interests. There may also be countervailing substantive interests. For example, the child's right to contact with the left-behind father and the child's right to return to his natural environment<sup>265</sup> are both protected by the Abduction Convention as well as by the Children's Rights Convention. Thus, the conflicting interests must be carefully weighed in the light of the particular facts of each case.

### 3. Undertakings

The practice of requiring undertakings, or imposing conditions that relate to matters following return to the requesting state,<sup>266</sup> is a clear interference with the sovereignty of the requesting state over those within its jurisdiction. Moreover, the very imposition of these undertakings expresses lack of confidence in the requesting state's legal system. A fortiori, steps, such as mirror orders, designed to ensure enforceability in the requesting state, expressly purport to "tie the hands" of the requesting state. Thus undertakings have been described as "smack[ing] of coercion of the foreign court."<sup>267</sup>

But, there is another way of looking at these practices. In particular, Richard Posner has noted that "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations."<sup>268</sup> Accordingly, awareness that "even the most robust and well-resourced legal systems suffer from enforcement gaps is not to denigrate mutual trust and comity; it is simply to embrace reality."<sup>269</sup> Thus, the requesting state should not see protective measures as interference, but as enhancing the requesting state's ability to protect returning children.<sup>270</sup>

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<sup>265</sup> *Id.*

<sup>266</sup> For an explanation of this practice, see *supra* at II.B.3(a).

<sup>267</sup> *Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002).

<sup>268</sup> *Van De Sande v. Van De Sande*, 431 F.3d 567, 570–71 (7th Cir. 2005).

<sup>269</sup> Noah Browne, *Relevance And Fairness: Protecting The Rights Of Domestic-Violence Victims and Left-Behind Fathers Under The Hague Convention On International Child Abduction*, 60 DUKE L. J. 1193, 1212 (2011).

<sup>270</sup> See *Re O* (Child Abduction: Undertakings), [1994] 2 F.L.R. 349, 372 (Eng.) (explaining the approach of the requested state to undertakings as follows: "comity would be strengthened and an understanding achieved that neither country wishes to cause offence to the court of the other, nor to seek to interfere with or to influence what that court does.").

Moreover, where the court of the requested state holds that return of the child will expose him to a grave risk of harm unless certain actions are taken by the administrative or judicial authorities of the requesting state, then the requested state has a choice between two options. It can either refuse return on the basis of the grave risk exception, or make the return conditional on the taking of the required actions (i.e., undertakings). Thus, the conditional option does not show lack of respect for the legal system of the requested state, but rather a desire to return the child to the country of habitual residence—as long as the return does not place the child at risk.

Similarly, the argument that mirror orders violate comity can be refuted. The utmost duty of the court in the requested state is to protect the returning child. In some circumstances, the only way the requested state's court can protect the child's safety is by dictating the conditions of return—and ensuring that those conditions are enforceable in the requesting state. Thus, the practice of making mirror orders may actually be seen as enhancing comity, because it enables the child to be returned in accordance with the law of the requesting state. Moreover, there is no real coercion because, if the requesting state finds that the conditions are a breach of its own sovereignty, or for some other reason are not appropriate, it can refuse to make the mirror order, and the child will remain in the requested state.

It is true that the requesting state has an interest in being free of interference from a foreign court order that makes return conditional on actions of the requesting state. This sovereign interest, however, is overridden by the interest of the requested state in ensuring that the measures which it considers necessary to protect the returning child will indeed be taken. This follows from the ruling in *Van de Sande v. Van de Sande*<sup>271</sup> that the safety of the child overrides considerations of comity.<sup>272</sup> Thus, in the light of the evidence that there is a problem in enforcing undertakings,<sup>273</sup> comity is not a valid excuse for failure to check up on the situation in relation to the child's safety in the requesting state, or for refusing to take steps to ensure the enforceability of necessary undertakings.

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<sup>271</sup> *Van de Sande*, 431 F.3d at 572.

<sup>272</sup> See also *Klantzoris v. Klantzoris*, [2007] EWCA (Civ) 533, [19] (where preference was given to the protection of children over “regard for the Greek judicial authorities.”).

<sup>273</sup> See *supra* at II.B.3

#### 4. The Recognition of Non-Return Orders

Where the requesting state has to decide whether to recognize the non-return order of another Contracting State, there is a real conflict of interests. On the one hand, the requesting state—now the forum—seems to have a strong interest in protecting the child and the left-behind parent<sup>274</sup> from the requested state's failure to order the child's return, in possible contravention of the Convention. This substantive interest might well prevail over its comity interests in recognizing the judicial decision of the requested state.<sup>275</sup> On the other hand, the requested state has a strong interest in not having the merits of its decision reviewed by a foreign court. Such review effectively sets the foreign court up as an appellate court over the courts of the requested state.

The U.S. decisions referred to above,<sup>276</sup> when considering the scope of the doctrine of comity in relation to the recognition of foreign non-return orders, prefer the interest of the current forum (i.e., the original requesting state). While admitting that the starting point should be an "inclination to accord deference"<sup>277</sup> to the foreign non-return order, they caution that U.S. courts are not obliged to recognize foreign decisions,<sup>278</sup> but rather choose to do so.<sup>279</sup> Moreover, these courts state that the general rule, that the doctrine of comity precludes review of the merits of the foreign court decision,<sup>280</sup> is not applicable in the context of the Abduction Convention.<sup>281</sup> The cases give two reasons for this departure from a fundamental aspect of the doctrine of comity.

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<sup>274</sup> Although in the case of *Ben-Haim*, No. FD 02-906-11 (NJ Super Ct Aug 25, 2011), the father had not yet acquired formal status in the United States. See RFamA 741/11 *OB-H v. ShB-H*, available at <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> (17/05/11).

<sup>275</sup> Unless return is likely to contravene some other substantive interest of the requesting state, such as the policy of combating domestic violence.

<sup>276</sup> At Part III.B.V

<sup>277</sup> *Diorniou v. Mezitis*, 237 F.3d 133, 145 (2d Cir. 2001).

<sup>278</sup> The full faith and credit provision in Section 4 of ICARA has been interpreted as applying only between states within the United States. *Id.* at 142.

<sup>279</sup> *Asvesta v. Petroustas*, 580 F.3d 1001 (9th Cir. 2009); *Diorniou*, 237 F.3d at 140.

<sup>280</sup> Stated in *Hilton v. Guyot* 159 U.S. 113 (1895).

<sup>281</sup> *Avesta*, 580 F.3d 1001; *Diorniou*, 237 F.3d 133. In *Diorniou*, reliance was placed on the "other special reasons" exception mentioned in *Hilton*, 159 U.S. at 202.

First, since the Abduction Convention is applicable equally in all Contracting States, a U.S. court is per se in a position to review the merits of the foreign decision.<sup>282</sup> This is in contrast to the usual situation, in which the fact that the foreign court applies foreign law, with which the local court is not familiar, makes review of the foreign decision very difficult. Second, the success of the Convention “relies upon the faithful application of its provisions by American courts and the courts of other contracting nations.”<sup>283</sup> Accordingly, deference should not be extended to a foreign non-return order which “clearly misinterprets the Hague Convention, contravenes the Convention’s fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.”<sup>284</sup>

These arguments, however, are unconvincing for the following four reasons. First, the principle of accepting a foreign decision is not based purely on the practical difficulties involved, but on the forum’s comity interest in respecting foreign states and their legal systems. Thus, the forum court’s familiarity with the applicable, substantive law in Abduction Convention cases cannot per se justify review on the merits. Moreover, procedural differences between states and the need to rely on translations present practical impediments to the fairness of a de novo review of the foreign case.

Second, “policing” the way in which other Member States apply the Convention is, inherently, a breach of the comity interests of both states. Furthermore, as stated in *Asvesta*, “careful examination of the merits of another contracting nation’s Hague adjudication could, in some circumstances, undermine the mutual trust necessary for the Convention’s continued success.”<sup>285</sup> Indeed, the judgment rendering state’s status as a treaty partner is a reason for giving its decisions a heightened degree of respect, whereas the approach in the U.S. case law expressly leads to the opposite result of according such decisions less respect than other foreign decisions.

Third, this approach affords no consideration to the policy of finality of judicial decisions, upon which the principle of res judicata is based. This policy is one of the primary justifications for the recognition of foreign judgments, over and above comity

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<sup>282</sup> See *Asvesta*, 580 F.3d at 1013.

<sup>283</sup> *Id.* at 1014.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*



considerations.<sup>286</sup> Refusal to extend deference to the non-return order effectively allows the left-behind parent an additional bite of the apple, and encourages the left-behind parent to counter-abduct, in the hope that the requesting state will review the merits of the non-return order. This possibility undermines the Abduction Convention's objective of deterring abductions.

Fourth, the U.S. courts ignore the impact of the refusal to extend comity to the foreign non-return order on the specific child, whose interests the Abduction Convention is expressly designed to protect. If the child is re-abducted after having become settled in the state of refuge (i.e., the original requested state), the re-abduction harms him, and thus the policy of the Abduction Convention requires his return to that state, even if the non-return order was misconceived.<sup>287</sup> But, one might argue, if the child remains in the requested state with the abductor, then the requesting state's refusal to recognize the non-return order does not affect him. This argument is flawed because a refusal of recognition means that neither the child nor the abductor will be able to leave that country for fear of arrest and forced return to the requesting state.<sup>288</sup> Thus, the child is denied his right to visit the left-behind parent<sup>289</sup> in the requesting state.<sup>290</sup>

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<sup>286</sup> A.T. Von Mehren and D.T. Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1603–04 (1968).

<sup>287</sup> See discussion of the objectives of the Convention *supra* at II.A.

<sup>288</sup> In the Israeli case of FamA 5253/00 *R v. L*, (unreported, 21.1.2001), the fact that the California court would not recognize the Israeli court's refusal to return the child—on the basis of the real risk that he would commit suicide—meant that the mother and child had to stay in Israel until the child reached eighteen, which effectively prevented the mother from finding employment and prevented the boy from participating in educational trips abroad. (Personal communication between author and the mother).

<sup>289</sup> *Cf. Re KL (a child)* [2013] UKSC 75 [2014] 1 FLR 772. One consideration for ordering return of the child under the inherent jurisdiction, despite the fact that the Hague Convention did not apply (because the child was habitually resident in England and not the United States at the time of the relevant U.S. decision ordering return), was that the mother would not let the child visit his father in the United States, since, inevitably, he would remain there, and this lack of contact with the father would be harmful to the child. *Id.*

<sup>290</sup> Where both states are parties to the Hague Conference on Private International Law's 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, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70) (last visited, Feb. 2, 2015), the stalemate should be resolved once twelve months have passed since the date that the left-behind parent knew the whereabouts of the

Accordingly, in the light of these considerations, the original requesting state, now the forum state, has strong comity interests in recognizing the foreign non-return order, without review of the merits of that order. These comity interests may override any interest the requesting state has in protecting the left-behind parent—or promoting the objectives of the Convention. Thus, the conflict turns out to be false, and the non-return order will be recognized. Even to the extent that there is still a real conflict of interests between the two states, the strong comity interest of the requested state in not having its judgments reviewed together with the comity interests of the requesting state, should prevail, except in extreme cases of fundamental misapplication of the Convention. *Carrascosa v. McGuire* was such an extreme case, both because the Spanish court determined the custody rights of the parties under its own law, and not under the law of the habitual residence,<sup>291</sup> and because its approach to the mother's right to travel would render the Abduction Convention completely redundant. However, the other cases discussed above do not seem to come into this category.

In the *Ben-Haim* case,<sup>292</sup> the New Jersey court effectively interfered with the Israeli court's finding that the father had consented to or acquiesced in the abduction of his own free will.<sup>293</sup> The Abduction Convention does not state that an unsigned agreement cannot constitute consent. Furthermore consent and acquiescence are determined subjectively on the basis of all the circumstances of the case.<sup>294</sup> Thus, while there is room to question the correctness of the decision of the Israeli Supreme Court on the issue of consent or acquiescence, the finding cannot be

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child and the child has become settled in his or her new environment. At that time, the country of refuge will become the child's habitual residence (Id. art. 7) and so will have international jurisdiction to make orders relating to the child (Id. art. 5(1)), which will be automatically entitled to recognition by all other signatory states (Id. art. 23(1)). This Convention is currently ratified by only forty-one states, not including the United States. See Concise Status Charts, HCCH, [http://www.hcch.net/index\\_en.php?act=text.display&tid=25](http://www.hcch.net/index_en.php?act=text.display&tid=25), (last visited Feb. 2, 2015).

<sup>291</sup> Which, in the words of the court, "violates principles of international comity." *Carrascosa v. McGuire*, 520 F.3d 249, 263 (3d Cir. 2008).

<sup>292</sup> See *supra* at II.B.4.

<sup>293</sup> RFamA 741/11 *OB-H v. ShB-H*, available at <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> (last visited May 17, 2011).

<sup>294</sup> *Re H and others (minors) (abduction: acquiescence)* [1997] 2 All E.R. 225 at 235 (Eng.).

said to be a fundamental misapplication of the Convention. Similarly, the U.S. court was not in a position to choose between the views of the different Israeli judges on the issue of free will, especially without understanding the use of *ne exeat* orders in family proceedings in Israel, and the possibility of giving appropriate security to have such orders lifted.

The *Asvesta* case is more borderline than the *Ben-Haim* because it is less clear that the foreign decision cannot be said to be a fundamental misapplication of the Convention. On the one hand, the Greek decision was made on the merits, and was “largely untethered from the relatively structured inquiry required by the Hague Convention.”<sup>295</sup> On the other hand, the factual findings of the court, could have justified invocation of the grave risk exception—or the exception of lack of exercise of parental rights.<sup>296</sup> In the case of doubt, the mutual comity interests of both states should prevail and the no-return order should be recognized.

#### *D. Interim Summary*

The above analysis shows that the various ways in which Abduction Convention cases use comity often do not reflect the real interests of the states involved. A number of factors may explain this phenomenon. The first such factor is the belief that the child’s return is the primary objective of the Convention, which leads to the automatic equation of non-return with noncompliance. Accordingly, comity is called in to support interpretation of an exception or to exercise discretion in a way that yields a return order.<sup>297</sup> Conversely, in a non-return case, comity is virtually ignored, as surrendering to comity interests would require acceptance of the non-return order. This approach is fundamentally misguided because, as is clear from the Preamble, the true objective of the Convention is protecting the child’s best interest, which does not always require return.<sup>298</sup>

The second factor, which is related to the first, is the failure of some courts to understand that the exceptions themselves are crucial to the Convention’s primary goal of protecting children. As such, the exceptions must be interpreted in the light of

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<sup>295</sup> *Asvesta v. Petroustas*, 580 F.3d 1001, 1016 (9th Cir. 2009).

<sup>296</sup> Abduction Convention, *supra* note 17, art. 13(1)(a).

<sup>297</sup> See *supra* at II.B.2 and II.B.3.

<sup>298</sup> Abduction Convention, *supra* note 17, Preamble.

the policies which inform them together with the objectives of the Convention and invocation of the exceptions cannot be automatically equated with noncompliance.<sup>299</sup> Accordingly, comity cannot be employed to limit the scope of the exceptions.

The third factor, and the source of the first two, is the failure of courts to examine the real interests of the states. Rather, many courts simply assume that comity requires return under the Convention without an examination of the legal system of the requesting state or any consideration of other relevant substantive interests.

While the first factor seems specific to the Abduction Convention, the other two failures are structural, and could easily occur in the context of other international instruments containing rules and exceptions, where comity is used to inform interpretation and application. In the next section, this Article will examine the extent to which similar problems can be found in cases under the Model Law on Cross-Border Insolvency.<sup>300</sup> As background to the examination of these cases and a comparison with the use of comity in Abduction Convention cases, this section will begin with an explanation of the mechanism and objectives of the Model Law, and highlight some of the similarities and differences between these and those of the Abduction Convention.

#### IV. THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

##### *A. Mechanism and Objectives*

The Model Law<sup>301</sup> requires courts to recognize a foreign insolvency proceeding in the state where the debtor has the center of its main interests—called a “foreign main proceeding”<sup>302</sup>—at the

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<sup>299</sup> See *supra* at III.A.2.

<sup>300</sup> UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997) [hereinafter MODEL LAW]

<sup>301</sup> Legislation based on the Model Law has been adopted in twenty states. *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html) (last visited Feb. 2, 2015).

<sup>302</sup> MODEL LAW, *supra* note 300, art. 2(a); 11 U.S.C. § 1501.

request of the foreign representative of the debtor,<sup>303</sup> subject to a public policy exception.<sup>304</sup> Following recognition of foreign main proceedings, certain relief automatically ensues.<sup>305</sup> This relief includes (1) a stay of actions or proceedings concerning the debtor's assets, rights, obligations, or liabilities; (2) a stay of execution against the debtor's assets; and (3) a suspension of the right to transfer, encumber, or otherwise dispose of any assets of the debtor.<sup>306</sup> Additionally, the court has discretion to order further relief, such as entrusting the foreign representative with distribution of the debtor's assets situated within the jurisdiction of the court.<sup>307</sup> The objectives of the Model Law are set out in the Preamble as follows:

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.<sup>308</sup>

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<sup>303</sup> *Id.* art. 16. Art. 2(d) defines a foreign representative as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

<sup>304</sup> *Id.* art. 6 ("Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.") (enacted in the United States as § 1506).

<sup>305</sup> *Id.* art. 20.

<sup>306</sup> *Id.* art. 20(1).

<sup>307</sup> *Id.* art. 21(2).

<sup>308</sup> *Id.* at Preamble.

The approach taken by the Model Law can be classified as a modified universal approach.<sup>309</sup> On the one hand, it requires states to recognize the proceedings in the main state. On the other hand, it respects differences between legal regimes, and leaves some leeway for each state to protect local interests. This synthesis is achieved by the provision of a procedural framework<sup>310</sup> for cooperation between jurisdictions that leaves substantive law largely in place.<sup>311</sup>

### *B. Comparisons with the Abduction Convention*

A central objective of both the Abduction Convention and the Model Law is to avoid conflicting proceedings located in different states.<sup>312</sup> Additionally, both instruments ensure that substantive issues are decided by the courts of the most appropriate and most interested state.<sup>313</sup> In pursuance of these objectives, the forum state is, normally, obliged to stay its own substantive proceedings.<sup>314</sup> Both instruments allow exceptions to the basic mandatory rules, but the respective official guides to interpretation

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<sup>309</sup> J. Leong, *Is Chapter 15 Universalist or Territorialist? Empirical Evidence from United States Bankruptcy Court Cases*, 29 WIS. INT'L L.J. 110, 112–13 (2011).

<sup>310</sup> The details of this procedural framework are outside the scope of this Article. For a detailed discussion of the Model Law, see IAN FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* Chapter 8 (Oxford University Press, 2d ed. 2005).

<sup>311</sup> UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, *GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION* ¶ 3 (2014) [hereinafter *GUIDE TO ENACTMENT*], available at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

<sup>312</sup> While the Model Law does anticipate that there may be a need for proceedings in the states where the assets are situated, its provisions are designed to ensure that these concurrent proceedings supplement the main proceedings, rather than conflict with them. *Id.* paras. 42–45.

<sup>313</sup> In the case of the Abduction Convention, the court of the child's habitual residence, and, in the case of the Model Law, the debtor's center of main interests.

<sup>314</sup> Upon the making of an application for return under the Abduction Convention, the courts of the requested state are obliged to stay any custody proceedings. Abduction Convention, *supra* note 17, art. 16. Under the Model Law, upon recognition of a foreign main proceeding, other proceedings are stayed, subject to certain exceptions. MODEL LAW, *supra* note 300, art. 20(2).

make clear that the exceptions should be interpreted narrowly.<sup>315</sup> Likewise, both instruments provide for discretionary relief in certain circumstances, either in addition to mandatory relief,<sup>316</sup> or where mandatory relief is not allowed.<sup>317</sup> On a procedural level, under both instruments, each state may both receive inward-bound requests (i.e., to return a child or recognize foreign main insolvency proceedings) and send outward-bound requests (i.e., asking for return of a child or for recognition of its main insolvency proceedings).<sup>318</sup> In addition, both expressly require cooperation between relevant bodies in each state.<sup>319</sup>

Interestingly, some of the practices provided for by the Model Law, although not mentioned in the Abduction Convention, have been developed by courts in Abduction Convention cases. For example, the Model Law specifically provides for direct judicial communication,<sup>320</sup> a practice which has been adopted by some judges in Abduction Convention cases and promoted via the Hague judicial network.<sup>321</sup> Similarly, the broad discretion given to courts by the Model Law to condition relief as it feels appropriate,<sup>322</sup> *inter alia* in order to protect creditors,<sup>323</sup> is similar to the practice of requiring undertakings to protect the child and returning abductor, adopted by some courts in Abduction Convention proceedings.<sup>324</sup>

Finally, while both instruments may appear to be largely procedural, venue-determining mechanisms, in fact they have substantive and far-reaching consequences. Thus, under the Model

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<sup>315</sup> GUIDE TO ENACTMENT, *supra* note 311, ¶¶ 30, 104, 161; PEREZ-VERA REPORT, *supra* note 32, ¶ 34.

<sup>316</sup> See MODEL LAW, *supra* note 300, art. 21.

<sup>317</sup> Under the Abduction Convention where there has been a wrongful removal or retention, but one of the exceptions has been established, the court has discretion to order return.

<sup>318</sup> In relation to the Model Law, see GUIDE TO ENACTMENT, *supra* note 311, ¶ 53.

<sup>319</sup> Under the Abduction Convention, the Central Authorities are required "to cooperate with each other and promote cooperation among competent authorities in their respective states." Abduction Convention, *supra* note 17, art. 7. Similarly under the Model Law, courts and trustees, or other insolvency officers, are required "to cooperate to the maximum extent possible with foreign courts or foreign representatives." MODEL LAW, *supra* note 300, arts. 25, 26.

<sup>320</sup> MODEL LAW, *supra* note 300, art. 25.

<sup>321</sup> See sources cited *supra* note 152.

<sup>322</sup> MODEL LAW, *supra* note 300, art. 22(2); Leong, *supra* note 309, at 117.

<sup>323</sup> GUIDE TO ENACTMENT, *supra* note 311, ¶ 187.

<sup>324</sup> See *supra* Part III.B.4.

Law, granting a type of relief that would not be available in the forum will invariably affect the financial position of creditors<sup>325</sup> and, under the Abduction Convention, the child's return has an immediate impact on the life of that child and may affect the outcome of the substantive proceedings.

However, despite these remarkable similarities, there are very important differences, three of which should be borne in mind when comparing the use of comity under the two regimes. First, the Model Law is adopted by states unilaterally, and, in its application, does not distinguish between foreign states that have also enacted the Law and those that have not.<sup>326</sup> In contrast, the Abduction Convention involves reciprocal obligations, which might increase the need for comity.<sup>327</sup>

Second, the Model Law involves more complex situations, which juggle many interested parties from different states and which cover a wide variety of relief. This complexity makes it harder to identify conflicting interests—and to balance between them. Ironically, the simplicity of the Abduction Convention may be a reason that courts have failed to identify the relevant state interests.<sup>328</sup>

Third, the most obvious difference is that the Abduction Convention concerns the interests and welfare of children. In contrast, the Model Law deals with purely financial interests. This fundamental difference must affect the interests of states under each regime, and the way in which competing interests are weighed against one another. Nonetheless, there is sufficient common ground between the two instruments to justify a comparison of the uses of comity, both in interpretation and application of their provisions and in the exercise of discretion under each regime.

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<sup>325</sup> Leong, *supra* note 309, at 114.

<sup>326</sup> For implications of the unilateral adoption model, see FLETCHER, *supra* note 310, at 445–46.

<sup>327</sup> *C.f.* claims that the ultimate success of the Model Law, however, depends on the “power of example.” *Id.*; see also Leong, *supra* note 309, at 136 (suggesting that a lack of correct compliance with the Model Law by the United States may discourage other states from complying with, or even adopting, it).

<sup>328</sup> See detailed discussion of interests and judicial misconceptions in relation to them, *supra* Part III.A



*C. The Model Law and Comity in the United States*

In 2005, the United States enacted the Model Law, with relatively minor changes, as Chapter 15 of the Bankruptcy Code.<sup>329</sup> This section briefly examines the treatment of comity in judicial decisions that apply the provisions of Chapter 15. Prior to the enactment of the Model Law, comity played a pivotal role in cross-border insolvency cases,<sup>330</sup> but the inherent uncertainty of the doctrine<sup>331</sup> led to inconsistent results. Indeed, the Model Law was expressly designed to reduce the uncertainty caused by overreliance on comity.<sup>332</sup> Part of this design is the Model Law's obligation to recognize foreign insolvency proceedings where the criteria therein are met,<sup>333</sup> subject to the public policy exception.

While the Model Law mandates recognition of qualifying foreign proceedings, post-recognition relief is largely discretionary. Significantly, § 1507(b) of the Bankruptcy Code expressly provides that, in exercising this discretion, courts should check consistency with the principles of comity, even though there is no parallel provision in the Model Law.<sup>334</sup> Indeed, the Fifth Circuit

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<sup>329</sup> 11 U.S.C § 1501 (replacing previous provisions relating to cross-border insolvency).

<sup>330</sup> *In re Iida*, 377 B.R. 243, 253 (B.A.P. 9th Cir. 2007) (“At least since the Nineteenth Century, principles of ‘comity’ or accommodation of foreign proceedings have provided the method by which foreign bankruptcies have been recognized in American jurisprudence.”); (enforcing under “international comity” Canadian bankruptcy scheme of arrangement made under Canadian statute that would have been unconstitutional impairment of contract if enacted by United States.) (citing *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) and JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 420–21 (1846); *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457–60 (2d Cir. 1985) (“Thus, it is long settled that when there is a case or controversy regarding a foreign bankruptcy or a representative of a foreign bankruptcy that warrants the intervention of courts in the United States, comity provides a basic mode of analysis.”).

<sup>331</sup> Which typically involved weighing up various comity factors. See e.g. *In Re French*, 440 F.3d 145, 153 (2006).

<sup>332</sup> GUIDE TO ENACTMENT, *supra* note 311, ¶ 5 (“the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment.”).

<sup>333</sup> *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 332–34 (Bankr. S.D.N.Y. 2008) (holding that principles of comity are not relevant in determining where the debtor's center of main interests is situated).

<sup>334</sup> Nor was such a provision included in the U.K. Cross-Border Insolvency Regulations, *supra* note 18. This absence may explain why no reference is made to

stated that “[i]n revising Chapter 15’s predecessor, § 304, Congress elevated comity from a factor under § 304(c) to the introductory text of § 1507 ‘to make it clear that it is the central concept to be addressed.’”<sup>335</sup> Nonetheless, this same provision also requires the court to take into account factors that clearly reflect U.S. substantive interests and policies—such as ensuring “distribution of the proceeds of the debtor’s property substantially in accordance with the order prescribed by this title,”<sup>336</sup> and the need to provide adequate protection of the creditors.<sup>337</sup> Accordingly, tensions between comity and other interests protected by the forum are likely to be played out in relation to both the question of whether discretionary relief should be awarded<sup>338</sup> and the application of the public policy exception. The following examples illustrate the courts’ approach to comity in these two contexts.

In *Metcalfe*, the court ordered the recognition of orders made in the main Canadian proceedings, even though they included third-party, non-debtor release and injunction provisions, which could not have been issued by a U.S. court in domestic bankruptcy proceedings.<sup>339</sup> In determining that principles of comity supported recognition of the Canadian orders, the U.S. court placed considerable weight on Canada’s status as a sister common law state, and on the fact that no doubt had been cast on the procedural fairness of the Canadian proceedings.<sup>340</sup> In addition, the court noticed that the plan, which the Canadian order established, had been adopted with near unanimous creditor support and that there was no basis to question the decisions of

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comity by the U.K. Supreme Court in the case of *Rubin and another v. Eurofinance SA and others*, [2012] UKSC 46, when holding that recognition of foreign judgments against third parties is not within the discretionary relief allowed by the Insolvency Regulations. In contrast, Lord Clarke, in his dissent, does rely on comity interests, such as international cooperation and global commerce. *Id.* ¶¶ 199, 204.

<sup>335</sup> *In re Vitro*, 701 F.3d 1031, 1064 (2013).

<sup>336</sup> 11 U.S.C. § 1507(b)(4).

<sup>337</sup> *Id.* § 1522(a) (limiting the discretion to grant relief under § 1521).

<sup>338</sup> *Leong*, *supra* note 309, at 125 (showing that, while the vast majority of cases recognized foreign proceedings, only in 9.1 percent of the cases in which there were U.S. creditors did they exercise their discretion to order entrustment of assets for distribution without any qualifications).

<sup>339</sup> *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

<sup>340</sup> *Id.* at 698–99.

the Canadian courts.<sup>341</sup> Indeed, the record does not reveal any competing domestic interests. The court emphasized that procedural and substantive differences between U.S. law and foreign law are insufficient to invoke the public policy exception.<sup>342</sup>

The cases where relief available under the Model Law was refused, either on the basis that it was inappropriate to grant discretionary relief, or on the basis of the public policy exception, are more instructive for the purposes of this Article's analysis, because courts in these cases tend to explain the interests that override comity.

In *Toft*,<sup>343</sup> the U.S. bankruptcy court refused to grant recognition to an ex parte German Mail Interception Order against the German debtor's email addresses, with servers in the United States. The court refused recognition, even though such an order was available under German law.<sup>344</sup> The ground for the court's refusal was that such an order, which was banned by U.S. law,<sup>345</sup> might subject those who enforced it to criminal prosecution.<sup>346</sup> Additionally, the order would violate the rights of privacy that also protected non-U.S. citizens.<sup>347</sup>

In *Gold and Honey*,<sup>348</sup> the U.S. bankruptcy court held that recognizing the Israeli Receivership proceedings, which had been started in violation of a stay awarded by the U.S. court, would be manifestly contrary to U.S. public policy. Condoning this behavior of the receivers "would limit a federal court's jurisdiction over all of the debtors' property . . . as any future creditor could follow the lead of the receivers and violate the stay in order to procure assets that were outside the United States, yet still under the U.S. court's jurisdiction."<sup>349</sup> Thus, the fundamental U.S.

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<sup>341</sup> *Id.* at 700.

<sup>342</sup> *Id.* at 697; see also *RSM Richter Inc. v. Aguilar (In re Ephedra Prods. Liability Litig)*, 349 B.R. 333, 336 (Bankr. S.D.N.Y. 2006). This approach to procedural and substantive differences between the two laws mirrors that taken in relation to the Article 20 human rights exception in the Abduction Convention. See e.g., *Caro v. Sher*, 687 A.2d 354 (N.J. Super. Ct. Ch. Div. 1996).

<sup>343</sup> *In re Dr. Toft, Debtor in a Foreign Proceeding*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011).

<sup>344</sup> *Id.* at 198.

<sup>345</sup> *Id.* at 196.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at 198.

<sup>348</sup> *In re Gold & Honey, Ltd., Debtor in a Foreign Proceeding*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009).

<sup>349</sup> *Id.* at 372.

interest protected by the court was the deterrence of future violations of its orders.

In *Qimonda*,<sup>350</sup> the U.S. Court of Appeals for the Fourth Circuit upheld the bankruptcy court's refusal to allow the German representative to revoke patent licenses in accordance with German law.<sup>351</sup> The German representative's claim that comity required granting him relief was rejected because § 1522(a) of the Bankruptcy Code conditioned the granting of relief on ensuring adequate protection for the creditors and other interested entities.<sup>352</sup> In this instance, the Fourth Circuit held that the U.S. creditors' patent licensees would not be sufficiently protected.<sup>353</sup> In determining that § 1522(a) requires a balancing of the substantive interests of the various parties,<sup>354</sup> regardless of whether this balance leads to tension with the foreign law,<sup>355</sup> the court relied heavily on the Guide to Enactment of the Model Law ("Guide to Enactment").<sup>356</sup> The Guide to Enactment states that achieving a balance between the relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief "is essential to achieve the objectives of cross-border insolvency legislation."<sup>357</sup> In other words, the Model Law recognizes that the need to achieve such a balance of private interests may prevail over comity.

The bankruptcy court in *Qimonda* also held that "deferring to German law, to the extent [that] it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy."<sup>358</sup> The reason for this holding was that failure to apply § 365(n) of the Bankruptcy Code, which allowed the licensees to

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<sup>350</sup> *Jaffee v. Samsung Electronics Co. Ltd.*, 737 F.3d 14 (4th Cir. 2013).

<sup>351</sup> The German proceedings had been recognized as main proceedings under Chapter 15. *Id.* at 18.

<sup>352</sup> *Id.* at 32.

<sup>353</sup> *Id.*

<sup>354</sup> The foreign representative claimed that § 1522(a) is merely a procedural protection "designed to ensure that all creditors [could] participate in the bankruptcy distribution on an equal footing' and thus it should not be used to protect parties from the substantive bankruptcy law that would otherwise apply in the foreign main proceeding." *Id.* at 27.

<sup>355</sup> As claimed by the foreign representative. *Id.*

<sup>356</sup> GUIDE TO ENACTMENT, *supra* note 311.

<sup>357</sup> *Id.* ¶ 161. Elsewhere, the Guide to Enactment indicates that Article 22 is designed to "protect the interests of the creditors (in particular local creditors), the debtor and other affected persons." *Id.* ¶ 35.

<sup>358</sup> *In re Qimonda AG*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011).

retain their rights under the licenses, would “severely impinge” an important statutory protection accorded to licensees of U.S. patents.<sup>359</sup> Failure to apply this protection would, therefore “undermine a fundamental U.S. policy promoting technological innovation.”<sup>360</sup> While the Federal Circuit refused to determine the correctness of the reliance on the public policy exception, it expressly recognized that its decision not to grant relief on the basis of § 1522(a) furthered the public policy that underlies § 365(n).<sup>361</sup>

Finally, *In Re Vitro*, the U.S. Court of Appeals for the Fifth Circuit, while emphasizing that comity is the rule under Chapter 15 and not the exception,<sup>362</sup> upheld the bankruptcy court’s refusal to allow enforcement of a Mexican reorganization plan under § 1507 or § 1521 because the plan discharged obligations held by non-debtor guarantors and did not provide the protections afforded to creditors under the U.S. Bankruptcy Code.<sup>363</sup> Significantly, the court expressly considered whether the arguments in favor of comity outweighed the court’s concerns under § 1507(b)(4)—namely, whether distribution is substantially the same under the proposed plan as it would be under local law. The court held that the factors that might have swayed it in favor of granting comity were absent.<sup>364</sup> In the light of this conclusion, the Fifth Circuit found it unnecessary to determine the correctness of the bankruptcy court’s invocation of the public policy exception on the basis that “the protection of third party claims in a bankruptcy case is a fundamental policy of the United States.”<sup>365</sup>

#### *D. Comparative Analysis of Model Law Cases and Abduction Convention Cases*

Analysis of the approach of U.S. Model Law cases to comity, in comparison with the Abduction Convention cases considered in Part II, above, reveals two general methodological distinctions. From both of these distinctions, lessons can be learned that

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<sup>359</sup> *Id.* at 185.

<sup>360</sup> *Id.*

<sup>361</sup> *Jaffee v. Samsung Electronics Co. Ltd.*, 737 F.3d 14, 49 (4th Cir. 2013).

<sup>362</sup> *In re Vitro S.A.B. De C.V.*, 701 F.3d 1031, 1064 (5th Cir. 2012).

<sup>363</sup> *Id.* at 1067.

<sup>364</sup> *Id.* (giving, as examples of such factors truly exceptional circumstances that would make the release, or the consent of the affected creditors, necessary.).

<sup>365</sup> *Id.* at 1070.

could be applied, both in Abduction Convention cases, and in the application of other international instruments as well. The following subsections will address each of these lessons.

### 1. General and Specific Exceptions

While the only express exception in the Model Law is the public policy exception, the limitations on the court's discretion, for example, in Articles 21(2)<sup>366</sup> and 22(1),<sup>367</sup> are in fact specific exceptions, albeit not absolute ones, to the broad power to grant discretionary relief. A clear difference can be seen in the courts' approach to the general public policy exception and to these specific "exceptions." In particular, the warning that the public policy exception should be interpreted narrowly and used sparingly<sup>368</sup> is not found in relation to the specific "exceptions." Notably, the Federal Circuit in *Qimonda*<sup>369</sup> and the Fifth Circuit in *Re Vitro*<sup>370</sup> expressly affirmed the refusal of the bankruptcy court to grant discretionary relief by relying on the specific "exceptions." Neither the Federal nor the Fifth Circuit decided whether the bankruptcy court had erred in also invoking the public policy exception. The Fifth Circuit commented in *Re Vitro* that the public policy exception in § 1506 "was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamental policy at stake as 'the protection of third party claims in a bankruptcy case.'"<sup>371</sup>

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<sup>366</sup> Article 21(2) providing that a court can only entrust assets to the foreign representative for distribution if it is satisfied that the interests of creditors in the non-main state are adequately protected. MODEL LAW, *supra* note 300, art. 21(2).

<sup>367</sup> Article 22(1) provides that, in granting relief under Article 19 or Article 21, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. More examples can be found in § 1507(b) of the U.S. Bankruptcy Code. *Id.* art. 22(1).

<sup>368</sup> See e.g., *In re Vitro S.A.B. De C.V.*, 701 F.3d 1031, 1069 (5th Cir. 2012); *In re Dr. Toft, Debtor in a Foreign Proceeding*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011); *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. 547, 570 (E.D. Va. 2010) (stating that the exception would only apply where the procedural fairness of the foreign proceeding is in doubt, or cannot be cured by the adoption of additional protections, or where taking the action requested "would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right.").

<sup>369</sup> *Qimonda*, 433 B.R. 547.

<sup>370</sup> *Vitro S.A.B. De C.V.*, 701 F.3d at 1070.

<sup>371</sup> *Id.* at 1069–70.

The court's comment indicates that it doubted whether the public policy exception had been properly invoked. This difference in approach to the two types of exceptions is not simply a function of the principle that a specific provision should be relied upon, in preference to a general one.<sup>372</sup> Rather, the difference can be seen as reflecting the scope of the doctrine of comity, which is more easily overridden by specific exceptions than by general ones.

Specific exceptions evince policies that are part of the philosophy of an international instrument<sup>373</sup> and, therefore, reflect the mutual interests of both states, where the foreign state is also a party to the instrument. These interests may prevail over the comity interests of one or both states, and thereby create a false conflict.<sup>374</sup> Accordingly, while the scope of the specific exception must be examined carefully in the light of its purpose, such an examination does not necessitate a narrow interpretation. In contrast, a general public policy exception reflects no specific policy of the international instrument. This fact makes a real conflict between the comity interests of the foreign state and the substantive interests of the forum state much more likely. Due to this increased possibility for real conflict, a narrow interpretation of general exceptions is justified.

This insight into comity's role in the interpretation of different types of exceptions is pertinent to the Abduction Convention, and indeed to other international instruments. The exceptions in the Abduction Convention<sup>375</sup> are specific and not general—

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<sup>372</sup> *In re Dr. Toft, Debtor in a Foreign Proceeding*, 453 B.R. at 196.

<sup>373</sup> *E.g.* GUIDE TO ENACTMENT, *supra* note 311, ¶ 196 (stating that the policy behind Article 22 of the Model Law is to balance the interests of those affected by the relief).

<sup>374</sup> *See supra* Part II.B. This point goes beyond the recognition that the issue of comity is moot unless foreign law applies (as noted in *Qimonda (Dist)* at 568), because it takes into account the question of the extent to which the foreign state actually has an interest in its law applying. Thus, for example, there could be a situation in which, in the circumstances of the case under the applicable law of the foreign state, some creditors would not be protected, whereas equal protection could be afforded under the law of the forum. In such a case, the foreign state might not have an interest—or, at least, not a strong interest—in its law applying. *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. at 568.

<sup>375</sup> *See supra* list at note 70.

apart from the Article 20 human rights exception.<sup>376</sup> In particular, two similarities with the specific “exceptions” in the Model Law should be noted. First, the exceptions themselves give expression to an identifiable policy, which is part of the philosophy of the instrument itself. Second, these exceptions are not absolute, and, even where they are established, the court still has discretion to order return.<sup>377</sup> Accordingly, by analogy with the approach in the Model Law cases and in line with the reasoning above, comity should not be used as a reason to interpret the exceptions in the Abduction Convention narrowly, other than the Article 20 human rights exception.

## 2. Interest Analysis

The U.S. Model Law cases demonstrate a general awareness of the need to find an appropriate balance between comity and competing substantive interests. Moreover, while comity is seen as the rule rather than the exception, courts have found that comity can be overridden by other policies—whether those reflected in Chapter 15 itself<sup>378</sup> or those stemming from other statutory or constitutional provisions.<sup>379</sup>

Of particular interest in the context of the discussion in this Article are the courts’ attempts to articulate the relevant interests, which they must in turn balance. Thus, for example, one court explained that the interest of the United States in granting comity is to ensure that “the assets of a debtor are dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic, or piecemeal fashion.”<sup>380</sup> The court went on to state that U.S. courts “have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.”<sup>381</sup> Similarly, the bankruptcy court in *Ernst & Young* addresses the policy that

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<sup>376</sup> The human rights exception was the compromise between those delegates who wanted a general public policy exception and those who were vehemently opposed to it. M. Weiner, *Strengthening Article 20*, 38 U.S. FAM. L. REV. 701, 708–11 (2004).

<sup>377</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 113.

<sup>378</sup> See *e.g.*, *Qimonda and In re Vitro*, discussed *supra* Part C.

<sup>379</sup> See *e.g.* *Re Toft*, discussed *supra* Part C.

<sup>380</sup> *Zeeco, Inc. v. Sivec SRL*, No. 10-CV-143-JHP, 2012 WL 49362 (E.D.Okla. Jan. 1, 2012) (citing *Cunard S.S. Co., Ltd v. Salen Reefer Services AB*, 773 F.2d 452, 458 (2nd Cir. 1985)).

<sup>381</sup> *Id.*



“wronged investors should share in the assets accumulated in the receivership proceeding, regardless of nationality or locale.”<sup>382</sup> The court also mentions that both states’ real interest is the most efficient administration of insolvency—not the protection of local creditors in preference to others.<sup>383</sup> The opinions in these cases express the mutual interests of both states, reflected by the doctrine of comity.

In cases where there is a conflict between comity and the “competing substantive interests” of the forum based on local statute, courts sometimes refer to the legislative history of a particular statutory provision in an effort to show that the provision was intended to protect the interest in question. For example, in *Qimonda*, the U.S. Court of Appeals for the Third Circuit notes as follows:

“The Senate Report accompanying the bill that became § 365(n) explicitly recognized that licensees have a strong interest in maintaining their right to use intellectual property following the licensor’s bankruptcy and that to deny them that right would ‘impose[] a burden on American technological development that was never intended by Congress.’”<sup>384</sup>

Similarly, expert evidence may be relied upon to determine whether the granting of the relief requested would in fact result in denial of the protection conferred by the local statute.<sup>385</sup>

Thus, it can be seen that the approach taken in these cases does involve interest analysis methodology. In that analysis, the courts pit the allegedly competing substantive interests of the forum state against the mutual comity interests of both the forum and the foreign states.<sup>386</sup> This approach is broadly consistent with Story’s concept<sup>387</sup> of comity and with the interest

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<sup>382</sup> *In re Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008).

<sup>383</sup> *Id.*

<sup>384</sup> *Jaffe v. Samsung Electronics Co.*, 737 F.3d 14, 32 (4th Cir. 2013).

<sup>385</sup> *In re Qimonda AG*, 462 B.R. 165, 185 (Bankr. E.D. Va. 2011) (citing expert testimony “that the resulting uncertainty would . . . slow the pace of innovation, to the detriment of the U.S. economy”).

<sup>386</sup> *See in re Dr. Toft, Debtor in a Foreign Proceeding*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011). The court specifically explains that, although under conflict of law principles, German law seemed to have the primary interest in the resolution of the matter, this was not determinative because the decision related to U.S. public policy. *Id.*

<sup>387</sup> Lorenzen, *supra* note 6, at 33–35; Watson, *supra* note 22, at 20–22.

analysis framework—for which this Article advocates.<sup>388</sup> A critical analysis of the weight placed on the respective interests in these cases is outside the scope of this Article, however. Indeed, it may be that insufficient weight has been placed on comity interests.<sup>389</sup> Nonetheless, defective implementation is not a reason to reject the proposed framework. Rather, it is indicative of a need for courts to identify the relevant interests more carefully<sup>390</sup> and to be more aware of the wider implications of giving preference to substantive interests.<sup>391</sup>

In contrast to the Model Law cases, the Abduction Convention cases that mention comity evince a blind assumption that comity requires the return of the child, and no examination is undertaken of the comity, or substantive interests, of either state. Thus, for example, while some courts have recognized that the child's safety overrides comity,<sup>392</sup> they have not considered other substantive policies that might be engaged in cases of domestic violence—even where the child's physical safety does not seem to be in immediate jeopardy.<sup>393</sup> Paradoxically, in relation to foreign non-return orders, courts have paid insufficient attention to either the real comity interests of the forum or to substantive policies of the forum, such as discouraging counter-abduction.<sup>394</sup> Thus, the Model Law cases teach us that, before citing the doctrine of comity, courts should articulate the relevant

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<sup>388</sup> See *supra* I.B.

<sup>389</sup> See *e.g.*, Leong, *supra* note 309, at 133 (stating that courts' refusal to exercise their discretion to hand over assets to foreign representatives unconditionally, in order to ensure that U.S. creditors are not prejudiced by application of foreign priority schemes, is frustrating the objectives of the Model Law); see also Buckel, *supra* note 1 (criticizing *Qimonda* and *In Vitro*). For a narrow reading of *In re Vitro*, see Tonya Ramsay and John Napier, *Enforcing Orders Of Foreign Courts Under Chapter 15 of The Bankruptcy Code: In Re Vitro S.A.B. de C.V.*, 63 *ADVOCATE* 60 (Summer 2013).

<sup>390</sup> For example, it is doubtful that there is a strong interest in protecting local creditors from different priority schemes—which seems to be the main motive behind the refusal to hand over assets—unless, under those schemes, they are going to be unfairly discriminated against. Leong, *supra* note 309, at 134.

<sup>391</sup> For a discussion of these implications, see Leong, *supra* note 309, at 136–39.

<sup>392</sup> *Van De Sande v. Van De Sande*, 431 F.3d 567, 572 (7th Cir. 2005).

<sup>393</sup> See *e.g.*, *Sourtaga v. Lee*, 720 F.3d 96, 10r (2d. Cir. 2013) (stating that "the Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm.").

<sup>394</sup> See *supra* Part IV.C.4.

comity and substantive interests of both states. By doing so, the courts can identify false conflicts and resolve real conflicts in an informed manner, based on weighing the competing interests.

## CONCLUSION

This section will be divided into two parts. The first will summarize and draw conclusions specifically relevant to the use of comity in Abduction Convention cases. The second will consider the wider implications of the theoretical framework developed in this study on understanding the proper scope of the doctrine of comity in the global era.

### *A. Comity in Abduction Convention Cases*

This Article's analysis of the use of comity in Abduction Convention cases has shown that, while the doctrine of comity has been "bandied about" by some courts to justify the return of the child,<sup>395</sup> this use is often based on misconceptions about the Convention itself, and the real interests of the respective states.<sup>396</sup> Indeed, this Article shows that, in many of the contexts in which comity is invoked, the requesting state does not have a strong interest in the return of the child,<sup>397</sup> and that substantive policies, especially the need to protect the child, often prevail over the comity interests of one or both states.

Moreover, the premise that the comity interests of both states require compliance with the Convention, albeit justified, does not mean that comity should inform the interpretation and application of the Convention or the exercise of discretion thereunder. Indeed, such an approach involves circular reasoning because it is only possible to know whether the Convention is being complied with once the proper interpretation and application have been determined. The principle of purposive interpretation<sup>398</sup> requires that this determination be made in the light of the objectives underlying the Convention. Thus, comity should

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<sup>395</sup> See *supra* Part II.B.

<sup>396</sup> See *generally supra* Part III.A.

<sup>397</sup> *E.g.* in cases of consensual removal, see *supra* Part II.A.1.

<sup>398</sup> As mandated by the Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1115 U.N.T.S. 331. For a detailed discussion of implications of the Vienna Convention on interpretation of the Abduction Convention, see SCHUZ, *supra* note 111, at Chapter 5.

not be cited to justify a narrow interpretation of the exceptions,<sup>399</sup> apart from, perhaps, the human rights exception, the invocation of which typically results in a direct infringement of comity interests.

Similarly, comity should not be treated as a relevant factor in exercising discretion to return a child, which arises where one of the exceptions is established,<sup>400</sup> since *ex hypothesi*, the very fact that an exception has been established means that there is no obligation to return the child. Rather, the focus should be on the substantive policies behind the relevant exception and, most importantly, the best interests of the child. Additionally, it is inappropriate to rely on the doctrine of comity as an excuse not to investigate whether the requesting state can adequately protect the returning child—or whether undertakings will be enforced in the requesting state.<sup>401</sup> Even though at first glance these practices appear to infringe the comity interests of the requesting state, upon further inspection they may actually promote that interest, where they enable the child to be returned.<sup>402</sup> In any event, the interest of both states in protecting the child must always prevail over their respective comity interests.

In contrast, however, in the context of recognition of foreign non-return orders, the comity interest of the judgment-rendering state in not having the merits of its decision reviewed is very strong. Thus, it is paradoxical that in this context some North American courts have given little weight to the doctrine of comity, and have even declined to recognize non-return orders, on the basis that the foreign court had not applied the Convention properly.<sup>403</sup> This Article argues that the respective comity and substantive interests of both states require that deference be given to the non-return order, unless there is truly a manifest and fundamental misapplication of the Abduction Convention.<sup>404</sup> Moreover, while the reciprocal obligations in the Convention do not extend to recognition of non-return orders, the spirit of mutual trust that underlies the Convention requires

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<sup>399</sup> The question of the extent to which the objectives of the Convention might require narrow interpretation of the exceptions is outside the scope of this Article.

<sup>400</sup> See *supra* Part II.B.2.

<sup>401</sup> See *supra* at II.B.3.

<sup>402</sup> See *supra* at III.C.3.

<sup>403</sup> See *supra* at II.B.4.

<sup>404</sup> See *supra* at III.C.4.

such recognition—to avoid encouraging counter-abductions *inter alia*.<sup>405</sup>

This Article urges that caution be exercised when using the doctrine of comity in international cases concerning children. In particular, unlike in civil and commercial disputes,<sup>406</sup> what is at stake is not simply which forum will adjudicate the case<sup>407</sup> or whether a foreign decision should be recognized,<sup>408</sup> but where the child will live in the meantime, a determination that may have an irreversible impact on her welfare.<sup>409</sup>

Indeed, common law, in refusing to give effect to foreign custody judgments,<sup>410</sup> recognized that the welfare of the child overrides the policies of reciprocity and deference to foreign judgments.<sup>411</sup> While the Abduction Convention has replaced the common law, that Convention is based primarily on protecting the interests of children—not on the doctrine of comity.<sup>412</sup> Thus deference is given to foreign law and foreign decisions, because doing so promotes the interests of abducted children, not out of reciprocity or judicial courtesy.<sup>413</sup> Moreover, while in financial mat-

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<sup>405</sup> See *supra* at III.C.4.

<sup>406</sup> For evidence of increasing importance of the doctrine of comity in commercial contexts, see for example, Paul, *supra* note 9, at 35–38 and Edward Janger, *Reciprocal Comity*, 46 TEX. INT'L L. J. 441 (2011).

<sup>407</sup> Although this issue may be determinative of the outcome of the case, in addition to having a significant effect on the cost of the litigation. See generally David Robertson, *The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion*, 29 TEX. INT'L L. J. 353 (1994).

<sup>408</sup> Although this may have enormous financial implications for the parties.

<sup>409</sup> PEREZ-VERA REPORT, *supra* note 32, ¶ 44; e.g., *Van De Sande v. Van De Sande*, 431 F3d. 567, 570–71 (7th Cir. 2005) (warning against treating the Hague Convention as a venue statute designed “to deter parents from engaging in international forum shopping in custody cases.”).

<sup>410</sup> *McKee v. McKee*, [1951] A.C. 352 (P.C.).

<sup>411</sup> FAWCETT, *supra* note 33, at 731.

<sup>412</sup> While Article 1 of the Abduction Convention states that one of its objects is “to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States,” the Perez-Vera Report explains that this object is “teleologically connected” with the object of ensuring prompt return, rather than being an object in its own right. PEREZ-VERA REPORT, *supra* note 32, ¶ 17. It should also be noted that the word comity does not appear at all in the Perez-Vera Report. *Id.*

<sup>413</sup> The Perez-Vera Report points out that “with the exception of the indirect means of protecting custody rights, which is implied by the obligation to return the child to the holder of the right of custody, respect for custody rights falls almost entirely out of the scope of the Convention.” *Id.*

ters it may be appropriate for comity interests, such as maintaining good international relationships and not deterring international commerce, to prevail over the interests of particular creditors or others, in the child abduction context, it is morally indefensible to sacrifice the interests of a particular child for the sake of diplomatic relationships or even in the hope that this will prevent other children from being abducted.

*B. The Scope of Comity in the Global Era*

This Article uses cases decided under the Abduction Convention and the UNCITRAL Model Law on Cross-Border Insolvency to test the scope of the doctrine of comity in the global era. While the analysis relates specifically to the use of comity in interpreting and applying international instruments, and exercising discretion under them, the framework developed for the purpose of that analysis can also be employed in other contexts in which the concept of comity is engaged.

This framework is founded on the original theoretical basis for the doctrine, combined with interest analysis methodology. The starting point is the recognition that the doctrine of comity was intended to serve the interests of individual states, and that it is based on the assumption that the benefits of giving effect to foreign laws and judgments serve the mutual interests of both states. These interests—here called “comity interests”—include the forum’s interest in maintaining good international relations, participating in international commerce, and the foreign state’s interest in having its law and judgments respected, without review and without interference in its legal process. These comity interests, however, are far from absolute, and they may be outweighed by the countervailing substantive interests or policies of either state. In some cases, the prevalence of the latter interests will lead to a false conflict. In many cases, the countervailing substantive interests will result in a real conflict. Where interests are in real conflict, that conflict must be resolved by weighing all of the competing interests—including the comity interests.

Finally, the impact of globalization on comity is not limited to the fact that greater interdependence of states strengthens the comity interests of the forum because of the greater importance

of international relations and international commerce.<sup>414</sup> Globalization has also brought with it the recognition of universal norms, such as the rights of children—including their right to protection<sup>415</sup>—the unacceptability of violence against women,<sup>416</sup> and equality and fairness between creditors.<sup>417</sup> This development across borders may mean that these norms will be equally applied in both states, which would facilitate comity. It may also mean, however, that increased weight should be given to the substantive interests of the forum, which are based on these global norms, in situations where deference to the foreign law would be inconsistent with them. This might be the case where, for example, the foreign law enforces the custody rights of the left-behind parent without ensuring proper protection for the child<sup>418</sup>—likewise, where foreign law cannot provide protection for the mother against domestic violence by the father, or where it would lead to preference being given to local creditors. In such cases, the very fact that the substantive interests of the forum are based on global norms, rather than purely partisan nationalist policies, makes it more likely that they will prevail over the comity interests of both states. Again, this insight shows that the proper scope of comity in the global era can only be determined by analyzing carefully the respective comity interests and the relevant substantive interests of both states.

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<sup>414</sup> Paul, *supra* note 9.

<sup>415</sup> See Convention on the Rights of the Child, *supra* note 223.

<sup>416</sup> Barbara Stark, *Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, etc.)*, 47 LOY. L. REV. 255 (2001) (citing inter alia the 1993 UN Declaration on the Elimination of Violence Against Women, the UN Convention on the Elimination of All forms of Discrimination Against Women, The UN Convention Against Torture and the Inter-American Convention on Violence Against Women).

<sup>417</sup> MODEL LAW, *supra* note 300, arts. 13, 22; GUIDE TO ENACTMENT, *supra* note 311, ¶¶118–19, 198.

<sup>418</sup> For example, in a case where custody is automatically transferred to the left-behind parent, even where his fitness is clearly in doubt.